

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2358

June 24, 1980

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STATE OF NEW JERSEY
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June 24, 1980

1. COURT DECISIONS - A.H.S., INC. v. WALL et al. - DIRECTOR AFFIRMED IN PART - REVERSED IN PART and REMANDED FOR FURTHER PROCEEDINGS.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-147-79

A.H.S., INC.,
t/a ROYAL MANOR,

Appellant,

v.

TOWNSHIP COMMITTEE OF THE TOWNSHIP
OF WALL and DIVISION OF ALCOHOLIC
BEVERAGE CONTROL, STATE OF NEW JERSEY,

Respondents.

Argued March 18, 1980 - Decided April 11, 1980.

Before Judges Matthews, Ard and Polow.

On appeal from the Division of Alcoholic Beverage Control.

Warren W. Wilentz argued the cause for appellant (Wilentz, Goldman and Spitzer, attorneys; Frank M. Ciuffani, on the brief).

John Jay Mangini argued the cause for respondent Township of Wall (Mangini, Gilroy and Cramer, attorneys; Roger J. McLaughlin, on the brief).

John J. Degnan, Attorney General of N.J., attorney for respondent Division of Alcoholic Beverage Control (Stephen Skillman, Assistant Attorney General, of counsel; Bertram P. Goltz, Jr., on the brief).

PER CURIAM

(Appeal from the Director's decision in Re: A.H.S., Inc. v. Wall Township, Bulletin 2308, Item 1. Director affirmed in part, reversed in part and remanded for further proceedings.)

2. APPELLATE DECISIONS - MILES v. NEWARK, ET AL.

#4376

James Miles,
t/a Twenty Grand Lounge & Hall, }

Appellant,

CONCLUSIONS

vs. }

AND

Board of Alcoholic Beverage Control
of the City of Newark & Magic
Wonders Bar, Inc.,

ORDER

Respondent. }

No appearance on behalf of Appellant, James Miles.
Salvatore Perillo, Esq., Corporation Counsel by Hugh B.
Gallagher, Esq., Assistant Corporation Counsel, Attorney
for Respondent, Newark Board of Alcoholic Beverage Control.

Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

Dated: October 10, 1979

Received: October 11, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were
filed by the parties pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein,
including the transcript of the testimony and the Initial
Decision, I concur in the findings and recommendations of
the Administrative Law Judge and adopt them as my conclusions
herein.

Accordingly, it is, on this 26th day of November, 1979,

ORDERED that the action of the Board of Alcoholic
Beverage Control of the City of Newark be and the same is
hereby affirmed and the appeal be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

Appendix
Initial Decision Below

IN RE:) INITIAL DECISION
 JAMES MILES, d/b/a TWENTY GRAND LOUNGE)
 vs. NEWARK MUNICIPAL BOARD OF A.B.C. ET AL.) OAL DKT.NO.A.B.C.2864-79
 APPEAL #4376)

APPEARANCES:

None for James Miles, Appellant

Hugh B. Gallagher, Esq., Assistant Corporation Counsel, for the Newark Alcoholic Beverage Control Board, Respondent

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

This matter was scheduled for hearing at 9:00 A.M. on October 3, 1979. The notice of appeal signed by Savino J. Russoniello, Esq. for Stanley Silverman, Esq., states that:

"James Miles, doing business as: Twenty Grand Lounge appeals from a determination of the Newark Alcoholic Beverage Control Board which approved the transfer of a certain plenary license, #L-6 from Cosetta Selman, Administrator, Estate of William Malone to the Magic Wonders Bar, Inc. in accordance with a Resolution dated June 1, 1979." A petition of appeal which set forth various grounds of appeal and which requested a hearing and a stay of the action of the Local Board, the resolution approved and adopted on May 29, 1979 and endorsed and effective on June 1, 1979 and a proof of mailing accompanied the notice. Mr. Silverman's name appears in the upper lefthand corner of the notice, the petition and the proof of mailing.

The hearing commenced at 10:35 A.M. with Hugh B. Gallagher, Esq. in attendance. Mr. Silverman was not present. I read into record the contents of Mr. Miles' notice of appeal, petition of appeal, the resolution and the proof of mailing.

At this point, I called Ms. Candace Ehler to the witness stand. Ms. Ehler testified that she is the receptionist at the front desk of the Office of Administrative Law and that, at approximately 8:55 A.M., a man who identified himself as Mr. Silverman came to her desk and said he wanted a postponement for the case that was at 9:00 A.M. this morning. (October 3, 1979).

I noted for the record that I had a message dated October 2, 1979, 8:55 A.M., to the effect that Mr. Silverman, attention James Miles, wanted a postponement on James Miles, Twenty Grand Lounge. This message was addressed to Vivian, who I assume is in our Judicial Management Section, our clerical and scheduling section, and was incorrectly dated October 2, 1979. I received it on October 3, 1979.

Ms. Ehler was excused.

I then indicated that at 9:15 A.M. on October 3, 1979 I was in the office of Thomas Lowe, Assistant Director of Judicial Management for our office, and Mr. Lowe indicated that he telephoned Mr. Silverman's office, spoke to his secretary and told her that Mr. Silverman had one hour in which to arrive at our office for the hearing. I noted it was then 10:47 A.M. and Mr. Silverman had not appeared.

Mr. Gallagher indicated that he had spoken to Mr. Silverman on the telephone at about 4:30 P.M. the previous day. Mr. Silverman told Mr. Gallagher that he was going to request an adjournment and Mr. Gallagher told him he would not object. Mr. Gallagher said he called our office at about 9:00 A.M. on October 3, 1979 to ascertain if the adjournment had been granted. When he was told that it had not been granted, he appeared for the hearing.

I pointed out that our notice of hearing contains a service list of parties and that Mr. Silverman's name is one of those on the list. This notice was mailed on August 29, 1979.

I indicated that Mr. Miles' notice of appeal indicated he appealed from a determination approving the transfer of the liquor license. I stated that I had reviewed the transcript of the hearing which was held below on May 29, 1979. Mr. Gallagher had mailed this transcript to me and the attorneys involved on September 24, 1979. I referred specifically to page 8 of the transcript, line 5, in which one Robert J. Jerome appeared on behalf of Stanley N. Silverman who, Mr. Jerome indicated, represented James Miles. He stated that he had been asked by Mr. Silverman to ask the Board to not make a final decision that evening on the license transfer because Mr. Silverman alleged "that these people here are not real parties in interest. They are merely holders for other people that don't have the qualifications to obtain this license". Mr. James H. Slaughter, the Board Chairman, indicated that it was a very, very strong accusation, that the Board would not get involved in those kind of accusations. He stated that Mr. Jerome would have to bring them up on charges. Mr. Jerome then said that he was not asking that the Board be involved in it. He said, "I just ask that the Board adjourn the final decision in this matter to a date subsequent to the one today". Mr. Slaughter indicated that this could not be done. That was the extent of Mr. Jerome's appearance on behalf of Mr. Silverman for James Miles.

It appeared to me, notwithstanding the wording of Mr. Miles' notice of appeal, that he was only aggrieved in that Mr. Jerome's request for an adjournment of the final decision was denied. He sought limited relief, that is an adjournment, and his request was denied. Mr. Gallagher indicated that this was the position he took. While he was addressing me, I saw Thomas Lowe motioning to me. I requested Mr. Lowe to testify. He confirmed the 9:15 A.M. telephone call. I then noted it was 10:57 A.M. Mr. Lowe stated that at about 10:45 A.M. Mr. Silverman telephone him. He said Mr. Silverman told him he had spoken to his adversary yesterday afternoon (October 2, 1979) and that they agreed the matter could or should be adjourned. Mr. Silverman said he appeared here this morning (October 3, 1979) at approximately 9:00 A.M., left a message that he wanted the matter postponed and that he left at that time. Mr. Silverman indicated that he was tied up on another matter in New York City, and that he was unable to appear this morning (October 3, 1979). Mr. Lowe said his office had no record of any correspondence or any telephone call from Mr. Silverman prior to October 3, 1979 requesting an adjournment.

Mr. Lowe was excused.

Mr. Gallagher indicated that he was the adversary to whom Mr. Lowe referred. He said that basically what Mr. Lowe said was about what occurred.

At this point I told Mr. Gallagher I would permit him to make an appropriate motion. I stated again that I was of the opinion that Mr. Miles was aggrieved solely by the denial of Mr. Jerome's request for an adjournment of the final decision of the Board. I invited any motion Mr. Gallagher would care to make because of Mr. Silverman's failure to appear.

I stated that a motion for an adjournment is addressed to the sound judicial discretion of the Court. I stated that I believed that, under the totality of the circumstances which had been discussed and which were in the record, the adjournment was a belated, eleventh hour request by Mr. Silverman and that it was one which I denied. I stated I very much denied Mr. Silverman's request for an adjournment, stating I thought Mr. Silverman should have been before me to proceed with his appeal. He not being before me to proceed, however tenuous the appeal may have been in view of what I read from the transcript of the proceedings below, I invited any motion Mr. Gallagher cared to make.

Mr. Gallagher indicated that, since Mr. Silverman's request for an adjournment had been denied, he moved to dismiss the appeal. I granted the motion and dismissed the appeal for the reason it had not been prosecuted. I added, additionally, it appeared to me, from a reading of the transcript of the proceedings below, that Mr. Silverman, through Mr. Jerome, was only aggrieved in that Mr. Jerome's request for an adjournment of the final decision by the Board was denied.

Under all the circumstances, I granted the motion and dismissed the appeal of James Miles, doing business as Twenty Grand Lounge.

It is therefore ORDERED that the appeal of James Miles, doing business as Twenty Grand Lounge, is dismissed because of the failure of Mr. Silverman to appear and prosecute it.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10(c).

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

3. SPECIAL RULING—PURSUANT TO N.J.S.A. 33:1-12.39 - PETITION OF HERBERT PRENTICE.

In the Matter of the Petition of

Herbert Prentice

Holder of Plenary Retail Consumption License No. 1414-33-035-001 issued by the Township Committee of Jefferson Township.

Herbert Prentice, Pro Se.

CONCLUSIONS AND ORDER

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: October 16, 1979 - Received: October 17, 1979

BY THE DIRECTOR:

No written Exceptions were filed in connection with the within Petition for relief pursuant to N.J.S.A. 33:1-12.39.

Having carefully considered the entire record herein, including the transcript of the testimony and the Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge, except as hereinafter noted, and adopt same as my conclusions herein. However, I specifically reject that portion of the Administrative Law Judge's opinion which "ORDERED that the renewal of the liquor license be granted." Such action is contrary to law. The right to renew or deny renewal of this retail license is vested in the local issuing authority. N.J.S.A. 33:1-19. The Petition herein seeks only an Order from the Director to authorize a further application for renewal. The statutory language is clearly set forth in N.J.S.A. 33:1-12.39.

I further note that some of the reasons set forth in justification for inactivity of this license, to wit, vandalism and fire, were submitted in conjunction with a similar Petition to authorize a further application for renewal for the 1978-79 license term. I granted that Petition by Special Ruling dated July 12, 1978. I have not given those factors any weight since the within Petition must be judged on the activities subsequent to my last Special Ruling. The current efforts to activate this license consist of transfer of this license to various alleged

prospective purchasers. The approval I shall grant herein will specifically be limited to the 1979-80 license term and no further authorizations will be granted.

Accordingly, it is, on this 29th day of November, 1979,

ORDERED that the Township Committee of Jefferson Township be and the same is hereby authorized to consider the application for renewal of the subject license for the 1979-80 license term, and, to thereupon, grant or deny said application in the reasonable exercise of its discretion; and it is further

ORDERED that if the Township Committee grants the application for renewal, it shall be made subject to the special condition that the license will become operational during the 1979-80 license term. No further applications for authorization shall be granted predicated upon allegations of attempts to sell the subject license.

JOSEPH H. LERNER
DIRECTOR

Appendix

Initial Decision Below

In the Matter of Petition of)

INITIAL DECISION

HERBERT PRENTICE, t/a SNOW)

O.A.L. DKT. NO. A.B.C.2829-79

BOWL, INC.)

APPEARANCES:

Herbert Prentice, Pro Se

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a petition pursuant to N.J.S.A. 33:1-12.39 for renewal of an inactive liquor license. Petitioner, Herbert Prentice, presently owns liquor license No. 141433035001 for premises known as Snow Bowl in Milton, New Jersey.

Petitioner testified that he purchased the liquor license from George J. Minish in September, 1975 who was Trustee for the bankrupt Snow Bowl, Inc. He stated that at the time of acquisition of the license, the facilities, which had originally been the site of a restaurant and beverage sales operation, was locked and sealed due to the bankruptcy proceeding. He stated that while he was attempting to reopen the business operations of Snow Bowl, Inc., the premises were vandalized and gutted of its copper plumbing and certain other parts which rendered the building temporarily unfit for use as a restaurant and lounge. He also testified that on February 6, 1978, a fire occurred which gutted the structure causing further serious damage to the building and precluding the prompt restoration of license to the active status. He testified that arrangements were made for reconstruction of the premises and bringing the license to an active status, but the prospective purchaser involved in the reconstruction was unable to secure the proper financing and the contract lapsed. He testified that he presently is negotiating with a purchaser who has sufficient capital to finance the reconstruction of the premises but cannot conclude the deal unless he has a valid active license.

N.J.S.A. 33:1-12.39 permits a license renewal application based upon good cause being shown or if the licensee has been deprived of the use of the licensed premises as a result of fire or other casualty.

Petitioner testified and I FIND that as a fact that the premises in question was vandalized and stripped of the materials necessary to operate the premises as well as being set on fire in February, 1978. I also FIND as a fact that Petitioner has a bona fide purchaser who will reconstruct the premises and put the license to a proper use.

I, therefore, CONCLUDE that there is substantial evidence in the record before me to support and justify the renewal of the liquor license No. 14143305001 located in the Township of Milton. [Accordingly, It is hereby ORDERED that the renewal of the liquor license be granted]

This decision shall not become final until forty-five (45) days after the agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the designee of the Alcoholic Beverage Control Commission, Joseph H. Lerner, Director, my Initial Decision in this matter and the record of these proceedings.

4. SPECIAL RULING - PURSUANT TO N.J.S.A. 33:1-12.39 - PETITION OF CHARLES RUDINOFF.

In the Matter of the Petition of)

Charles Rudinoff)

Holder of Plenary Retail Consumption License No. 1707-33-012-002 issued by the Borough Council of the Borough of Penns Grove.)

CONCLUSIONS
AND
ORDER

DiNicola & DiNicola, Esqs., by Joseph M. DiNicola, Esq.,
Attorneys for Petitioner.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: October 18, 1979 - Received: October 22, 1979

BY THE DIRECTOR:

No written Exceptions were filed in connection with the within Petition for relief pursuant to N.J.S.A. 33:1-12.39.

Having carefully considered the entire record herein, including the transcript of the testimony and the Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge, except as hereinafter noted, and adopt same as my conclusions herein. However, I specifically reject that portion of the Administrative Law Judge's opinion which "ORDERED that the renewal of the liquor license be granted." Such action is contrary to law. The right to renew or deny renewal of this retail license is vested in the local issuing authority. N.J.S.A. 33:1-19. The Petition herein

seeks only an Order from the Director to authorize a further application for renewal. The statutory language is clearly set forth in N.J.S.A. 33:1-12.39.

Accordingly, it is, on this 29th day of November, 1979,

ORDERED that the Borough Council of the Borough of Penns Grove be and the same is hereby authorized to consider the application for renewal of the subject license for the 1979-80 license term, and, to thereupon, grant or deny said application in the reasonable exercise of its discretion. If the application for renewal is granted, it shall be made expressly subject to the Special Condition that the license must become operational during the 1979-80 license term.

JOSEPH H. LERNER
DIRECTOR

In the Matter of:)

PETITION OF CHARLES RUDINOFF)

INITIAL DECISION

) OAL DKT. NO. ABC 2891-79

Appearances:

Joseph M. DiNicola, Esq., Attorney for Petitioner

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a petition pursuant to N.J.S.A. 33:1-12.39 for renewal of an inactive liquor license. Petitioner, Charles Rudinoff, presently owns liquor license number 1707-33-012-002 located in the Borough of Pennsgrove, New Jersey.

Petitioner testified that he purchased the license in August 1978 from Anthony Marindola and that at the time of the purchase of the license it was inactive. He stated that it was his intention at that particular time to have a person-to-person place-to-place transfer so that he might begin operation at 64 East Main Street in the Borough of Pennsgrove. He testified that he did in fact receive the person-to-person and place-to-place transfer and instituted arrangements to begin repairs and renovations on his premises so that the license may be made active. He stated that he was not aware at the time of the transfer that he had to put the license in use immediately and expects at this particular juncture to begin operation of the business with his two sons upon having the license reactivated and completing the final repairs on the premises.

N.J.S.A. 33:1-12.39 permits license renewal application based upon good cause being shown and there is a reasonable expectation that the license will be made active within the near future and that good faith has been shown that all efforts to make the license active have been done.

I find as a fact that Petitioner acted in good faith since obtaining the license by entering into contracts with A. Verdecchio and Sons, General Contractors to brick veneer the front as well as make other exterior modifications on the building; by contracting with Bill Webb's Electric to upgrade the electrical service in the interior of the building; by contracting with Null Builders to have a new roof put on the building; and by contracting with H. Turner Refrigeration and Air Conditioning Service to repair the air conditioning units on the premises. I also find that Petitioner acted in good faith by having prepared a blue print of the floor plan layout and getting it approved by the State Division of Alcoholic Beverage Control.

Therefore, I CONCLUDE that there was substantial evidence in the record before me to support and justify the renewal of the liquor license number 1707-33-012-002 located in the Borough of Pennsgrove. Accordingly IT IS HEREBY ORDERED that the renewal of the liquor license be granted.

This decision shall not become final until forty-five (45) days after agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record of these proceedings.

5. DISCIPLINARY PROCEEDINGS - UNLAWFUL POSSESSION AND SALE OF DRUGS BY PATRON AND GAMBLING IN FORM OF PLAYING POOL FOR MONEY - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against)

Lucille Holmes, A/E of)
Henry Kominski)
t/a Park Inn)
1907 Park Avenue)
South Plainfield, N.J.)

S-11,460

CONCLUSIONS

AND

ORDER

Holder of Plenary Retail Consumption License 1222-33-007-001 issued by the Mayor and Council of the Borough of So. Plainfield.)

Robert Linder, Esq., Attorney for Licensee.
Ronald Blumstein, Esq., Deputy-Attorney General, Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

The licensee pleaded "not guilty" to two charges alleging that: (1) on June 3, 1977, she permitted unlawful activity pertaining to controlled dangerous substances on the licensed

premises, in violation of Rule 4 of State Regulation No. 20 (now N.J.A.C. 13:2-23.5); and (2) on June 25, 1977, she allowed, gambling, in the form of playing pool for money, within her licensed premises, in violation of Rule 7 of State Regulation No. 20 (now N.J.A.C. 13:2-23.7).

ABC Agent P testified in support of the Division charges that, on June 3, 1977, she, in the company of fellow agent, Agent D, arrived at the subject premises. She entered alone and seated herself at the bar. Engaging the bartender, whom she knew as Phil in conversation, she inquired if she could purchase drugs, i.e., cocaine, hashish, marijuana or the like. He replied that he would make inquiry among the customers. He apparently did so because she observed him engage other patrons in conversation and one male, whom she identified as George, came over to her place at the bar. While the bartender Phil leaned over the bar toward them, George stated that she could purchase marijuana for \$40.00 an ounce. Agreeing to such purchase, Agent P left the premises with George. They went to the parking lot and at his car the agent purchased the marijuana. She returned to the bar and told Phil that she had secured the drugs. ABC Agent D testified in corroboration of Agent P with the exception that the conversations Agent P related with Phil and George were not within his hearing range.

New Jersey State Police Forensic Chemist, Sharon Mikolajaczyk, testified that the specimen which she had received through this Division, as allegedly purchased by Agent P, was a controlled dangerous substance, to wit, 21.13 grams of marijuana.

Agent P further testified that she and ABC Agent H (now a member of a municipal police department) visited the subject premises on June 25, 1977. She observed Agent H engage in a game of pool with the bartender Phil. Following the pool game, Agent H told Agent P that he had lost \$2.00 to Phil, and when Agent P remonstrated with Phil for taking money from her "kid brother", Phil assured her that the winnings would be put into a "tip box" to be shared by both bartenders. On the same evening, Agent P thanked Phil for aiding her in securing drugs.

ABC Agent H testified that, when he and Agent P arrived on June 25, 1977, there was a pool game in progress. He was finally able to engage in a game with the bartender Phil who asked him, "are we playing for the usual?" and Agent H asked if the usual could be played for \$2.00. Phil assented and shortly thereafter Agent H lost the \$2.00.

Testifying for the licensee, Lucille Holmes' husband, George Holmes stated that since the death of his brother-in-law in 1975, he took a leave of absence from his regular employment to manage the affairs at the tavern. From that time until the spring of 1977, there were many difficult problems which arose in its management. In addition to financial difficulties, a social problem arose when a gang of motorcyclists exerted an evil influence on the patronage. The prevalence of drugs in the area, together with all of the other problems, caused him to visit the Police Department and enlist

their aid. In the year following, the police did conduct a surveillance of the premises and increased their visits, which resulted in an improved situation. The improvements were sufficient for him to decide to resume his prior employment,

The bartender, Phil, was not hired by him, but he felt that he knew him sufficiently well to believe that Phil would not engage in the conduct described by the agent. He admitted that Phil might engage in games of pool with patrons, which was contrary to management policy.

William Warren, the stepson of Holmes, next testified in defense of the charges that he had been a helper in the premises at the time of the subject incidents. In November, 1977, he was first advised of the pending charges based upon the prior incidents in June, 1977. Thereupon, he confronted Phil concerning the incidents. He described Phil's reaction as being very vague. There had been a girl patron who had nagged Phil about obtaining drugs, but her requests had been brushed aside. There was no specific recollection pertaining to the pool playing, but a general denial of such activity was asserted. Warren added that Phil had quit in June of 1978 and had not thereafter been employed in the premises. He did know, however, where Phil resides.

The licensee introduced into evidence a letter from the South Plainfield Police Department indicating that it had received requests for assistance from Holmes and the Park Tavern.

In adjudicating matters of this kind, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

In appraising the factual picture presented, and having had the opportunity to observe the demeanor of the witnesses, as they testified, their credibility has been assessed. Testimony to be believed 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. Bonnett, 16 N.J. 546 (1954). The general rule in these cases is that the finding must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S., Evidence, sec. 1042.

Appellant's counsel, at the outset of the hearing, indicated that part of her defense would be based upon what would be developed as consequential variances between the testimony of the respective agents and requested that the agents be sequestered. This request was granted. The testimony of each agent was clear and forthright. Despite some minor differences in their recollections of small details, there was no significant or substantial differences in their testimony so far as it related to the charges themselves. Despite vigorous cross-examination by appellant's counsel, the testimony of the agents remained unshaken.

The substantive portion of Agent P's testimony was corroborated by the testimony of her fellow agents. The testimony of Agent P was detailed and decisive and, additionally, was totally uncontroverted by any direct testimony.

Appellant made much of the description by Agent P that the conversations between her and the seller of the drugs were conducted sotto voce with his body then at angle to the bar. Agent P insisted that the bartender could, at that time, hear the conversation because he was then leaning over the bar towards both Agent P and the drug seller. The logic of appellant's argument is elusive. All that is necessary to support the charge is that evidence indicate that the bartender knew or should have known by the exercise of reasonable diligence of drug activity in the licensed premises. This was established.

Appellant offered virtually no defense of any substance. None of the witnesses called were present at any of the times and dates specified in the charges. Neither of the active bartenders at the subject times were called to testify, nor was their absence explained. The failure to call an important witness gives rise to an inference that such testimony as might be elicited would be disadvantageous. Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1964).

I conclude that a fair evaluation of the evidence and the legal principles applicable thereto, clearly and reasonably preponderates in favor of a finding of guilt on the said charges for the reasons hereinabove set forth. I, therefore, recommend that the licensee be adjudged guilty of the said charges.

Licensee has a prior record of the following two dissimilar violations: (1) On June 23, 1977 a fine was paid in lieu of suspension, in consequence of a violation of Rule 16b of State Regulation No. 20; and (2) On November 11, 1975, licensee pleaded non vult to charges of sales of alcoholic beverages to minors, for which a fine was accepted in lieu of suspension of license.

In view of the absence of any competent defenses whatever, coupled with the specious denial of the occurrences testified to by the agents, the Division was required to produce each of its witnesses as well as arrange for the testimony of the State Police Department Chemist who affirmed that the evidence offered was, in fact, the marijuana alleged. From the gravity of the charge, the active participation by the licensee's employee and consideration of the aforesaid factors, it is glaringly apparent that appellant's request that the usual

minimum penalties be assessed, be rejected.

Accordingly, it is recommended that the license be suspended on the charges herein for sixty days, to which should be added ten days by virtue of the prior dissimilar violations, resulting in a total of seventy (70) days suspension of the said license.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the licensee, and written Answers were submitted thereto on behalf of the Division, pursuant to N.J.A.C. 13:2-19.6.

Several Exceptions are directed to specific alleged inconsistencies in the testimony of the Division's witnesses, and to the asserted overbroad conclusions reached by the Hearer in his report. Nothing alleged therein materially affects the ultimate conclusions of the Hearer that the licensee's bartender knew of and participated in the Division agent's drug acquisition in or about the licensed premises. I find these Exceptions to lack merit.

The next group of Exceptions relates to the absence of defense witnesses capable of testifying to the specific incident charged because the bartender is no longer employed by the licensee; the licensee was not in the premises on the dates in question, and the charges were preferred some five months after the incident.

As to the time interval in the charge, I find nothing improper therein. The absence of the licensee at the licensed premises constitutes no basis for mitigation. N.J.A.C. 13:2-23.28.

I do, however, reject that portion of the Hearer's Report which attributes an adverse inference to the licensee for failure to call the bartender on duty at the time of the incident. While such principle of law is generally correct, the factors sub judice do not warrant drawing said inference. This does not materially affect the Hearer's conclusions because sufficient, credible, direct, evidence exists in the record in support thereof. Therefore, except as noted, I find these Exceptions to be without basis.

The final area of Exceptions by the licensee concerns the efforts made to enlist local police cooperation in combatting unlawful activities at or about the licensed premises. Inasmuch as the licensee's employee activity participated in the violative situations, internal controls and diligence would have provided the licensee protection. Calls to others for aid cannot constitute a defense or mitigation when the licensee fails to control and supervise those directly responsible to her.

Therefore, I dismiss these Exceptions as lacking in merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report, the written Exceptions filed to said Report and the written Answers submitted thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein. I find the licensee guilty as charged.

Accordingly, it is, on this 28th day of November, 1979

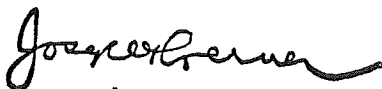
ORDERED that Plenary Retail Consumption License #1222-33-007-001 issued by the Mayor and Council of the Borough of South Plainfield to Lucille Holmes, A/E of Henry Kominski, t/a Park Inn, for premises 1907 Park Avenue, South Plainfield be and the same is hereby suspended for seventy (70) days commencing 2:00 a.m. Monday, December 10, 1979 and terminating 2:00 a.m. Monday, February 18, 1980.

JOSEPH H. LERNER
DIRECTOR

6. STATE LICENSES - NEW APPLICATIONS FILED.

Wellington Importers, Ltd.
3000 Marcus Avenue
Lake Success, New York
Application filed June 13, 1980
for limited wholesale license.

Cointreau America Inc.
6 Princess Road
Lawrenceville, New Jersey
Application filed June 16, 1980
for plenary wholesale license.



Joseph H. Lerner
Director