

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
25 Commerce Dr. Cranford, N.J. 07016

BULLETIN 2073

DECEMBER 14, 1972

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before the Board was received into evidence in accordance with Rule 8 of said regulation. In addition thereto, testimony was presented at this de novo hearing, with full right of cross examination afforded the parties hereto.

Capsulating the testimony on behalf of appellant, Max Melnick (principal officer of the corporate transferor Chancellor Delicatessen and Restaurant, Inc.) testified that he had a recent heart attack, was obliged to sell the licensed premises and did so to the appellant. He presently operates a delicatessen, sells packaged goods and operates a small bar about six feet long, containing five or six stools.

Alex Neu testified that he is the owner of ninety-eight per cent. of the capital stock of appellant corporation which presently operates another tavern in the city. He intends that the subject premises will be operated "as a package store with a small bar and selling sandwiches" and he will continue to operate primarily as a delicatessen.

Ladislav F. Feher testified that he owns one per cent. of the capital stock of appellant corporation, and the holder of the other one per cent. of such stock is Stanley A. Iwanski (an accountant).

Samuel J. Zucker (an attorney at law) testified that he represented the appellant before the Board but no opportunity was afforded him to present testimony concerning the background of the sale to appellant.

Testifying for the Board, objectors Willie E. Brown and Donald Payne expressed their vehement objections to the enlargement of any bar facilities in the area and asserted that the residential character of the neighborhood, the proximity of schools and churches and the overwhelming public objection to the intrusions of taverns constituted valid reasons for the Board's actions.

In matters of this kind involving person-to-person transfer of a liquor license, the crucial issue concerns the fitness of the applicant to hold such license.

"Proper liquor control dictates that an issuing authority should be free within the confines of sound discretion to determine whether or not a person is fit to hold a liquor license. However, the determination of unfitness must in every case be founded upon valid and substantial grounds. Re Sudol, Bulletin 276, Item 7." Cook v. Hope, Bulletin 1610, Item 3.

None of the testimony offered before the Board or at this de novo hearing reflected any aspect of unworthiness of the appellant. To the contrary, it appeared that appellant, in conducting its present licensed premises nearby, does so properly and lawfully. Hence the issue of unworthiness was not established. Thus it would appear that the action of the Board was motivated by the obvious fear that appellant would transform the establishment from a delicatessen with a small bar to an operation with a full bar, resulting in the concomitant evils envisioned therefrom.

At the hearing before the Board one of its members exhibited indignation of a previous action respecting the transferor Chancellor Delicatessen and Restaurant, Inc. in its successful attempt to secure its right to operate a bar in the premises. The remarks of that member, in addition to being transcribed in the minutes before the Board, were read

into the record of this hearing by the attorney for appellant in an attempt to show prejudice by that member in the instant matter. A brief extract from that member's opinion is as follows:

"This is the time to really bring things to light. This particular establishment never had the bar before, and the only person who really knows it is myself, because I was designated by the Board in my first year of appointment to go up and look to see if this establishment had a bar. And they did not have a bar. The second time I went up they did have a bar, and this is something that they did illegally. And the record will show what followed; they are able to manipulate, to convince the other Commissioners that the bar was there and that made a total liar out of me, and I have been carrying a very bad taste in my mouth for the owner of it since that day who unequivocally called me a liar to my face when I came up there, that there was no bar in this establishment. So now I would like to repeat myself, the chickens have come home to roost."

The records in this Division in the matter referred to (Chancellor Delicatessen & Restaurant, Inc. v. Newark, Bulletin 2000, Item 1) disclose that the transferor herein had applied to the Board for permission to extend the length of its bar, which application had been denied. At the de novo hearing of that appeal it appeared that an extended portion of the existing bar had been unused and covered for some years and, since it was out of use, the then appellant assumed further permission of the Board would have been required to reuse it. The hearing was then adjourned in order to provide the Board with an opportunity to examine the premises for the purpose of determining the question of the prior existence of the bar and to obtain the Board's thinking concerning the necessity of the filing of the subject application if the bar had been in existence although not used. Upon the return day of the hearing the Board neither appeared nor filed with this Division any advice pertaining to its determination. In consequence of the silence of the Board, the Director acted in accordance with the uncontroverted proofs submitted by the appellant therein. It thus is apparent that the opinion of the Board member making the above comment is not borne out by the records.

Furthermore, it is regrettable that the obvious rancor of the Board member should have played a part in his consideration of this application as it apparently prejudicially affected an unbiased determination of appellant's application. The transferor's right to sell the license is not in question; neither is appellant's right to buy in dispute. The total rejection of transfer by the Board surrounds only the anticipated extension or enlargement of the bar facilities. This anticipation could have been easily erased by the Board by the approval of the transfer upon a special condition relating to the said bar.

From the totality of all of the evidence presented before the Board and at this de novo hearing, I find that appellant has successfully met the burden of establishing that the action of the Board was erroneous and should be reversed in accordance with Rule 6 of State Regulation No. 15.

Therefore it is recommended that an order be entered reversing the action of the Board and that the transfer be approved upon the express conditions that the bar be limited to a length not in excess of six feet, accommodating not more than six persons (as appellant indicates to be its present dimensions) and that the character of the operation of this facility as presently exists be maintained.

#### Conclusions and Order

Written exceptions to the Hearer's report were filed by appellant herein and an answer to the said exceptions was filed on behalf of the Board, pursuant to Rule 14 of State Regulation No. 15.

I have carefully considered the entire record herein and am persuaded that the Board's denial of the subject transfer application was predicated upon an apprehension that appellant would change the primary character of the business from a delicatessen and restaurant to a tavern-type business with an enlarged bar facility. It is apparent that the Board recognized the validity of the arguments by the objectors to the effect that a tavern would thus be introduced to the neighborhood.

However, it is clear that the worthiness of the appellant was not in issue, and that the apprehension of the objectors could be obviated by the imposition of the special condition recommended by the Hearer. Additionally, it should be noted that the principal stockholder and officer of the corporate appellant indicated that it was his intention to operate the premises primarily as a delicatessen-restaurant.

In sum, I find the instant appeal is significantly similar to the factual complex presented in 4 Leaf Liquors & Lounge v. Newark, Bulletin 1830, Item 1, wherein this Division granted a person-to-person transfer subject to a special condition that the licensed business be conducted as a restaurant.

I will therefore adopt the recommended findings and conclusions of the Hearer with the modification that a special condition under the statutory authority granted by N.J.S. 33:1-32 be imposed as part of the grant of the license transfer that there be no increase in size of the public bar now in use in the subject premises which I find to be eight feet in length and that appellant shall conduct a restaurant and/or a delicatessen business (as defined by N.J.S. 33:1-1(t)). Bayonne v. B. & L. Tavern and Division of Alcoholic Beverage Control, 42 N.J. 131, 134 (1964).

Accordingly, it is, on this 2nd day of October 1972,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby reversed; and it is further

ORDERED that the said respondent transfer the license to appellant in accordance with the application heretofore made, subject to the special conditions that (1) the licensed place of business must be operated and conducted as a bona fide delicatessen-restaurant, (as defined by N.J.S. 33:1-1(t)), and (2) there be no public bar utilized at the licensed premises other than the existing bar now in use, approximately eight feet in size.

ROBERT E. BOWER  
DIRECTOR

2. APPELLATE DECISIONS - MONTEIRO v. NEWARK.

James Monteiro, t/a House	)	
Roscommon,	)	
	)	
Appellant,	)	On Appeal
v.	)	
	)	
Municipal Board of Alcoholic	)	CONCLUSIONS and ORDER
Beverage Control of the City	)	
of Newark,	)	
Respondent.	)	
-----	)	

Myron P. Maurer, Esq., Attorney for Appellant  
 William H. Walls, Esq., by Beth M. Jaffe, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant (holder of a plenary retail consumption license for premises 376 South Orange Avenue, Newark) appeals from the action of respondent Board which on November 8, 1971 found appellant guilty of allowing, permitting and suffering a brawl or act of violence on licensed premises in violation of Rule 5 of State Regulation No. 20 and imposed a suspension of his license for twenty days effective November 15, 1971.

Upon filing of this appeal an order was entered by the Director on November 12, 1971 staying respondent's action pending determination of this appeal.

In his petition of appeal appellant alleges that the action of respondent was erroneous because it was "against the weight of the evidence."

The Board in its answer admits the jurisdictional aspects of the appeal, denies that its action was erroneous and avers that its action was a reasonable exercise of its discretion based on the factual testimony adduced at the hearing.

The appeal was presented upon the transcript of the hearing below, supplemented by oral summation pursuant to Rules 6 and 8 of State Regulation No. 15.

A review of the transcript discloses the following testimony:

Nicolo Palumbo testified that on the evening in question (Saturday, February 20, 1971) he arrived at the licensed premises at approximately 7:30 p.m. for his weekly visit. At approximately 9:45 p.m., and while the appellant was making preparation to close for the evening, a telephone call was received and was answered by a patron, one Angelo D'Onofrio. The appellant James Monteiro remarked to D'Onofrio "If that's my wife, tell her I'm not here." D'Onofrio replied "Come on you clown, get on the telephone, your wife wants you."

Immediately thereupon, rising from his stool, he was struck on the head by Monteiro with an unknown object. Thereafter the witness and Monteiro were separated by D'Onofrio and Monteiro gave him a drink of water. He received some sixteen stitches on the front and back of his head.

Angelo D'Onofrio testified that on the evening in question he had heard Palumbo engage in an argument with the bartender somewhat earlier than the incident herein. At approximately 9:45 p.m. Palumbo arose from his stool, fell and struck his head on the footrest. At the time of this incident Monteiro was seated three tables away from D'Onofrio eating supper. He helped Palumbo to his feet and noticed a small cut above the eyebrow but paid no attention to the back of Palumbo's head. He concluded that Palumbo's only comment was "What happened?"

Frances Lezniak testified that she was present when the incident occurred. She saw him "make an effort to get up", whereupon he slipped, fell and struck his head and bleeding began from the side of his face. During this incident Monteiro was seated at a table eating his supper.

Nicolo Palumbo, recalled by the chairman of respondent Board, testified that he had received sixteen stitches on the front of his head and eight stitches on the back of his head as a direct result of this incident. He further disclosed that he had had six or seven drinks from the time of his entrance until the alleged altercation.

James Monteiro testified that he is the owner of the premises herein and was present on the evening of February 20, 1972. He corroborated the testimony of D'Onofrio and Lezniak regarding Palumbo's fall. He denied striking Palumbo and further explained that, after D'Onofrio had helped cleanse the wound, the two left the premises, returning shortly thereafter for another drink. He heard Palumbo ask D'Onofrio "What happened?"

Preliminarily, it should be observed that, in order to prevail on this appeal, the appellant must sustain the burden of establishing that the action of the Board was clearly erroneous and against the logic and effect of the presented facts. Hudson-Bergen County Retail Liquor Dealers Assn. v. Hoboken, 135 N.J.L. 502 (1947) at 511. The Director's function in matters of this kind is not to reverse the determination of the municipal issuing authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Febbi v. Paterson, Bulletin 1938, Item 5. The ultimate test in these matters is reasonableness on the part of the Board or, to put it another way, could the members of the Board, as reasonable men, acting reasonably, have come to the determination based upon the credible evidence presented. Geiger v. Newark, Bulletin 1937, Item 2.

While the versions of the incident as described by the witness stand directly in conflict, one fact is abundantly clear. Two wounds of a serious nature were inflicted on Palumbo. It is only the cause of the wounds which stands in dispute.

From my evaluation of the testimony, I find that the version of Palumbo is more consistent with the reality and is more credible. I do not believe that the extensive injuries sustained by him necessitating sixteen sutures was occasioned by his alleged fall alone but was caused by his being struck with an object by appellant. I thus conclude that the Board, which had the opportunity to observe the demeanor of the witness, properly concluded that in its judgment the version as described by Palumbo was the more credible. Having had such opportunity and having weighed the credibility of the witnesses, respondent Board could reasonably have reached its determination. Schwartz v. Newark, Bulletin 1986, Item 2.

It is therefore recommended that an order be entered affirming the Board's action, dismissing the appeal, vacating the order staying the Board's order of suspension, and fixing the effective dates of suspension of the license as imposed by respondent.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the licensee pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcripts of the testimony, the Hearer's report and the written exceptions with respect thereto, which I find have either been fully considered by the Hearer in his report or are lacking in merit, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 2nd day of October 1972,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated November 12, 1971 staying the Board's order of suspension pending the determination of the appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-590, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark for the current licensing period to James Monteiro, t/a House Roscommon, for premises 376 South Orange Avenue, Newark, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Tuesday, October 17, 1972, and terminating at 2:00 a.m. Monday, November 6, 1972.

ROBERT E. BOWER  
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES NOT TRULY LABELED -  
PRIOR DISSIMILAR VIOLATION - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary )  
Proceedings against )

Richard Kahn & Annie Kahn )  
t/a Dick & Ann's Bar )  
65 Pierce Street )  
Newark, N.J. )

CONCLUSIONS  
and  
ORDER

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Holders of Plenary Retail Consumption )  
License C-747, issued by the Municipal )  
Board of Alcoholic Beverage Control of )  
the City of Newark )  
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Licensee, Pro se  
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensees plead not guilty to the following charge:

"On September 29, 1971, you possessed, had custody of and allowed, permitted and suffered in and upon your licensed premises, alcoholic beverages in bottles which bore labels which did not truly describe their contents, viz.,

Two one quart bottles labeled "Calvert Extra Blended Whiskey, 86 Proof", and

Two one quart bottles labeled "Four Roses American Blended Whiskey, 86 Proof";

in violation of Rule 27 of State Regulation No. 20.

On behalf of the Division, ABC agent D gave the following account: On September 29, 1971, pursuant to a specific assignment to make a routine, retail liquor gauge inspection at these premises, he entered the licensed premises and proceeded to gauge the contents of the open stock of liquor. After gauging 56 bottles, he seized five bottles which, upon preliminary tests made by him, appeared to be low in proof, and contained labels which did not truly describe their contents.

After giving an official receipt to Patricia Kahn, co-licen-see herein, he sealed the bottles in her presence and transmitted them to the Division chemist for further chemical analysis.

He was accompanied on this visit by ABC agent B who corroborated his testimony with respect to the aforementioned activity.

The bottles were analyzed by the Division chemist and his report, certified by the Director and admitted into evidence pursuant to R.S. 33: 1-37, established that four of the seized bottles were not genuine as compared to numerous samples of sealed original bottles delivered to the Division laboratory over the years.

The report shows that the following bottles were not genuine:

Two one quart bottles labeled "Calvert Extra Blended Whiskey, 86 Proof" were low in proof.

Two one quart bottles labeled "Four Roses American Blended Whiskey, 86 Proof", were low in proof.

Richard Kahn, the co-licensee herein, testified that he could not explain why these bottles were low in proof. He denied personally tampering with the whiskey. However, he admitted that there were three other persons who tend bar and, of course, he had no knowledge of their activity with respect thereto when he was not present in the premises.

The firmly established rule in these matters is that the licensee is responsible for any alcoholic beverages not truly labeled found upon his licensed premises. As the court stated in Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156, at p. 159:

"\*\*\* We find nothing within the Alcoholic Beverage Control Act, R.S. 33:1-1, et seq., to indicate an intent that the holder of a retail consumption license must have knowledge that he possesses illicit beverages in order to make him amenable to disciplinary action. Our courts have consistently held that such knowledge is not an essential ingredient to conviction for possession under statutes similar to the one under consideration." See also Panda v. Driscoll, 135 N.J.L. 164. (E. & A.)

The testimony clearly supports the charge herein that the proofs on the seized bottles were low and did not accurately reflect the proof as noted on the labels of the said bottles. The licensee did not offer any satisfactory explanation in defense of this charge. Furthermore, although the co-licensee did not know why the contents of the bottles were not genuine as labeled, our courts have consistently held that knowledge on the part of the licensee is not a prerequisite to a finding of guilt.

After careful consideration and appraisal of the testimony, I conclude that the charge herein has been established by a fair preponderance of the credible evidence. It is, accordingly, recommended that the licensee be found guilty thereof. Re Sussex Lanes, Inc., Bulletin 1915, Item 5; Re The Chateau Corporation, Bulletin 1943, Item 8.

The licensees have a prior adjudicated record of suspension by the local issuing authority (1) for 10 days effective January 2, 1967 for violation of Rule 1 of State Regulation No. 38; and (2) for 55 days, effective October 13, 1969, for gambling (numbers) activity on the licensed premises, in violation of Rules 6 and 7 of State Regulation No. 20.

It is therefore, further recommended that the license be suspended on this charge for twenty days, (Re Three Sisters (A Corporation), Bulletin 1945, Item 6), to which should be added five days for the dissimilar violation occurring within the past five years, making a total suspension of twenty-five days.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 2nd day of October 1972,

ORDERED that Plenary Retail Consumption License C-747, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark for the current licensing period to Richard Kahn & Annie Kahn, t/a Dick & Ann's Bar, for premises 65 Pierce Street, Newark, be and the same is hereby suspended for twenty-five (25) days, commencing at 2:00 a.m. Monday, October 16, 1972 and terminating at 2:00 a.m. Friday, November 10, 1972.

ROBERT E. BOWER  
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ORDER.

In the Matter of Disciplinary Proceedings against )

Marchese Investment Corp. )  
t/a Public Tavern )  
1240 Kaighn Avenue )  
Camden, N.J., )

ORDER

Holder of Plenary Retail Consumption License C-104 (for the current license period), issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden, )

and transferred to )

Bruce Hundley & Son, Inc., )

for the same premises. )

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Novack and Trobman, Esqs., by David Novack, Esq., Attorneys for Licensee

Dennis M. Brew, Appearing for Division

BY THE DIRECTOR:

On August 25, 1972, Conclusions and Order were entered herein suspending the plenary retail consumption license for the balance of its term commencing on Tuesday, September 6, 1972, with leave to the licensee or any bona fide transferee of the license to apply to the Director by verified petition for lifting of the suspension whenever the unlawful situation has been corrected, but in no event sooner than twenty-five days from the commencement of the suspension. Re Marchese Investment Corp., Bulletin 2069, Item 1(V).

It now appears from the verified petition submitted by the attorney for the transferee, Bruce Hundley & Son, Inc. that Patrick R. Caridi transferred all his right, title and interest in and to the stock of Marchese Investment Corp. to Bruce Hundley and Simmie Hundley, who are the principal stockholders of the

said transferee, Bruce Hundley & Son, Inc., and that neither Patrick R. Caridi or any stockholder of Marchese Investment Corp., has a beneficial interest in the said corporate transferee. Further, the said license was transferred by the local issuing authority to Bruce Hundley & Son, Inc. on September 19, 1972.

Thus, it appears that the unlawful situation has been corrected and I shall grant the petition requesting termination of the suspension, effective immediately.

Accordingly, it is, on this 2nd day of October 1972,

ORDERED that the suspension heretofore imposed herein be and the same is hereby terminated, effective immediately.

ROBERT E. BOWER  
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - GAMBLING (FOOTBALL POOL) - LICENSE SUSPENDED FOR 90 DAYS.

In the Matter of Disciplinary Proceedings against )

Ancorp National Services Inc., t/a Savarin )  
Pennsylvania R.R. Station )  
(Raymond Plaza West) )  
Newark, N.J., )

CONCLUSIONS  
and  
ORDER

Holder of Plenary Retail Consumption License G-609, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark. )

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Lamb, Blake, Hutchinson & Dunne, Esqs., by Paul B. Thompson, Esq.,  
Attorneys for Licensee  
Peter A. Rhatican, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"1. On December 15, 1971, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets in a lottery, commonly known as a 'football pool', and allowed, permitted and suffered in and upon your licensed premises, slips, tickets, records, documents, memoranda and other writings pertaining to the aforementioned gambling activity; in violation of Rule 7 of State Regulation No. 20.

2. On December 15, 1971, you allowed, permitted and suffered tickets and participation rights in a lottery commonly known as a 'football pool' to be sold and offered for sale in and upon your licensed premises, and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

The Division's case was presented through the testimony of two ABC agents who pursuant to a specific assignment participated in the investigation of alleged unlawful sales of football lottery tickets by a male at the subject premises on the date charged herein. Their testimony may be briefly summarized as follows: On Wednesday, December 15, 1971 at approximately 4:25 p.m. ABC agent D entered the subject premises which are located on the ground floor of the Pennsylvania Railroad station.

He seated himself at the bar and was joined therein at about 5:30 p.m. by ABC agents B and C. During their visit, the agents observed a male, identified as Walter J. Cordick, seated at a table with five males. Cordick was selling football lottery tickets to the other males. They were making notations on slips of paper, and asking various questions concerning odds and point spreads. He also overheard them mention the names of various professional football teams. Cordick accepted money from these males and the slips. The agents identified the activity as being bets on football games.

At about 6:20 p.m. they observed one of the bartenders, identified as George Fresolone, come from behind the bar and take a seat at the table with the group. During the conversation between Fresolone and Cordick, Cordick passed one of the white slips to Fresolone who then began to make notations on it. During that time monies were being passed back and forth on the table to Cordick, and slips were being passed from Cordick to the other males.

The slips were identified as commercial football lottery tickets, which were later taken by the agents from the table area. The agents, who have had an impressive background of specialized training and experience in the investigation of such gambling activities, described these slips as commercial football lottery tickets in which an individual picks a number of games according to the point spread listed on it and wagers anywhere from a dollar up to ten dollars on the choices that he has made. Depending on the number of games that he has picked correctly, he can win anywhere from ten dollars to one thousand dollars. "The point spread is given and various scores are picked by the individuals. This is a bet apparently made between two individuals on the coming games that week." Agent D further described the bet slips as follows:

"Well, this is a betting slip which has been made up and includes 13 individuals who, for fourteen weeks, will wage a specific amount of money each week and pick a game of the week and the one who has, -- for example, this particular week the Dallas football team scored 42 points as opposed to their opposition, 20 points, making a total of 62 points. This was the high for that week and the individual who had that game would win. Each week somebody else won and the winner here is marked, circled--it comes out as a total points for a particular game with the high total winning. This is a homemade football pool."

During this period, agent B went over to the table and asked Cordick whether he could buy a football ticket. Cordick replied that he did not have any extras. Agent B thereupon returned to the other agents at the bar, and, shortly thereafter, called the Newark Police Department for assistance.

The police arrived at the restaurant-bar at about 7:00 p.m. and in the company of the agents approached the table where Fresolone was seated with Cordick and the other males, and identified themselves. An envelope was picked up from the floor next to Cordick's left foot and upon opening the envelope, they found that it contained football lottery tickets. A large football pool ticket and two more football lottery tickets were found on the table.

Cordick admitted that the contents of the envelope belonged to him. Cordick also admitted to the agents that he runs a pool for persons that he knows. Cordick was placed under arrest and charged with possession of lottery slips and operating a football lottery.

The agents noted that money was being transacted between the persons at the table and that Fresolone, the bartender, was present and seated at the table during these transactions.

Agent B added that Fresolone was at the table facing him at the time that he approached the table and asked for a football ticket. Fresolone actively participated in the gambling transactions.

George Fresolone testifying on behalf of the licensee gave the following account: He was employed by the licensee on the date and time charged herein and he took his lunch break at that time from 6:30 to 7:30 p.m. Upon his return from the kitchen where he had his "lunch" he returned to the bar area and seated himself at a table next to this group of four or five males whom he identified as customers. He denied any knowledge of gambling activity or that any football bets were being taken by Cordick at that time. On cross examination, he admitted that, while he did take his lunch break between 6:30 and 7:30 p.m. he was on call, and if the bar became very crowded and his services were needed he would help out. He asserted that when he seated himself at a table it was a table separate from that at which the four or five other males were seated. Although he had money on him, he did not place any bets with Cordick or anyone else.

Johnnie Clark, the assistant manager at these premises, testified that he observed nothing unusual at the bar or in the premises and specifically was "shocked" to learn from the ABC agents that gambling activity had taken place therein. He stated that it was his custom to walk through the restaurant and bar area and during the period between 5:00 and 7:00 p.m. he was in and out of the bar area.

Finally he stated that he was certain that Fresolone was in the kitchen having coffee during his lunch break, but he did not have a watch so he could not actually verify the exact time that Fresolone took his break on that date. However, he insisted that when he passed the table, he did not see any slips or money on the table.

Thus, a purely factual issue has been presented because of the sharp conflict in testimony.

In evaluating the testimony and its legal impact we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature, and not criminal, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

I have carefully analyzed and evaluated the testimony herein and have had the opportunity to observe the demeanor of the witnesses as they testified at this hearing.

In appraising the factual picture presented I have assessed the credibility of the witnesses. Testimony, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. (App. Div. 1961). In other words the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

From my consideration of the testimony I am imperatively persuaded that the version given by the Division's witnesses was credible and forthright, and accurately depicted what occurred on the date in question. I find it particularly significant that the betting was done openly and with the participation of the licensee's employee, Fresolone. On the other hand, I find Fresolone totally incredible and unbelievable. He states that he was on his lunch break and during that period took a seat at the table next to where Cordick and the other males were seated and did not participate and knew nothing of any betting activity.

The fact is, however, that the empiric evidence belies his version of what happened because slips in an envelope were actually found at the foot of the table, as well as slips found on the table.

I was equally unimpressed with the testimony of Clark who saw nothing during the period in which the alleged betting activity took place.

The licensee is, of course, responsible for the action of its agents, servants and employees. Rule 33 of State Regulation No. 20. This rule is applicable even if the employee violates the express instructions of his employer. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951); cf. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

In a memorandum submitted in summation on behalf of the licensee, the attorney for the licensee argues that Fresolone was actually on his lunch break for the period between 6:30 and 7:30 p.m. on the date charged herein and, therefore, was not an employee during that time. He maintains that when he sat down at the table next to the men in question it was a personal matter "and the fact that this occurred in the bar area was pure happenstance." The testimony of Fresolone himself contradicts that assertion because Fresolone stated that he was on call even during that time to assist the other bartenders in the event that the bar became crowded. His employment did not cease during the lunch break.

Furthermore, the testimony on behalf of the Division is that Fresolone actually joined the group at the table at approximately 6:20 p.m. which was before the alleged "lunch break."

Therefore, this contention is rejected. It is further argued that there should be no absolute liability on the part of a licensee for the acts of its agents, servants and employees, citing In re S. Edward Hausner, 116 N.J. Super. 206 (1971), and One Eleven Wines and Liquors, Inc. v. Director of Alcoholic Beverage Control, 50 N.J. 329 (1967). I find these cases are not in point, and do not support the licensee's contentions.

Hausner involved a charge of possession of contraceptives in a desk in the office of the licensee away from and unrelated to the tavern activities. The court held that proof of possession of the article would constitute a prima facie case, leaving the licensee the right to establish, by way of affirmative defense, that he possessed the articles strictly for his private use in objective circumstances which adequately evidenced the strictly private nature of the possession.

In One Eleven Wines and Liquors, Inc., the court held that the mere congregation of apparent homosexuals on licensed premises was not in itself a violation. No gambling activity or the acts of employees was involved herein.

The licensee also cites Gallagher v. City of Bayonne, 106 N.J. Super. 401 (App. Div.) affirmed, 55 N.J. 159 (1969), where the court stressed the "principle that liquor regulations adopted in the exercise of police powers must be reasonable and not go beyond the public need."

It appears unarguable that where gambling and the placing and the making and accepting of bets in a lottery takes place openly in licensed premises the exercise of the police power of the State in suppressing such activities cannot be considered unreasonable. The facts in this case established that the licensee through his employee allowed, permitted and suffered such proscribed activity on the licensed premises. Thus the licensee is inculpated by the unlawful acts of its employee during his employment at the licensed premises. In re Schneider, supra; Greenbrier, Inc. v. Hock, supra. Knowledge on the part of the employer (licensee) is not a prerequisite to a finding of guilt where an employee participates in, or permits the misdeeds. Re Schultz Realty Co., Bulletin 1780, Item 2.

The licensee further argues that the acts complained of do not fall within the scope of Rule 7 of State Regulation No. 20. Rule 7 in pertinent part states:

"No licensee shall...allow, permit or suffer any...unlawful game or gambling of any kind...in or upon the licensed premises, nor shall any licensee...allow, permit or suffer in and upon the licensed premises any slip, ticket, book, record, document, memorandum or other writing pertaining in any way to any pool-selling, book-making or any unlawful game or gambling of any kind...."

I find this rule is clearly applicable herein. The alleged gambling activity, furthermore, may also be chargeable under Rule 6 of State Regulation No. 20. However, while it is the usual practice of the Division to bring these charges under both rules, the Division considers both charges as one violation for penalty purposes. Thus, this contention lacks merit.

Accordingly, I conclude that the Division has established the truth of these charges by a fair preponderance of the credible evidence. It is, therefore, recommended that an order be entered finding the licensee guilty of the said charges.

Licensee has no prior adjudicated record during the past ten years. It is further recommended that an order be entered suspending the license for ninety days. Re Falinski, Bulletin 2062, Item 5.

#### Conclusions and Order

No exceptions to the Hearer's report were filed by the licensee pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein, including transcript of the testimony, the exhibits, the written memorandum in summation filed on behalf of the licensee and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 3rd day of October 1972,

ORDERED that Plenary Retail Consumption License C-609, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Ancorp National Services, Inc., t/a Savarin, for premises Pennsylvania R.R. Station (Raymond Plaza West), Newark, be and the same is hereby suspended for ninety (90) days, commencing 2 a.m. Tuesday, October 17, 1972, and terminating at 2 a.m. Monday, January 15, 1973.

Robert E. Bower,  
Director.

#### 6. STATE LICENSES - NEW APPLICATION FILED.

Coast Line Beverages, A Corporation  
2-26 Eastview Avenue  
Little Silver, N. J.

Application filed December 8, 1972 for limited wholesale license and additional warehouse license for premises 1251-1261 Lakehurst Rd., Dover Township, PO Toms River, N. J.



Robert E. Bower  
Director