STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 2023 January 13, 1972

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - COLONY ROCK INC. et als. v. NEWARK et al.

Colony Rock Corp., Bunker Hill Corp. and Feist & Feist, Appellants, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, and A & B Diner Corp., Respondents.	On Appeal CONCLUSIONS and ORDER

Hellring, Lindeman & Landau, Esqs., by Michael K. Edelson, Esq., Attorneys for Appellants
William H. Walls, Esq., by Melvin S. Simon, Esq., Attorney for Respondent Municipal Board
Charles B. Turner, Esq., Attorney for Respondent A & B Diner Corp.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

On June 16, 1971 the Municipal Board of Alcoholic Beverage Control of the City of Newark (Board) granted the application of the respondent A & B Diner Corp. (A & B) for a place-to-place transfer of its plenary retail consumption license from premises 56 Mulberry Street to 16-18 East Park Street, Newark.

The Board, after a full hearing on the application, set forth the following reasons for its action:

1. This is not a new license in the neighborhood, but a transfer within the prescribed 600 ft. as outlined and indicated in the City Ordinances.

2. There was no trafficing (sic) in licenses or fraud as indicated in the Police denial of transfer.

3. The new location is a diner, which according to the testimony of the applicant, closes no later than 7:00 p.m. each weekday, and remains closed on Saturdays & Sundays, and presents no competition for other licensees in the vicinity.

4. The bar service at this location will not be held out to the public as an off-the-street tavern, but actually according to the testimony, will be used

as an accommodation feature to the sale of food.

5. The objectors' reasons were heard and carefully considered, as well as an inspection of the premises by members of this authority.

The adoptive resolution states:

"RESOLVED, that the following Place to Place transfer be and the same is hereby granted by reason of the fact that it has met the statutory requirements for transfer and the approval of this Board. (This is for premises for which certain alterations and/or changes and corrections will be made). The effective date to be subject to the completion of premises at the new location and subsequent to the Inspection of the issuing Authority."

A & B has apparently made the alterations and changes referred to in the said resolution and is presently operating at the present premises.

Appellants allege that the action of the Board was erroneous because:

(1) It was contrary to City Ordinance 4:2-17(a);

(2) The transfer results in an additional license in the immediate area of several existing licenses, and the area is already sufficiently serviced by existing liquor licenses.

The Board, in its answer, denies the substantive allegations of the petition and defends that "The grounds upon which the issuing authority made its decision were based upon the factual testimony before the Board from which it, in its sound discretion, concluded that the transfer should be granted."

A separate answer filed on behalf of A & B asserts that the Board acted in the proper exercise of its discretion after a full hearing; that the transfer was made in full compliance with the applicable ordinance; that A & B does not intend to "convert its operation and to abandon the food business in which it had long dealt and which had been the basis of its operation"; and there was no showing that there would be any detriment to the area by the grant of the said application.

The hearing on appeal was heard de novo in accordance with Rule 6 of State Regulation No. 15, and was based upon the transcript of the hearing below, supplemented by additional testimony adduced at the hearing herein, in accordance with Rule 8 of State Regulation No. 15.

I

Appellants allege that the action of the Board was contrary to City Ordinance 4:2-17(a) which, in relevant part, provides:

"(a) No plenary retail consumption license, except renewals for the same premises and transfer of licenses from person to person within the same premises, shall be granted or transfer made to other premises within a distance of one thousand feet from any other premises then covered by any other plenary retail consumption license or any plenary retail distribution license; provided,

> however, that the local license issuing authority may, in its discretion, grant a transfer of an existing license to the same licensee only, to other premises within 600 feet of the premises from which the transfer is made, notwithstanding that the premises to which the license is so transferred is within 1,000 feet of premises for which there is an existing plenary retail consumption license or plenary retail distribution license; provided, however, that such transfer shall be made in good faith and shall inure solely for the benefit of the same licensee."

Appellants assert that there are presently two plenary retail consumption licenses "issued" for premises within one thousand feet from 16-18 East Park Street; that both of these licenses, in fact, were "issued" for premises owned by appellants, owned and located within two hundred feet of premises 16-18 East Park Street.

The action of the Board was predicated upon the hardship exception contained in the aforementioned ordinance. A brief summary of the background is necessary to develop a proper prospective for the rationale of the Board's action.

The subject license was held prior to 1971 by Newark Club Durand for premises located at 56 Mulberry Street, Newark, which is just around the corner from the East Park Street premises. In early 1971, an application was made to the Board for both a person-to-person and place-to-place transfer of the said license. However, while the said application was pending, A & B was advised by the Board that it was the long standing practice of the Board to insist that a separate application be made for a person-to-person transfer and then for a place-to-place transfer. Such separate applications are permissible under Rule 14 of State Regulation No. 6. The language of that rule is permissive, not mandatory; transfers of licenses both as to person and place "may be applied for simultaneously and in a single application." This clearly implies the propriety of separate applications, as was done here. Indeed, under the strict applicable terms of the ordinance, no simultaneous person-to-person and place-to-place transfer could be legally effective. Accordingly, the aforementioned application was withdrawn without prejudice.

Thereafter, an application was made for a person-to-person transfer of the aforementioned license from Newark Club Durand to A & B, and it was approved unanimously by the Board without objections by anyone.

A & B then made application for a place-to-place transfer of the said license from 56 Mulberry Street to 16-18 East Park Street. The application came on for hearing on June 2, 1971, when objectors were heard, including one of the appellants. It was pointed out by A & B at that hearing that the premises at 56 Mulberry Street had been condemned by the Newark Housing Authority, which had closed them down and taken possession of the property on Mulberry Street, and the property is about to be torn down. The record further discloses that properties surrounding the premises on Mulberry Street have been torn down and most of the area has already been razed.

It was also established, and it is not challenged, that if this transfer came within the hardship provisions of the ordinance and that the transfer did come within the six hundred foot requirement of the said ordinance. Appellants, nevertheless, maintain that the six hundred foot exemption in the applicable

ordinance was designed to alleviate hardship upon a licensee who for one reason or another found it necessary to remove from its present location. Since A & B obtained the license with a view to move it from the premises occupied by Newark Club Durand to premises occupied by A & B and operated as a diner, the action was not made in good faith.

It should be noted, however, that in his summation at the conclusion of the hearing on appeal, the attorney for appellants conceded that:

> "We are not here to charge bad faith on the part of A & B Diner. What we're saying is that the entire procedure used was in violation of the ordinance, whether advised to do it that way by the City or not."

He argued further that:

> "A & B Diner Corp. should not by the two step procedure outlined above be permitted to achieve the same result which it could not achieve directly."

The fact is, however, that the method used by A & B was the only legal and proper method by which the said license could be transferred under the provisions of the ordinance. A similar situation was adjudicated in Essex Co. Retail, etc., v. Newark, etc., Bev. Control, 77 N.J. Super. 70. There, an application was made for a person-to-person transfer to respondent Smith and during a colloquy at the hearing before the local Board, an objector requested assurance from Smith that he intended to operate at the new premises if the license was granted. The Board declined to oblige Smith to state his present intention with respect to future operation. Shortly thereafter a person-to-person application was made to transfer of Smith's license at the new premises to Home Liquors, and the appellant appealed from the grant of that application.

The court held that the City of Newark ordinance did not require that the licensee asking for a place-to-place transfer under the exception of the aforementioned ordinance have good faith intentions to continue to operate the business at the new premises. Said the court:

> "The language of section 3.29 of the Newark ordinance is clear and unambiguous, and this is expressly conceded by appellant. Despite the concession, it insists upon reading into the exception clause the requirement that the 'same licensee' seeking the place-to-place transfer must continue to operate his business at the new location. Nothing in the ordinance requires such construction. 'Same licensee' refers to a licensee already holding a license within 600 feet of the premises to which the transfer is sought. Section 3.29 imposes no further limitation."

The court states further:

> "Much of appellant's argument is devoted to the assertion that respondents 'circumvented' the Newark ordinance. Forgetting for the moment that the language of the ordinance is clear and unambiguous, it is not inappropriate to note that there is a real distinction between avoiding the limitations of an ordinance and evading them. Avoidance of the prescriptions of a statute or ordinance is entirely permissible; evasion of its requirements falls outside the bounds of legal activity."

And further:

> "Notwithstanding the fact that the Director may have considered that respondents circumvented the ordinance by avoiding it, he correctly determined that he would not question the discretionary authority of the Board to grant the transfers."

I find that the Board acted within the lawful exercise of its discretion in granting this transfer based upon the exceptions in the ordinance. As noted above, this was clearly a hardship case and it is obviously impossible for A & B to continue the operation of the license at the Mulberry Street premises. A & B acted in the only statutorial permissible method in seeking the transfer as hereinabove set forth. Having acted legally and having made full disclosure to the Board of its intentions even when the first application for a person-to-person transfer was made, it can not be charged either with evasion of the ordinance or with bad faith. I perceive no fairly debatable question with respect to the applicability of the subject ordinance in the matter sub judice, and find appellants' contention lacking in merit.

II

The appellants allege that the granting of the place-to-place transfer results in an additional license in the immediate vicinity of several existing licenses and that the existing licenses satisfied the public needs. Furthermore, they contend that although the transfer involves a distance of about three hundred feet "...the difference in neighborhoods between the two locations is great." They fear that the attraction of the clientele to the new location "...would add to what is already argued to be a deteriorating situation."

They point out further that there are existing licenses such as the Hotel Carlton, the Hotel Robert Treat, the Twins Restaurant, and the Park Liquor Store at 60 Park Place, all of which adequately service the area.

Norman Kruvant, representing the Hotel Carlton, located at 22 East Park Street, maintained that the transfer of the license would affect its business, although he admitted that the hotel does not serve food in its premises. Also, he asserted that in the future, A & B could discontinue its food operation and "...convert it to strictly a liquor operation...."

Maxwell Albach, an attorney representing the owner of the Military Park Building, felt that there was no need for the license at the new location. He also deplored the fact that "drifters" infest the area, and this condition would be aggravated by this transfer.

However, he acknowledged that A & B is "...a normal diner operation. It has been there for six years. It has given us no trouble, and I have no objection to it."

Witnesses for A & B vigorously challenge these allegations. According to the testimony of its principal officers, it has been in business at its present location on East Park Street, operating a diner for the past six years. Prior to that it operated a diner for about sixteen years in the Public Service Terminal, located across the street from its premises. They stated at the hearing before the Board that it was not nor is it their intention to convert its operation and abandon the food business; that it intends to serve alcoholic beverages merely as an accommodation to its customers.

It was further pointed out that while the premises on Mulberry Street (characterized as a "gin mill") were open until 2:00 a.m., the present operation of A & B intends to operate on a five-day weekly basis, will be closed on Saturday and Sunday, and will close at 5:00 p.m. each day, as it has for the past three years. Its operation up to the time of the hearing has shown that it does not attract the old clientele of the Newark Club Durand but caters primarily to businessmen and employees of the Public Service, who have been patrons of these premises for years. In fact, the liquor sales have been disappointing, representing approximately five percent of its total gross sales.

Finally Alvin S. Benenson and E. William Benenson, the principal officers of A & B, asserted that they have had no financial interest in the Newark Club Durand, nor do the former owners of the Newark Club Durand have any connection with or financial interest in A & B.

In matters involving appeals from transfers of licenses the burden of establishing that the action of the Board in granting the transfer was erroneous and should be reversed rests with the appellants. Rule 6 of State Regulation No. 15. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 Cert. denied 18 N.J. 204 (1955). It has been consistently ruled that no one has a right to the issuance or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946); Biscamp v. Teaneck, 5 N.J. Super. 172 (App. Div. 1949). The decision as to whether or not a license should be transferred to a particular locality rests in the first instance within the sound discretion of the local issuing authority. Hudson-Bergen County Retail Liquor Dealers Assn. v. North Bergen et al., Bulletin 997, Item 2.

In Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, at p.302-303, the applicable principles were articulated:

> "Responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place...is primarily committed to municipal authorities. N.J.S.A. 33:1-19,24... In allocating spheres of operation between the State Division and municipal authorities, the Legislature wisely recognized that ordinarily local officials are thoroughly familiar with the community's characteristics...the nature of a particular area....
>
> "Obviously when the lawmakers delegated to local boards the duty 'to enforce primarily' the provisions of the act it invested them with a high responsibility, a wide discretion and intended their principal guide to be the public interest. Lubliner v. Paterson, 33 N.J. 428, 446 (1960).
>
> "The conclusion is inescapable that if the legislative purpose is to be effectuated, the Director and the courts must place much reliance upon local action (and) its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion."

To the same effect, see Fanwood v. Rocco, 33 N.J. 404 at p.414.

As the Board pointed out in its statement of reasons, this is clearly a hardship situation. The City of Newark has heretofore recognized hardship situations and approved transfers of licenses in these cases. Re Tagliaferro v. Newark, Bulletin 1710, Item 1; Club Warren, Bulletin 1585, Item 4.

It should be emphasized, however, in the instant matter that the new premises are less than three hundred feet from the old premises. It has been argued that the area is already sufficiently serviced by other liquor licenses. However, I find that the transfer from the old premises to the present premises is such a short distance (approximately three hundred feet), that it cannot be s aid that there was an increase in the number of liquor licenses in that area. Cf. L. Kubisky, Inc. v. Paterson, Bulletin 1662, Item 2; Bomwell v. Newark, Bulletin 1639, Item 1, affirmed id.nom. (App. Div. 1966), not officially reported, recorded in Bulletin 1667, Item 1.

It is a well accepted thesis that an owner of a license privilege acquires through its investment therein an interest which is entitled to some measure of protection in connection with a transfer. R.S. 33:1-26. Tp. Committee of Lakewood v. Brandt, 38 N.J. Super. 462.

The function of the Director in these matters is to determine whether reasonable cause exists for the issuing authority's opinion and, if so, to affirm its action. Helms v. Newark et al., Bulletin 1398, Item 3. The action of the issuing authority will not be reversed by the Director unless there was evidence that "the act of the board was clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Association et al. v. Hoboken et al., 135 N.J.L. 503, at p.511; Fanwood v. Rocco, supra.

The ultimately dispositive rule in these matters was succinctly stated in Lyons Farms Tavern, Inc. v. Newark, et als., supra (55 N.J. at p.303):

> "...Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue in these cases: Did the decision of the local board represent a reasonable exercise of discretion on the basis of evidence presented? If it did that ends the matter of review both by the Director and by the courts."

I conclude that the determination of the Board was not vulnerable under the controlling principles of review mentioned above. Thus the appellants have failed to sustain the burden of showing that the action of the Board was arbitrary, unreasonable and an abuse of its discretion. Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that an order be entered affirming the action of the Board and dismissing the appeal.

Conclusions and Order

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

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

Accordingly, it is, on this 9th day of December 1971,

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.

Richard C. McDonough
Director

2. APPELLATE DECISIONS - H. & W. LIQUORS, INC. v. WAYNE - ORDER DISMISSING APPEAL.

H. & W. Liquors, Inc.,
Appellant,
v.
Municipal Council of the Township of Wayne,
Respondent.

On Appeal

O R D E R

Stasse, Van Norde & Boyle, Esqs., by George M. Sullivan, Esq., Attorneys for Appellant
Michael C. Rudolph, Esq., Attorney for Respondent

BY THE DIRECTOR:

Appellant appeals from the denial of its application for a transfer of plenary retail distribution license for the 1971-72 licensing period from premises 2132 Hamburg Turnpike, Wayne, to premises at the Preakness Shopping Center, Wayne.

Prior to hearing, appellant's attorney advised me by letter dated December 6, 1971 that the appellant desires to withdraw its appeal and requests that the appeal be dismissed.

Accordingly, it is, on this 9th day of December 1971,

ORDERED that the appeal herein be and the same is hereby dismissed.

Richard C. McDonough
Director

3. DISCIPLINARY PROCEEDINGS - HOSTESS ACTIVITY - LEWDNESS AND IMMORAL ACTIVITY (TOPLESS DANCERS) - SALE TO MINOR - UNQUALIFIED EMPLOYEE - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 140 DAYS, LESS 28 FOR PLEA.

In the Matter of Disciplinary Proceedings against Artie's Hialeah, Inc. t/a Hialeah Club 1917 Atlantic Ave. and 13-15 N. Michigan Ave. Atlantic City, N. J. Holder of Plenary Retail Consumption License C-228, issued by the Board of Commissioners of the City of Atlantic City.	CONCLUSIONS AND ORDER

Sherman L. Kendis, Esq., Attorney for the Licensee.
Edward F. Ambrose, Esq., Appearing for the Division

BY THE DIRECTOR:

Licensee pleaded non vult to the following four charges, alleging that on April 21, 1971: (1) it permitted an employed female to accept beverages at the expense of patrons in violation of Rule 22 of State Regulation No. 20; (2) it permitted lewdness and immoral activity (indecent entertainment) upon the licensed premises in violation of Rule 5 of State Regulation No. 20; (3) it sold alcoholic beverages and permitted their consumption by a minor, age 19, in violation of Rule 1 of State Regulation No. 20; and (4) it employed a minor, age 19, in the licensed premises, in violation of Rule 3 of State Regulation No. 13.

Reports of investigation disclosed that a minor female dancer employed in the licensed premises solicited drinks from patrons, encouraged to do so by the agents of the licensee; further, entertainment provided consisted of dancers performing "topless" and with lewd gyrations.

Although this corporate licensee has no record of prior violations, the license held by Two Sixes, Inc. for same premises and linked to this corporate licensee by a common stockholder, Arthur Stamm, was suspended by the Director for 170 days, effective December 18, 1967 on charges of (1) hostess activity, (2) lewd and immoral activity and conduct, and (3) conducting its business as a nuisance. Re Two Sixes, Inc., Bulletin 1776, Item 1.

The license will be suspended on the first charge for thirty days to which will be added thirty days by reason of the prior record of suspension for similar offense within the past five years (Re Bucci, Bulletin 1910, Item 4); on the second charge for thirty days (Re Caprio, Bulletin 1974, Item 5) to which will be added thirty days by reason of prior record of suspension for similar offense within the past five years; on the third charge for fifteen days (Re J & N, Inc., Bulletin 1982, Item 3); and on the fourth charge for five days (Re Ray Russo, Inc., Bulletin 1808, Item 4), making a total suspension of one hundred forty days with remission of twenty-eight days for the plea entered, leaving a net suspension of one hundred and twelve days.

Accordingly, it is, on this 9th day of December 1971,

ORDERED that Plenary Retail Consumption License C-228 issued by the Board of Commissioners of the City of Atlantic City to Artie's Hialeah, Inc., t/a Hialeah Club for premises 1917 Atlantic Ave. and 13-15 N. Michigan Ave., Atlantic City, be and the same is hereby suspended for one hundred and twelve (112) days, commencing at 7 a.m., Tuesday, December 14, 1971 and terminating at 7 a.m., Tuesday, April 4, 1972.

Richard C. McDonough
Director

4. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS) - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against

Artie Weber's Tavern, Inc.
560 Newark Avenue
Jersey City, N. J.,

Holder of Plenary Retail Consumption License C-244 (for 1970-71 and 1971-72) license periods), issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.

CONCLUSIONS and ORDER

Miller, Hochman, Meyerson & Miller, Esqs., by Leonard Meyerson, Esq., Attorneys for Licensee
Edward F. Ambrose, Esq., 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 January 7, 11, 14, 19 and 21, 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 the 'numbers game'; in violation of Rule 7 of State Regulation No. 20.

"2. On January 7, 11, 14, 19 and 21, 1971, you allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the 'numbers game', to be sold and offered for sale in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

The Division's case was developed through the testimony of ABC Agent D, which was corroborated by Agents R and G and New Jersey State Trooper Leck. On January 21, 1971 the agent made his fifth visit to the licensed premises, during all of which visits he had made the acquaintance of patrons Rocco and Edward Ford, with whom he had made bets previously. On this date Agent D made a numbers bet with Ford in the men's room of the licensed premises, paid Ford with marked money and, shortly thereafter, Ford was arrested outside by accompanying State Troopers and charged with accepting numbers bets. Agent G assisted one of the State Troopers in arresting Ford. The marked money and bet slip were found on Ford, and that the bet was made in the licensed premises was clearly established.

The charge against the licensee is that it allowed, permitted and suffered gambling upon the licensed premises. In that connection Agent D testified that on January 21, while accompanied by Agent R, he asked the bartender Dilcks "if the numbers man had been in yet", to which Dilcks replied, "No, he hasn't, but he will be here." Upon arrival of one Edward Ford, Agent R asked Dilcks (the bartender), "That's the numbers man, isn't it", to which the bartender nodded affirmatively. Thereupon Agent D spoke briefly to Ford, whereupon they retired to the men's room and Agent D made the bet.

To establish the impression that the agents were confirmed "numbers" players, on the January 7 visit Agent D had left the side of Agent R for a brief period during which Agent R spoke to the bartender Dilcks, "That guy drives me crazy with his numbers." Later, while Agent R was seated next to him, Agent D declared, "The numbers man is here", to which Agent R replied, "Well, give me 123 for a dollar straight." The bartender Dilcks was at that moment serving Agent R. Agent D then met Ford in the men's room and placed a bet.

On January 19, 1971 Agent D was in the licensed premises with Agent R and obtained a slip of paper from the bartender. He was about to complete the writing of his numbers when he was seen by Arthur Weber (principal stockholder and officer of the licensee corporation). He got quite loud and yelled, "Put that away. I don't allow any of that sfuff to go on in here." On one occasion Weber became suspicious of a patron and asked another to go outside and learn the license plate number of his car. Weber later learned that the patron who had aroused his suspicion had been one of the State Troopers. His testimony revealed a militancy against violations of any kind.

We are dealing here with a purely disciplinary measure and its alleged infractions. Such proceedings are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (1948). Proof is required by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). 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.

It can be readily conceded that the principal stockholder of the corporate licensee (Arthur Weber) would not allow, permit or suffer gambling to take place on the premises. Testimony of the agents supports this conclusion. Hence any conviction must be predicated upon Rule 33 of State Regulation No. 20, which states:

> "... The fact that the licensee did not participate in the violation or that his agent, servant or employee acted contrary to instructions given to him by the licensee or that the violation did not occur in the licensee's presence shall constitute no defense to the charges preferred in such disciplinary proceedings."

The testimony of the bartender Dilcks was a complete denial of any conversation with the agents relative to numbers or any knowledge that Ford or anyone else took bets in the licensed premises. His testimony was laconic and his answers during his examination were vague. However, assuming that his entire testimony was discounted, the Division attempts to establish its case by virtue of a few sentences offered the bartender with his clipped replies. He admitted he could have replied with a response, "Well, maybe you'll be lucky today" and "He has to protect himself. I'm not allowed to let people take numbers in here." Certainly there is no testimony either by the agents or by the bartender indicating any participation in numbers activity.

The gambling in the licensed premises took place in the men's room; there was no selection made in the bar proper other than the writing of the numbers on the slip of paper. There was no gambling paraphernalia present, nor was there testimony that the thirty or more patrons present were active in the placing of numbers. There was no discussion with the bartender involving numbers in which he participated. In short, having heard him testify, it is doubtful that there could be any discussion about much of anything in which he would be a participant.

The burden of establishing that gambling took place in the licensed premises has been met by the Division, but the concomitant burden that such gambling took place with the knowledge and acquiescence of the licensee or its agents has not been met. Cf. Re Columbia Tavern, Inc., Bulletin 1750, Item 8.

Since there appears to be a lack of the necessary preponderance of the evidence herein, I recommend that the licensee be found not guilty and that the charges be dismissed. Re Royal Club of Beverly, Bulletin 1973, Item 8.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, written exceptions to the Hearer's report have been filed by the attorney for this Division and oral argument was had before me.

In substance, the exceptions challenge the factual findings of the Hearer and the recommendations based thereon. Emphasis was laid upon the testimony that gambling activity did take place on the licensed premises to such degree as to be readily ascertainable by the agents or employees of the licensee with the exercise of prudent observation.

At oral argument counsel for the licensee urged support for the Hearer's findings because, at most, the licensee's agents or employees could only have had mere suspicion of the presence of gambling activity, if in fact suspicion was generated at all.

I have carefully examined the entire record herein and, as a result, am unable to agree with the Hearer's determination that the charges herein were not established by a fair preponderance of the credible evidence.

It is uncontroverted that gambling activity took place within the licensed premises. The crucial issue is whether the licensee's agents or employees knew or should, under the circumstances herein, have become aware of the proscribed gambling activity, with the consequence that the activity was "allowed, permitted and suffered." Failure to prevent the prohibited activity is to "suffer" its occurrence. Essex House Holding Corp. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947). The licensee cannot avoid his responsibility in preventing the illegal activity if he or his agents knew or should have known of its existence. Davis v. New Town Tavern, Inc., 37 N.J. Super. 376 (1955); In re Schneider, 12 N.J. Super. 449 (App.Div. 1951).

The transcript of testimony discloses that the investigating agent inquired of the bartender "if the numbers man was in yet", to which the bartender replied,"No, he hasn't, but he will be here." Thereafter, upon arrival of the said "numbers man" (identified as Edward Ford), the agent asked the bartender, "That's the numbers man, isn't it", to which question the bartender nodded affirmatively.

On another occasion two agents indicated to the bartender that they desired paper on which to write their numbers bets and the bartender, with obvious knowledge of the reason for this request, supplied the pen and paper.

From these and other expressions or actions peculiar to gambling activity, it is apparent that the bartender knew or should have known the purpose of the activity. His failure to take the necessary steps to prohibit the proscribed gambling activity within the licensed premises constitutes "suffering" its occurrence. Re Finbar, Bulletin 1851, Item 3; cf. Jackson v. Newark, Bulletin 1600, Item 2; Benedetti v. Trenton et al., 35 N.J. Super. 30 (App.Div. 1955).

Under such circumstances I conclude that the licensee's guilt of the charges has been established by a fair preponderance of the believable evidence -- indeed, by substantial evidence. I therefore find the licensee guilty of the said charges.

The corporate licensee has no prior adjudicated record. However, when the license was in the name of Arthur Weber (principal stockholder in the present corporation), such license was suspended by this Division for ten days effective June 9, 1958, for violation of Rule 1 of State Regulation No. 38. Re Weber, Bulletin 1235, Item 9. The said prior suspension occurring more than five years ago disregarded for penalty purposes, the license will be suspended for sixty days since the violation occurred prior to the date of adoption of new schedule of increased penalties for gambling offenses. Re Arnone, Bulletin 1971, Item 3.

Accordingly, it is, on this 8th day of December 1971,

ORDERED that Plenary Retail Consumption License C-244, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Artie Weber's Tavern, Inc., for premises 560 Newark Avenue, Jersey City, be and the same is hereby suspended for sixty (60) days, commencing at 2 a.m. Thursday, January 6, 1972, and terminating at 2 a.m. Monday, March 6, 1972.

Richard C. McDonough,
Director.

5. DISCIPLINARY PROCEEDINGS - PURCHASE FROM UNAUTHORIZED SOURCE - UNLAWFUL TRANSPORTATION - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 45 DAYS, LESS 9 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
Micwill, Inc. t/a Elmwood Lounge 1180 Springfield Avenue Irvington, N.J.,	) CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-2, issued by the Municipal Council of the Town of Irvington.	)

Licensee, Pro se
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that on divers days from January 18, 1971 to about July 14, 1971, (1) while on the non-delivery list it obtained alcoholic beverages except from the holder of a New Jersey manufacturer's or wholesaler's license or pursuant to a special permit first obtained, in violation of Rule 15 of State Regulation No. 20, and (2) transported alcoholic beverages in a vehicle having no transit insignia affixed thereto or fixed thereon, in violation of Rule 2 of State Regulation No. 17.

Licensee has a prior record of suspension by the municipal issuing authority for ten days effective November 17, 1969 for permitting hostess activity on the premises; by the Director for sixty days effective January 4, 1971 affirming action of municipal issuing authority on charges of sale to minors and permitting a brawl on the premises. Re Micwill, Inc., Bulletin 1953, Item 4; and by the Director for forty-five days effective May 14, 1971 affirming action of municipal issuing authority on charges of sale to a minor and to an intoxicated person. Re Micwill, Inc., Bulletin 1982, Item 2.

License will be suspended for twenty days on the first charge, and for ten days on the second charge. Re Oakley, Bulletin 1715, Item 4, to which will be added fifteen days by reason of the three prior dissimilar offenses occurring within the past five years, making a total of forty-five days, with remission of nine days for the plea entered, leaving a net suspension of thirty-six days.

Accordingly, it is, on this 9th day of December 1971,

ORDERED that Plenary Retail Consumption License C-2, issued by the Municipal Council of the Town of Irvington to Micwill, Inc., t/a Elmwood Lounge for premises 1180 Springfield Avenue, Irvington, be and the same is hereby suspended for thirty-six (36) days, commencing 2:00 a.m. on Tuesday, December 14, 1971, and terminating 2:00 a.m. on Wednesday, January 19, 1972.

Richard C. McDonough
Director

6. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF RULE 1 OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA - APPLICATION FOR FINE IN LIEU OF SUSPENSION GRANTED.

In the Matter of Disciplinary Proceedings against	)	
Nick Vafiadis t/a Orient Deli. & Liquor Store 663 Ocean Avenue Jersey City, N.J.,	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Distribution License D-66, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	)	

Licensee, Pro se
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on Sunday, August 29, 1971, at about 11:50 a.m. he sold an alcoholic beverage for consumption off licensed premises, in violation of Rule 1 of State Regulation No. 38.

Absent prior record the license would normally be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Rosen, Bulletin 2000, Item 10. However, the licensee has made application for the imposition of a fine in lieu of suspension in accordance with the provisions of Chapter 9 of the Laws of 1971.

Having favorably considered the application in question, I have determined to accept an offer in compromise by the licensee to pay a fine of $400 in lieu of suspension.

Accordingly, it is, on this 9th day of December 1971,

ORDERED that the payment of a $400 fine by the licensee is hereby accepted in lieu of a suspension of license for ten days.

Richard C. McDonough
Director

7. DISCIPLINARY PROCEEDINGS - ORDER TERMINATING SUSPENSION.

In the Matter of Disciplinary Proceedings against	)	
Marie Bosco t/a 220 Club 220 Ferry Street Newark, N. J.	)	ORDER
Holder of Plenary Retail Consumption License C-290, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	)	

Goldberger, Siegel & Finn, Esqs., by Jerry M. Finn, Esq., Attorneys for Licensee.
Walter H. Cleaver, Esq., Appearing for Division.

BY THE DIRECTOR:

On August 25, 1971, Conclusions and Order were entered herein suspending the license for the balance of its term, commencing on the date of the renewal of the said application for the current licensing period, August 25, 1971, with leave to the licensee or any bona fide transferee of the license to file a verified petition establishing correction of the unlawful situation for lifting of the suspension after thirty days from the commencement of the said suspension. Re Bosco, Bulletin 2004, Item 2.

It appearing from the verified petition submitted by Betty Artis that the said license was transferred to her by the Municipal Board of Alcoholic Beverage Control of the City of Newark on November 22, 1971 and that the unlawful situation has now been corrected, I shall grant the petition requesting termination of the suspension, effective immediately.

Accordingly, it is, on this 9th day of December 1971,

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

Richard C. McDonough
Director