

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
P.O. BOX 2039
U.S. ROUTE 1-9 (SOUTHBOUND), NEWARK, N. J. 07114

BULLETIN 2288

July 24, 1978

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STATE OF NEW JERSEY
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July 24, 1978

1. COURT DECISIONS - CASINO ROYAL v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL -
DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4285-76

CASINO ROYAL,

Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL,

Respondent.

Submitted April 10, 1978 - Decided April 21, 1978.

Before Judges Fritz, Botter and Ard.

On appeal from New Jersey Department of Law and Public
Safety, Division of Alcoholic Beverage Control.

Mr. Leonard J. Altamura, attorney for appellant.

Mr. John J. Degnan, Attorney General of New Jersey, attorney
for respondent (Mrs. William F. Hyland, former Attorney
General of New Jersey; Mrs. Erminie L. Conley, Deputy Attorney
General, of counsel; Mr. Mart Vaarsi, Deputy Attorney General,
on the brief).

PER CURIAM

(Appeal from the Director's decision in Re Casino Royal v. Division
of Alcoholic Beverage Control, Bulletin 2269, Item 3.
Opinion not approved for publication by the Court Committee
on Opinions).

2. APPELLATE DECISIONS - 111 CLUB, A NEW JERSEY CORPORATION v. BOONTON.

#4131		
111 Club, a New Jersey Corporation,	}	
Appellant,	}	
v.	}	ON APPEAL
Mayor and Board of Aldermen of the	}	CONCLUSIONS
Town of Boonton,	}	and
Respondent.	}	ORDER

 David Jerchower, Esq., Attorney for Appellant.
 Maraziti and Maraziti, Esqs., by Joseph J. Maraziti, Jr., Esq.,
 Attorneys 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 respondent, Mayor and Board of Aldermen of the Town of Boonton (Board) which, by unanimous vote on June 28, 1977, adopted a resolution denying appellant's application for a renewal of its Plenary Retail Consumption License C-4 for the 1977-78 licensing year for premises 111 Mechanic Street, Boonton.

The resolution adopted by the Board stated that, having considered the objections to the renewal expressed at a hearing conducted by the Board, the objections expressed in a petition, and letters filed with the Board, it was the judgment of the Board that the renewal should be denied.

Appellant, in its Petition of Appeal, alleges that the action of the Board was erroneous in that the same was arbitrary and unreasonable, and contrary to the facts and law on the record adduced.

In its answer, the Board denies the substantive allegations presented in the Petition of Appeal. It asserts that its action was not arbitrary or unreasonable, but was rendered after full consideration of the facts and evidence before it.

Upon the filing of the within appeal, the Director entered an Order, dated June 29, 1977, to show cause why the subject license should not be extended for the 1977-78 license period pending determination of the appeal. At the same time an ad interim extension of license was granted, and which extension was continued, subject to special conditions, by the

Director's Supplemental Order dated August 29, 1977.

A de novo appeal was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross examine witnesses. Additionally, a transcript of the proceedings held by the Board on June 20, 1977 was received in evidence, in accordance with Rule 8 of State Regulation No. 15. This was further supplemented by the receipt into evidence of the letters and the petition referred to heretofor.

At the hearing held by the Board on June 20, 1977 to consider appellant's application for renewal of its license, a petition containing twenty-four signatories and thirty-three letters addressed to the Mayor and Aldermen, wherein the writers expressed their objections to the renewal of the subject license, were presented for the Board's consideration. Additionally, eight area residents articulated their objections to the renewal of the license at the aforesaid hearing. A number of those signing the petition also addressed letters to the Mayor and Aldermen, and several of residents who vocalized their objections at the hearing also signed the petition, and sent letters.

The objections to the renewal of the license may fairly be summarized by incorporating the objections expressed in the petition as follows:

We, the residents of Union and Mechanic Streets, present this petition against the "111 Club" for the following reasons.

- *1. Loud music from a band 3 nights a week. (especially when the door is opened)
2. screaming, yelling, and cursing as people leave the bar
3. fights as people are leaving
4. blowing of horns, motorcycles racing in the Charter Savings parking lot
5. cars speeding and screeching down Mechanic Street
6. beer bottles thrown in our yards (a Mechanic Street resident had a beer bottle thrown through her front window)
7. using the Charter Savings parking

lot for a bathroom

8. children are kept awake 3 nights a week (Wednesdays, Fridays, and Saturdays) - Wednesday nights band keeps our children awake and therefore are tired for school the next day

* The loud music is our main concern for we cannot sleep until the bar closes between 2:00-2:30 a.m.; Afterwards, we must put up with all the other above complaints.

Additionally, Captain Mariano of the local police department testified, at the Board hearing, that the vast majority of the police calls for assistance were prompted by complaints of noise emanating from the premises due to the loudness of band music.

Bertha Lucas, the manager of a Savings and Loan institution located across the street from appellant's premises testified at the Board hearing that she observed people park their cars in the bank's parking lot and then enter the appellant's establishment. Upon remonstrating them she was subjected to abusive language. Many mornings she observed beer bottles and "unmentionables" littering the parking lot.

At the de novo hearing, Theresa Ann Smith, age 22, testified on behalf of the appellant that, through the death of her father in January, 1975, her mother became the owner of all the shares of stock issued by the corporate licensee. Ever since that time, the witness has been in active management of the business affairs of the appellant.

Smith explained that the licensed business is conducted in a room one hundred feet in depth and fifty feet in width in front, which contains a bar area, kitchen facilities and a dance area.

Prior to her taking over the management of the establishment, country western and "rock and roll" bands, with vocalists and using amplifiers, entertained on Friday and Saturday nights. Smith added Wednesday nights to the entertainment.

The local police visited the establishment on five or six occasions in response to complaints of noise. Each time, Smith instructed the band to turn down the volume of the music. When the complaints persisted, Smith had the bandstand moved from the front of the building to the rear. A window in the front of the building was blocked in the later part of June, 1977. The front entranceway, which contained no foyer, was

replaced by a new outside doorway which would open into an enclosed foyer. This double door arrangement was intended to impede noise escape when patrons left the premises. Additionally, appellant sought to insulate the premises against noise by hanging carpeting over the upper half of the walls which were not covered by panelling.

After conferring with representatives of the Savings and Loan association, which had its office and parking lot across the street from appellant's premises, relative to bottles and other debris strewn upon its parking lot, Smith arranged to have the debris picked up every morning.

On cross-examination the witness explained that since February, 1977, in addition to the bands that had been usually employed, she hired seven or eight bands which had their own following. Since that time, the patronage increased substantially. Smith conceded that there was a change in the patronage since February, 1977.

In response to the Hearer's question relative to the age group of the patronage generally, Smith testified as follows: "Mostly kids, early 20's. We have like, you know, our regular customers who are older that still tend to come in when we have the bands or when we don't have the bands."

Since February 1977, Smith placed advertisements in newspapers publicizing the entertainment consisting of country western and rock and roll music on Wednesdays, Fridays and Saturdays.

The questioning of this witness then proceeded as follows:

Q Do you have an opinion as to the reason for the increase in complaints with respect to the noise outside the premises since February of 1977?

A Yes. I have an opinion why, why it's increased, because of the volume of clientele that I have, number one, because we have more people coming to the bar itself. Just on that basis alone, more people. Even getting into their cars, when you close the bar up at two o'clock in the morning, when you had 50 people leaving the place, you have 40 leaving, they're going to make more noise naturally. Whether they yell, scream or just start their cars up, they will make more noise.

THE HEARER Does that happen more frequently when you have the bands?

THE WITNESS We have a lot more clientele when we have bands, of course.

In order to arrive at a determination herein, a review of the pertinent precedential decisions is warranted.

Preliminarily, I observe that the critical and decisive issue is whether the action of the Board in denying renewal of appellant's license was reasonable under the circumstances presented to it. It is firmly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of the Board in the first instance, and in order to prevail on this appeal, appellant must show that the action of the Board was unreasonable and a clear abuse of its discretion. Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962); Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955).

The burden of proof in these cases which involve discretion, falls upon the appellant to show manifest error or abuse of discretion by the issuing authority. Downie v. Somerdale, 44 N.J. Super. 84 (App. Div. 1957); Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957).

The denial of renewal has been held not to represent a forfeiture of any property right. A liquor license is a privilege and a renewal license is in the same category as an original license. There is no inherent right in a citizen to sell intoxicating liquor at retail. No licensee has a vested right to the renewal of a license. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946).

In matters relating to the denial of a renewal of licenses the Director has unhesitatingly affirmed the action of the local issuing authority in denying renewal where the licensee fails to correct intolerable conditions either inside or outside the premises. Delroz, Inc. v. West Orange, Bulletin 2027, Item 2; Perkins and Silver Edge Corp. v. Newark, Bulletin 2083, Item 2.

As early as Conte v. Princeton, Bulletin 139, Item 8, the principle was expressed that a licensee is responsible for conditions both in and outside his licensed premises which are caused by patrons thereof. Cf. Garcia v. Fair Haven, Bulletin 1149, Item 1.

A licensee must keep his place and his patronage under control both outside and inside his premises. Galasso v. Bloomfield, Bulletin 1387, Item 1.

I find that, ever since the youthful and apparently inexperienced manager, Theresa Ann Smith, took over the management of the premises after her father's death approximately five months prior to license renewal time, she instituted a

policy of hiring rock and country western bands on three nights a week, which intentionally acted as a magnet to large numbers of youthful patrons.

The record discloses that the conditions on the outside of the premises on those three nights became so intolerable that the neighbors, in large numbers, manifested their displeasure and disgust to the governing body concerning the conditions outside the premises on those nights. To her credit, the manager sought to alleviate the conditions by soundproofing the interior of the premises. However, I deem those efforts to be insufficient. The malaise to the neighborhood was caused not only by the noise conditions inside the premises, but also to a substantial degree by the conditions on the exterior thereof. Such conditions resulting from the large numbers of youthful citizens who patronized the subject premises to view their favorite bands, and who totally disregarded the right of the neighbors to enjoy peace and quiet.

However, I am mindful of the youth and inexperience of the manager of the premises and of her good faith attempt to remedy the situation. I am also mindful of the principle expressed in Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462, 466 (App. Div. 1955); wherein it was noted that "[an] owner of a license or privilege acquires through his investment therein, an interest which is entitled to some measure of protection..."

I am persuaded, upon examination of the entire record herein, that appellant should be given an opportunity to continue in business and to demonstrate its worthiness to hold an alcoholic beverage license. I find that the denial of appellant's application for renewal is too severe and constitutes an abuse of discretion by the Board. The factual proofs support the conclusions that serious breaches of licensee's control of its patrons exist, but the selected remedy is inappropriate considering the lack of prior disciplinary proceedings against the licensee, the recent nature of the offenses, and the bona fide efforts of the licensee to rectify the problems.

Therefore, I recommend that the action of the Board be reversed and that it be directed to renew the said license in accordance with the application filed therefor, subject however, to the following special conditions recited in the Director's Supplemental Order entered herein on August 29, 1977:

- (1) There shall be no amplification of any live entertainment, other than vocal amplification limited to one singer, permitted at any time on the licensed premises; and

- (2) Any live entertainment on the li-

censed premises shall be limited to no more than three persons, of which, no more than two may be playing unamplified instruments.

Conclusions and Order

No written 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 the 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 3rd day of February, 1978,

ORDERED that the action of the Mayor and Board of Aldermen of the Town of Boonton be and the same is hereby reversed, and the appeal herein be and is hereby dismissed; and it is further

ORDERED that the Board of Aldermen of the Town of Boonton be and the same are hereby directed to renew appellant's Plenary Retail Consumption License C-4, for the 1977-78 license term, in accordance with the application filed therefore, expressly subject to the imposition of the following special conditions which are to be annexed thereto:

- (1) There shall be no amplification of any live entertainment, other than vocal amplification limited to one singer, permitted at any time on the licensed premises; and
- (2) Any live entertainment on the licensed premises shall be limited to no more than three persons, of which, no more than two may be playing unamplified instruments.

Joseph H. Lerner
Director

3. APPELLATE DECISIONS - BRAHM'S TAVERN, INC. v. IRVINGTON.

#4121

Brahm's Tavern, Inc.
t/a Center Lounge,

Appellant,

v.

Municipal Council of the
Town of Irvington,

Respondent.

ON APPEAL

CONCLUSIONS
and
ORDER

-----)
 Louis M. Minotti, Esq., Attorney for Appellant.
 Henry E. Rzemieniewski, Esq., by Salvatore Muscato,
 Assistant Town Counsel, 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 Municipal Council of the Town of Irvington (Council) which, by unanimous vote on May '24, 1977, suspended appellant's plenary retail consumption license for a period of fifteen days, effective June 15, 1977, in consequence of a finding of guilt of a charge alleging that, the appellant allowed, permitted or suffered a brawl, acts of violence and a disturbance to take place in its licensed premises on December 23, 1976; in violation of Rule 5 of State Regulation No. 20.

In its Petition of Appeal, appellant alleges that the action of the Council was erroneous in that the finding of guilt was not sustained by the evidence.

In its answer, the Council denied this contention and asserted that its action was predicated upon the preponderance of the credible testimony.

Upon the filing of the appeal, the Director, by Order dated June 15, 1977, stayed the effective date of the suspension pending determination of the appeal.

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 testimony and cross-examine witnesses. However, the parties opted to rely upon the transcript of the hearing held by the Council, which was made part of the record herein, pursuant to Rule 8 of State Regulation No. 15. Additionally, appellant presented oral argument and respondent

presented a written summation.

The transcript of the hearing before the Council reveals that four business associates, namely Charles Herrick, Ernest Hausman, Robert H. Keller and Kenneth Gilley, entered the licensed premises on December 23, 1976 at approximately 6:00 p.m. for the purposes of refreshment.

Herrick testified on behalf of the Council and stated that the barroom "looked full". Herrick and one of his companions sat at the bar, while the other two stood.

Herrick explained that approximately one-half hour after entry, while his companion Keller was conversing with a patron at the bar, he observed that patron raise a barstool in the air. Things quieted down. Herrick then testified:

I said I was finishing my beer and I saw out of the corner of my eye Mr. Keller being punched to the floor. I stood up and I got pushed into the center of it. I tried to get out of that. I don't know who pushed me. Everything happened so fast. As I remember, I was trying to get to my feet and somebody was holding my arms. Another fellow came from the side of the bar with a billyclub in his hand. He hit me on the head and it wasn't until after that that I found out that I had been stabbed in the back and underneath the arm.

Herrick observed Hausman, his other companion, leave the tavern staggering and holding his neck. He caught up with Hausman outside and saw that his (Hausman's) coat was cut. He then ran across the street and summoned the police. He returned towards the tavern and the police had arrived. At that time he first realized he had been stabbed. After being given first aid he was taken by ambulance to the local hospital where he stayed overnight for treatment of his injuries.

On cross-examination, the witness asserted that, prior to seeing the raised barstool, he did not hear any loud or offensive language. Neither of the bartenders, whom he identified as Joe and Gilda, nor the manager identified as "Mooney" were involved in any disturbance.

In further description of the altercation, the witness noted that Keller and the individual who picked up the barstool were approximately seven or eight feet apart, and then moved to within two feet of each other.

The questioning then revealed the following:

Q How long did the barstool stay in the air?

A I'd say a good two minutes.

Q He held it up in the air for about two minutes?

A He was holding the chair and this group came around and everybody started talking to him and hushing it up and he was holding the chair and then he placed it down on the ground again.

While the manager, Mooney, admonished Herrick to sit down when the barstool was raised, Herrick did not hear any employee of the appellant order that the barstool be lowered.

Ernest Hausman, who was a member of the quartet that entered appellant's tavern on the aforesaid date, next testified upon behalf of the Council. After having a second round of drinks he stated that "...Mr. Herrick got up from his seat and left Mr. Gilley standing or sitting to my immediate left. And at that time, I recall a ruckus behind me but I didn't pay that much attention to it."

After explaining that a third round of drinks was ordered, Hausman then testified:

At this time there was another ruckus and I assumed it was a pretty big one. I turned around and looked and it was people all behind me. I don't know how many, quite a few, and I--Ken Gilley was to the left of me and I hit him on the shoulder and I said, "Let's get the hell out of here," at which time I proceeded along the bar going north...I don't know, I was spun around at the north end of the bar and I remember as I was proceeding, trying to get out of the bar, I think I stumbled or I was pushed right into the pack, into all these people here and I was pushed back up against the jukebox at which time I felt something sharp on my neck. I put my hand on my neck and I brought it away with a little bit of blood on my hand and I put my hand there again and I almost passed out. It was really a mess."

Hausman further testified that he received a stab wound in the left leg and two cuts on his "right finger" which required five stitches. The neck wound required three stitches. As he went out the door he looked back and saw Keller lying on the floor. He didn't appear to be injured.

On cross-examination it was established that Hausman did not recall anyone utter threatening language. He heard no loud or offensive language. He described the first "ruckus" as patrons arguing. It did not involve him and he heard no threats exchanged.

The witness described the "ruckus" as "A bunch of guys fighting in a brawl." Later, upon being asked whether the disturbance was a "very quick type" Hausman responded: "When I say quick, you know, it could have been a minute. It could have been longer."

Robert H. Keller also testified on behalf of the Council and stated that upon entry into the barroom with Herrick, Hausman and Gilley, he observed that the barroom was crowded. His companions proceeded to the bar while he stopped to talk to Mooney and another patron. He ambled about the barroom to greet acquaintances and was introduced to a patron wearing a light suit with whom he had words. There was no physical contact, just verbal remarks. Mooney told them to quiet down, which they did. Shortly thereafter, he saw a raised chair, and while not struck by the chair, somebody did jump him from behind, choked him and threw him to the floor. He then recalls seeing his friend Hausman going through the door and he followed him.

Kenneth Gilley, the fourth member of the quartet testified in behalf of the Council that, after entering appellant's tavern, he and Herrick sat at the bar while Hausman and Keller were standing. He turned around and observed a male lift a chair "across his shoulders." This resulted in everyone looking and wondering what happened. Everything returned to normal. A few minutes later he observed ten or more males around Keller. Hausman and he prepared to make a quick exit when he saw a male about to smash a chair over Hausman's head. Gilley took the chair from the male. It was at that time that he realized that "there was anything really serious, a little push-shove fight." He and Hausman continued to exit quickly. He observed Herrick standing near the bar holding his head. Once outside he saw Hausman holding his neck and saw blood. He observed that Herrick had been struck, his head was "red a little bit." He estimated that the event was of approximately a minutes' duration.

Irvington police officer Robert Puorro testified in support of the charges and confirmed the injuries to Hausman and Herrick.

Upon entering the tavern he observed Mooney picking up stools and sweeping. He saw blood on the floor of the barroom and "all over the ladies' room." In the ladies' room he saw a piece of male's outward with fresh blood on it.

Michael Damiano, employed as a detective by the Town of Irvington, testified that, pursuant to radio summons he received from Puorro, he proceeded to appellant's liquor establish-

ment. Upon arriving at the scene he observed Hausman at the corner of Myrtle and Springfield Avenues (close vicinity of the subject premises) with a "great deal of blood on him", being attended by several individuals. Near the tavern area he saw Herrick who had some blood on his clothing and appeared to be "somewhat hysterical and quite concerned over his friend." Damiano observed the presence of blood in the men's room. He did not enter the ladies' room.

Damiano questioned several of the patrons and the appellant's employees. He did not find any weapon in the premises, nor did any patron admit being involved in the incident or having any knowledge of who may have participated therein. They gave various versions of the incident.

Upon the detective's return to headquarters, he was instructed by his superior to return to the licensed premises and have it closed for the rest of the night. The manager complied with that request.

Damiano then testified that, when Mooney stopped in at police headquarters pursuant to request, Mooney was asked whether he witnessed a fight that night. He replied to Damiano

I was near the jukebox and I heard the commission (sic). Some guy was over by the front door and there was yelling and a pushing match. Some of the guys were swinging, and I called one of the bartenders to call the police because I didn't want no trouble inside the place. The next thing I know it looked like everybody was involved in it. Some guy was bleeding. One of the customers ran over to help him. I stayed at the bar and the police came real quick. I explained to you at the bar just what I said now and I can only tell you what I did.

At headquarters, the bartender on duty identified as Joseph Casalino explained the incident to Damiano as follows:

The people were a good group. There was later in the night that I don't know what time it was, though, when some trouble turned up in the front of the jukebox. I was in the rear of the bar taking care of some customers when I found out there was some trouble up front. I seen a couple of men running out of the place and I seen the cops come in. One cop came behind the bar and started looking around for a knife, a knife he said. I helped as much as I

could but I didn't see no one get hurt in the fight.

On cross-examination Damiano acknowledged that he had Mooney's complete cooperation in the investigation.

Damiano's testimony was concluded as follows:

Q And isn't it a fact, throughout your investigation of this entire incident which did occur from the evidence which you have been able to gather, the incident that occurred lasted a very, very short interval of time, maybe a minute or less?

A That is correct.

No witnesses were called on behalf of the appellant in defense of the charges.

Preliminarily, I observe that we are dealing with a purely disciplinary action which is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15.

The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way: Could the members of the Council, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted findings of fact or mistake of law by the Council. Lyons Farms Tavern v. Mun. Bd. of Alc. Bev., Newark, 55 N.J. 292, 303 (1970); Hudson Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957).

The critical inquiry is whether the licensee or its employees, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, has exercised that degree of care consistent with such obligation in keeping the premises free from disturbances, noise and acts of violence.

The evidence clearly establishes that a brawl, a disturbance, an act of violence occurred in appellant's licensed

premises in the early evening hours of December 23, 1976. The issue to be decided is whether appellant, through his agents or employees (Rule 33 of State Regulation No. 20) "allowed, permitted or suffered" such occurrence.

In Essex Holding Corp. v. Hock, 136 N.J.L. 28, 31 (Sup. Ct. 1947), the court said that, within the meaning of the Alcoholic Beverage Law and its Regulations, the word "suffer" imposes responsibility on a licensee, regardless of knowledge, where there is a "failure to prevent the prohibited conduct by those occupying the premises with his authority." The question involved here is whether the licensee could reasonably have taken steps to prevent the act of violence and disturbance that took place on his licensed premises, but failed to do so.

This Division has consistently held that:

Licensees may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees must use their eyes and ears, and use them effectively, to prevent the improper use of their premises.

Bilowith v. Passaic, Bulletin 527, Item 3.

While it is true that a licensee has been held not to be responsible for a "sudden flare-up" on his premises, where he could not have reasonably been aware of its imminence, such is not the case here.

It appears from the evidence that prior to the general melee, wherein Herrick and Hausman received stab wounds which required hospital attention, Keller had engaged in a verbal duel with a patron which resulted in an admonition by Mooney to the participants.

I find that the brawl which was of sufficient intensity to cause two of the patrons to seek medical assistance at the hospital was not a sudden flare-up, but was, in fact, an occurrence, the happening of which was permitted and suffered by appellant. The admonition of the bartender was insufficient under the circumstances. Given the violent activities that followed the verbal ruckus, it is clear that a hostile attitude still existed. The appellant should have taken further steps to resolve the dispute or eject the hostile patrons. Once the appellant became aware of the problem, a greater responsibility is reposed in a licensee to insure control of its patrons.

It is noteworthy that appellant did not produce either the bartender, the barmaid or the manager as witnesses. No reason was given for their failure to testify.

The principle of law applicable hereto is that, where a party has a witness or witnesses available and they possess peculiar knowledge concerning the facts essential to a party's case, the failure to call said witness or witnesses gives rise to an inference that, if called, the testimony elicited therefrom would be unfavorable to said party, i.e., he could not truthfully contradict the testimony of the Council's witnesses. Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1964); Re Soto Pruna, Bulletin 1713, Item 1; Re Lesniewski, Bulletin 1581, Item 5.

In considering the totality of the evidence in conjunction with the application of that standard of review above expounded, I find and conclude that appellant has failed to meet the burden of establishing that the action of the respondent herein was erroneous, and thus, I recommend that the action of the Council be affirmed and the appeal be dismissed.

I further recommend that the Director's Order staying suspension be vacated, and that an Order be entered reimposing the suspension heretofore imposed by the Council.

Conclusions and Order

No written 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 the 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 6th day of February, 1978,

ORDERED that my Order of June 15, 1977, staying the Council's order of suspension pending determination of this appeal, be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-60 issued by the Municipal Council of the Town of Irvington to Brahm's Tavern, Inc., t/a Center Lounge for premises 9-11 Myrtle Avenue, Irvington be and the same is hereby suspended for fifteen (15) days commencing at 2:00 a.m. Thursday, February 16, 1978 and terminating at 2:00 a.m. Friday, March 3, 1978.

Joseph H. Lerner
Director

4. STATE LICENSES - NEW APPLICATIONS FILED.

Modern Beverages, Inc.

1701 Valley Road, Ocean Twp., Monmouth Co., N. J.

Application filed June 20, 1978 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-43 from Shore Point Distributing Co. of Ocean, Inc., 1251-1261 Lakehurst Road, Dover Twp., PO Toms River, N. J.

Progress, Inc.

9 York Avenue, West Caldwell, N. J.

Application filed June 21, 1978 for plenary wholesale license and for additional warehouse or salesroom license for premises 711 Pine St. Camden, N. J.

Nathaniel F. Flink

Box 153 Holiday Lake

Montague, N. J.

Application filed June 22, 1978 for broker's license.

International Fruits & Liqueur, Inc.

6 Princess Road

Lawrenceville, N. J.

Application filed June 26, 1978 for plenary wholesale license.

Gillhaus Beverage Co., Inc.

Route 169 & Pulaski St., Bayonne, N. J.

Application filed July 7, 1978 for place-to-place transfer of its plenary wholesale license from Meta Lane, Lodi, N. J.

National Wine & Liquor Co.

Building 56 River Terminal Develop.

Kearny, N. J.

Applications filed July 14, 1978 for place-to-place transfer of its plenary wholesale license from 130 Ward Avenue, Trenton, N. J. and for additional salesroom license at 1 Central Ave., Mt. Laurel, N. J.

Capitol Wine & Spirits Co.

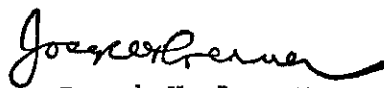
Bldg. 56, River Terminal Develop., Kearny, N. J.

Applications filed July 14, 1978 for place-to-place transfer of its plenary wholesale license from 130 Ward Avenue, Trenton, N. J. and for additional salesroom license at 1 Central Ave., Mt. Laurel, N. J.

J. Jacob Lee

RFD #1, Rt. 130, Mansfield Twp., PO Bordentown, N. J.

Application filed July 18, 1978 for person-to-person transfer of a plenary winery license from J. Jacob Lee, Executor of the Estate of Katharina Lee.



Joseph H. Lerner
Director