

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

BULLETIN 2153

JULY 30, 1974

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1. APPELLATE DECISIONS - 566 CORP. v. MADISON.

566 Corp.,)	
Appellant,)	
v.)	On Appeal
Mayor and Council of the)	CONCLUSIONS
Township of Madison,)	and
Respondent.)	ORDER
-----)		
Wilentz, Goldman & Spitzer, Esqs., by Stephen Kessel, Esq.,		
Attorneys for Appellant		
Louis J. Alfonso, Esq., Attorney for Respondent		

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Mayor and Council of the Township of Madison (hereinafter Council) which on April 1, 1974, denied appellant's application for a person-to-person transfer of Plenary Retail Distribution License D-5, from Eleanor Edelstein to appellant.

The petition of appeal contends that the Council's action was arbitrary and unreasonable in that the stockholders of corporate appellant consists of the present licensee, Eleanor Edelstein and her husband, Eric Edelstein, and the purpose of the transfer was merely to vest the license in them both by way of the corporate entity.

In response to the petition, the Council rejected appellant's application for the reasons that: (a) she had not yet complied with a condition attached to her license; and (b) her husband, as a stockholder of the newly formed corporation, had not been investigated by the police.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses.

The resolution of the Council rejecting appellant's application was accepted into evidence. It revealed that the appellant's application was rejected by the action of but one councilman of the seven officials entitled to vote. Of the remaining, one would not participate because of what he considered to be a possible conflict of interest on his part; and the remaining five abstained. As there were no affirmative votes for the transfer and one negative vote, the resolution approving the transfer was, in consequence, defeated.

The negative voting councilman, Edward B. Murphy, testified on behalf of the Council, that he had initially voted in favor of the grant of the license to Eleanor Edelstein, in December 1973. The conditions attached to the then-grant required that, among others, a parking area be paved before the end of June 1974, and as of the present time, such condition was not met.

Additionally, he considered that a corporate ownership could relieve the licensee of individual responsibility which he considered was not in contemplation at the time that the grant was made. He believed that the transfer to a corporation, although the stockholders of such corporation are the present licensee and her husband, would not be to the best interests of the community.

On cross examination, he admitted that there were a number of corporate licensees in the municipality. He further admitted that had the initial license application been in the name of both husband and wife, it would have been readily granted. He knew of no negative information concerning the licensee's husband, Eric Edelstein, but added that he knew of no police approval of Eric Edelstein's character or record.

Eleanor Edelstein testified on behalf of the appellant. She stated that the license was initially granted to her with three conditions: (a) that there be a valid and executed lease for the premises in which the license would be situated; (b) that a police "check" of her should be negative; and (c) six additional parking spaces were to be provided on the site to be occupied. Of these conditions, the first two have already been met, and the third is in the process of being fulfilled; a contractor has examined the site and is about to pave the necessary area for the six parking places. The licensed premises is now in operation; and appellant and a male employee are in charge of it. Her husband is a dentist and they have resided in the Township for about five years.

The appellant introduced the testimony of Eric Edelstein who stated that the only reason his name does not appear on the license was that at the time the initial license application was signed he was out of the country on a vacation. He confessed to having a financial interest in the licensed business as it is a joint enterprise with his wife, and intends to take some active role in the conduct of the licensed business. He believed that the police department had made a usual check of him in conjunction with an application for a firearms permit some time ago.

It is entirely competent for a municipal issuing authority to confine its selection of licensees to those who have clearly demonstrated that they are worthy to receive the privilege of a license, and its determination should be given considerable weight on appeal. Eana, Inc. v. Pleasantville, Bulletin 1024, Item 2; Clark v. West Orange, Bulletin 631, Item 7; Esa v. Paterson, Bulletin 2140, Item 3.

The transfer of a liquor license, whether person-to-person or place-to-place, or both, is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was unreasonable, arbitrary or capricious, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1; Silver Sands Motel v. Point Pleasant Beach, Bulletin 1624, Item 1; Walban, Inc. v. Deal, Bulletin 1894, Item 2.

As there was no proof whatever that appellant, 566 Corp., or its principal stockholders, Eleanor and Eric Edelstein, were unworthy to hold a plenary retail license, the Council's determination to withhold approval of its application for a person-to-person was entirely arbitrary. Cf. Federici's Hideaway, Inc. v. Belleville, Bulletin 1595, Item 2; Chestnut Wines & Liquors, Inc. v. West Orange, Bulletin 1740, Item 1.

It is apparent from the candid testimony of appellant's witnesses, the husband-wife here involved, that the initial application by the wife should have had the joinder of her husband as he is a participant with her in an obvious joint venture. Although his name was innocently omitted from that application as he was then away from home, his admitted interest in the licensed business would require his joinder as a licensee. Hence, a situation requiring correction resulted and the means to accomplish that correction was the corporate entity wherein both husband and wife became the sole stockholders. The advantages of being corporate licensees apparently overcame the concomitant disadvantages of corporate license ownership and the appellant corporation was formed for that purpose.

The Council's argument that a "police check" had not been made of the husband stockholder is without merit as such a "check" could have been a condition to the transfer, as an identical "check" of the wife was a condition attached to the original grant of license.

For these reasons, I conclude that the appellant has sustained the burden imposed upon it of establishing that the Council's action was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15. It is, therefore, recommended

that the respondent's action be reversed and that it be ordered to grant the transfer in accordance with the application filed, subject to and upon condition that respondent receive a favorable police report as to Eric Edelstein, one of the corporate licensees.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of May 1974

ORDERED that the action of the respondent Mayor and Council of the Township of Madison in denying appellant's application for a person-to-person transfer of Plenary Retail Distribution License D-5, from Eleanor Edelstein to appellant, be and the same is hereby reversed; and it is further

ORDERED that respondent be and the same is hereby directed to grant the aforesaid transfer in accordance with the application filed therefor.

Joseph H. Lerner
Acting Director

2. APPELLATE DECISIONS - TOWN HALL RESTAURANT and TAVERN, INC. v. BERGENFIELD - ORDER PERMITTING WITHDRAWAL OF APPEAL.

Town Hall Restaurant and Tavern, Inc.,)	
)	
Transferred to and now known as)	On Appeal
Bergenfield Bar & Beverage Corp.)	O R D E R
)	
Appellant,)	
)	
v.)	
)	
Mayor and Council of the Borough of Bergenfield,)	
)	
Respondent.)	

Minuskin & Aliotta, Esqs., by Gary R. Feitlin, Esq.,
 Attorney for Bergenfield Bar & Beverage Corp.
 Picinich & Rigolosi, Esqs., by Ronald J. Picinich, Esq.,
 Attorney for Town Hall Restaurant and Tavern, Inc.
 Morton R. Covitz, Esq., Attorney for Respondent

BY THE DIRECTOR:

Appellant, Town Hall Restaurant and Tavern, Inc., appealed from action of respondent which by resolution adopted May 2, 1974 suspended its Plenary Retail Consumption License C-1 for a period of seven (7) days, effective May 6, 1974 upon finding it guilty in a disciplinary proceeding.

Upon filing of the appeal an order was entered by the Director on May 6, 1974, staying respondent's order of suspension pending the entry of further order herein.

It appears that on May 7, 1974, appellant Town Hall Restaurant and Tavern, Inc., transferred its said Plenary Retail Consumption License to Bergenfield Bar & Beverage Corp. and the said Bergenfield Bar & Beverage Corp. now desires to withdraw the within appeal and further requests that the effective date of the suspension be postponed to June 19, 1974, by reason of certain banquet commitments incurred by it, after being given credit for the period of suspension already served; and

It further appears by letter of the respondent Borough clerk dated May 24, 1974 that the said licensee has actually served a suspension of one (1) day; and

Good cause appearing, I shall grant Appellant's requests.

Accordingly, it is, on this 31st day of May 1974,

ORDERED that the action of the respondent be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my Order dated May 6, 1974, staying respondent's action pending determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-1, issued by the Mayor and Council of the Borough of Bergenfield to Bergenfield Bar & Beverage Corp. for premises, 52 So. Washington Street, Bergenfield, be and the same is hereby suspended for seven (7) days, with remission of one (1) day suspension already served or a net suspension of six (6) days commencing at 12:01 a.m. Wednesday, June 19, 1974 and terminate on 12:01 a.m. Tuesday, June 25, 1974.

Joseph H. Lerner
Acting Director

3. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against
 Rudy Cicchino
 t/a Sussex Mall Wines & Liquors
 48 Sussex Avenue
 East Orange, New Jersey
 Holder of Plenary Retail Distribution License D-2 issued by the Municipal Board of Alcoholic Beverage Control of the City of East Orange.

CONCLUSIONS and ORDER

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Beckerman, Franzblau & Cohen, Esqs., by Gary L. Falkin, Esq.,
 Attorneys for Licensee.
 David S. Piltzer, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on January 12, 1974, he sold alcoholic beverages to a minor, age 16, in violation of Rule 1 of State Regulation No. 20.

In behalf of the Division, ABC Agents B, C and Ch and the alleged minor, Dean --, testified in support of the charge. The minor, Dean, testified that he was born on March 2nd, 1957 and was 16 years of age on the date of the charge.

On that date, at about 9:00 P.M., he entered the licensed premises, "...grabbed a bottle of wine, brought it over to the counter...They gave me a bag; and I left". He described the brand of wine, the amount paid and the clerk who served him. Upon leaving the licensed premises, he was accosted by ABC Agent B who, after a short conversation, telephoned the minor's mother.

ABC Agents B, C and Ch each testified that they were on the exterior of the licensed premises at the time of the said alleged incident and saw the apparent minor, Dean, enter the premises. As they approached the licensee's store to observe a possible sale to a minor, they were momentarily accosted by two local policemen. Upon displaying their Division identification, they were released from inquiry.

At that moment Dean emerged from the licensed premises carrying

a bag which contained a bottle of wine. Dean returned to the premises accompanied by the agents, but the minor failed to identify the person who had sold the wine to him.

The licensee, Rudy Cicchino, testified that he was not present in the licensed premises on the night of the date hereinabove referred to. However, on a prior occasion, he had refused service to Dean and a friend and had ejected them from the premises. Three clerks, then employed by the licensee, testified that they were on duty at the time of the alleged purchase; each categorically denied that a sale to Dean had been made. One of them, Luther Allen, recalled that Dean had entered the store, stood there for a time and then apparently departed. Another clerk, Willie Keith, corroborated the licensee's testimony respecting the prior attempt of Dean and his friends to purchase beer.

The Division produced Dean's mother, Doris E. Britton, as a rebuttal witness. During cross-examination, and in response to a question relating to where her son Dean had gone, she testified as follows:

"A He left home, he went to get some wine, and I knew he was going to get it, and it was my fault, I should have gone to get it, but I didn't, but I expected an older person to get it and bring it upstairs to me."

Preliminarily, I observe that, 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).

In appraising the factual picture presented in this proceeding, the credibility of witnesses must be weighed.

Evidence to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet 16 N.J. 546 (1954)

Based upon the foregoing principles, I am persuaded that the testimony of the agents, presented in a forthright and detailed manner was not a fabrication but was factual and credible. I find that a sale and delivery of alcoholic beverages to a minor was made in the manner described and in violation of Rule 1 of State Regulation No. 20.

I find that the testimony of licensee's witnesses to be completely self-serving and incredible. The agents' presence at the scene in time to observe the minor depart from the premises with the bottle of wine gives rise to no other inference than that an illegal sale of an alcoholic beverage had been made. The candid testimony of the minor's mother that her son has been sent to the licensed premises to obtain the wine adds further support to the conclusion that the aforesaid purchase had been intended and executed. No charge was made that the wine had been pilfered.

Accordingly, after considering the entire record and the applicable legal principles, I am convinced that the charge has been established by a fair preponderance of the credible evidence. It is, therefore, recommended that the licensee be found guilty of the said charge.

Absent prior record, it is recommended that the license be suspended for thirty days.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by the attorney for the licensee, and answers to the said exceptions, with supportive argument, were filed by the attorney for the Division, pursuant to Rule 6 of State Regulation No. 16.

Licensee contends that the conclusions of the Hearer was not supported by a preponderance of the credible evidence.

In view of the sharp conflict in testimony presented herein I have carefully examined and considered the entire record herein. I am impressed by the credible testimony of each of the Division agents, that they observed the minor enter the licensed premises empty handed, and emerge therefrom with a paper bag in which was a bottle of wine. In view of the evidence to the effect that the bags were kept out of reach of the customers the unsupported supposition by the licensee that the wine was stolen is speculative, and lacks evidential support.

None of the licensee's three employees testified that they had sold a similar bottle of wine during the time alleged to another customer. In the absence of such testimony, it cannot be reasonably inferred that the wine was purchased by anyone other than the minor. Thus, this contention lacks merit.

I have also considered the matter of the register tape. Since there was no proof that the cash register tape sought to be introduced in evidence by the licensee was in fact the one processed on the date in question, I find that the Hearer acted properly in determining that it was inadmissible as evidence.

Licensee finally contends that the penalty recommended by the Hearer is too severe. The recommended penalty is consonant with precedential Division penalties implied for similar violations, and is fully warranted under the circumstances herein.

I have carefully examined the exceptions and arguments on behalf of the licensee, and find that they have either been satisfactorily considered and resolved in the Hearer's report or are lacking in merit.

Consequently, having considered the entire record herein, including the transcript of the testimony, the Hearer's report, the exceptions filed with respect thereto and the answer to the said exceptions, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 30th day of May 1974

ORDERED that the Plenary Retail Distribution License D-2, issued by the Municipal Board of Alcoholic Beverage Control of the City of East Orange to Rudy Cicchino, t/a Sussex Mall Wines & Liquors, for premises 48 Sussex Avenue, East Orange, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1974, effective 2:00 a.m. Wednesday, June 12, 1974; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. Friday, July 12, 1974.

Joseph H. Lerner
Acting Director

4. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - INADEQUATE PROOF - CHARGE DISMISSED.

In the Matter of Disciplinary Proceedings against)
)
 Liquor Shop 38 Inc.)
 t/a Holiday Spirit Shop)
 805 Route 38)
 Cherry Hill, N. J.,)
 Holder of Plenary Retail Distribution License D-7, issued by the Township Council of the Township of Cherry Hill.)

CONCLUSIONS and ORDER

 Wilinski, Suski, Kille & Scott, Esqs., by Robert Wilinski, Esq.,
 Attorneys for Licensee
 David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on May 11, 1973, it sold alcoholic beverages to a minor, age 14, in violation of Rule 1 of State Regulation No. 20.

The Division presented its case through the testimony of two minors, Matthew --- (age 14) and Corey --- (age 13) and ABC agent G. The charge specified a sale to minor Matthew, whose testimony may be summarized as follows:

On the evening of May 11, 1973, Matthew took his father's car without permission and, in the company of Corey, drove the car to his school where he picked up another six minors and then drove to the licensed premises. Matthew parked the car in the rear of the premises and walked to the front entrance, entered and proceeded to the back of the store. He took five four-fifths of a quart bottles of Boone wine to the check-out counter, paid \$5.62 at \$1.07 per bottle plus tax, to a lady clerk, received a bag containing the five bottles and returned to the car.

Corey meanwhile, after waiting in the car for a few minutes, proceeded to the entrance of the store and waited there until Matthew emerged with a bag. The youths then returned in the vehicle to the junior high school and shouted from the car to some school-mates there. This attracted the attention of a police officer who endeavored to stop them. Matthew eluded the police officer and drove the car home.

On cross examination he described the clerk as a woman

about five feet eight inches in height, with big and fluffy hair. He denied that he had asked the price of a bottle and declared that he knew the price of that particular brand. He denied that the bottles bore price markings on them.

Corey testified that, before the youths began their drive to the store, they consumed a bottle of wine found in Matthew's home. He was unsure of the location of the licensed premises but recalled leaving the car, following Matthew to the front entrance, and observing Matthew as he made the purchase.

ABC agent G testified that at the request of the local Police Department he drove the minors to the licensed premises six days subsequent to the date of the charge. The female clerk was not then on duty so he returned with the minors the following day. On their arrival, the clerk, later identified as Sylvia Levin, was observed getting out of her car, whereupon the minors identified her as the clerk who sold the wine to Matthew. He later added that, on inspection of the licensed premises, he found Boone wine in two cases on the floor near the rear of the establishment.

Testifying on behalf of the licensee, Sylvia Levin described her height as five feet. She has worn her hair page-boy style or straight for many years. She admitted being on duty on the evening of May 11 in the company of her husband (one of the owners of the license). While she had no recollection of any sale as described by Matthew, she denied vigorously that such a sale could have been made because of Matthew's obvious youthfulness. She added that the sale of five bottles of one brand of wine is an unusual sale and one that would be remembered. Additionally, when several bottles of wine are purchased, the bottles are individually wrapped to avoid the danger of breakage. Lastly, each bottle sold has to carry a price tag glued thereon, otherwise the selling clerks would have to know the specific prices of hundreds of brands and sizes.

William Levin (an officer of the corporate licensee) testified that he was on duty with his wife Sylvia Levin on May 11 and assisted her in the sales. Had anyone purchased five bottles of wine, he would have had to help package such a purchase and, as the sale of five bottles of the same kind of wine would be most unusual, he would have recalled such sale. He denied that Matthew purchased anything in his store at any time; he admitted, however, that it might have been possible for Matthew to have accompanied a customer some previous occasion.

The sole issue in this matter is one of credibility: Did the minor make a purchase in these licensed premises, or did he obtain the wine somewhere else.

The crucial issue in the matter is: Did the licensee allow, permit or suffer the prohibited acts charged to take place? In evaluating the factual picture presented in this proceeding, the credibility of witnesses must be weighed. Testimony to be believed must be credible in itself; it must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App.Div. 1961).

The testimony of the minors is vague and indecisive. The variance between Matthew's description of Mrs. Levin, both as to height and hair style, raises a doubt with respect to his recollection. The narrative account of the escapade as described by both youths shows such disparity of recollection that doubts are implanted as to their veracity. The appearance of Matthew is such that it strains credibility that any reasonably intelligent clerk would entertain making a sale to him. Additionally, the testimony of Mr. and Mrs. Levin as to their practice of "bagging" bottles of wine and having a glued sticker showing the price of each bottle lends grave doubt that the subject bottles were ever procured from this licensee.

The general rule in these cases is that the finding must be based on competent legal evidence and 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.

I have had an opportunity to observe the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony. After carefully considering all the evidence adduced herein, I conclude that the Division has not established the truth of the charge herein by a fair preponderance of the believable evidence. I therefore recommend that the charge herein be dismissed.

Conclusions and Order

Written exceptions to the Hearer's report with supportive argument were filed by the attorney for the Division, and answers to the said exceptions with supportive argument were filed by the attorney for the licensee, pursuant to Rule 6 of State Regulation No. 16.

The attorney for the Division contends that the evidence is sufficient to warrant a finding of guilt. On the other hand, the attorney for the licensee contends that the minor's credibility is highly questionable if not entirely destroyed.

Although I find that a reasonable inference of guilt could be drawn from a perusal of the totality of the testimony

I recognize that the critical determinant in this matter is one of credibility. The Hearer, who has had the benefit and advantage of observing the demeanor of the principal witnesses who testified in behalf of the Division, mainly, the minor and his companion, has found that their account of the alleged transaction is not credible. I perceive no warrant for disturbing the Hearer's recommendation in this regard.

Consequently, having considered the entire record herein, including the transcript of the testimony, the Hearer's report, the exceptions filed with respect thereto and the answer to the said exceptions. I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 24th day of May 1974,

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

Joseph H. Lerner
Acting Director

5. STATE LICENSES - NEW APPLICATIONS FILED.

Garden State Liquor Wholesalers, Inc.
312 Frelinghuysen Avenue
Newark, New Jersey

Application filed July 15, 1974
for place-to-place transfer of
Plenary Wholesale License W-78
from 1080 Garden State Road,
Union, New Jersey.

Reitman Industries
300 Frelinghuysen Avenue
Newark, New Jersey

Application filed July 15, 1974
for additional warehouse license,
operated under Plenary Wholesale
License W-42, for premises 10 Patton
Drive, West Caldwell, New Jersey.



Leonard D. Ronco
Director