

MR. ZEMEL

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

BULLETIN 1599

February 1, 1965

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1. NEW LEGISLATION - ACT AMENDING R.S. 33:1-10, PARAGRAPH 2a -  
PLENARY WINERY LICENSE.

Senate, No. 308 was approved by the Governor on December 17, 1964 and thereupon became Chapter 228 of the Laws of 1964, effective immediately. The act changed the provisions of R.S. 33:1-10, Paragraph 2a to read as follows, the bracketed language being deleted and the underscored language being new:

"Plenary winery license. 2a. The holder of this license shall be entitled, subject to rules and regulations, to manufacture any fermented wines, and to blend, fortify and treat wines, and to sell and distribute his products to wholesalers and retailers licensed in accordance with this chapter and to churches for religious purposes, and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution, and to maintain a warehouse. The fee for this license shall be \$650.00. Upon payment of an additional fee of \$100.00 the holder of this license shall have the right to sell wine at retail on the licensed premises [; provided, however, that such sales shall be made only for consumption off the licensed premises; and provided further, that such wines shall be manufactured or blended, fortified or treated from fresh grapes grown in this State ]or upon payment of an additional fee of \$500.00 the holder of this license shall have the right to sell wines and other alcoholic beverages at retail on the licensed premises; provided, however, that such sales shall be made only for consumption off the licensed premises; and provided further, that such wines and other alcoholic beverages shall be manufactured or blended, fortified, distilled or treated by the licensee in his licensed premises or in a subsidiary corporation operated by the licensee and sold only under the label or labels of the licensee. The combined total number of plenary winery licenses having retail privileges, shall not exceed 3 per each million of population in the State as shown by the last preceding Federal census. In the granting of such plenary winery licenses, the Director of the Division of Alcoholic Beverage Control may, in the exercise of his discretion and pursuant to such rules and regulations as he may adopt, give prior consideration to applicants engaged in growing and cultivating grapes upon land owned by the applicant, having an area not less than 3 acres. The containers of all wine sold at retail by such licensee shall have attached thereto a label setting forth such information as shall be required by the rules and regulations of the director of alcoholic beverage control."

JOSEPH P. LORDI  
DIRECTOR

Dated: January 7, 1965

2. APPELLATE DECISIONS - HOLLYWOOD LIQUORS & GROCERIES INC. v. MATAWAN and TOWNE AND COUNTRY LIQUOR STORE, INC.

Hollywood Liquors & Groceries Inc.,	)	
	)	
Appellant,	)	On Appeal
	)	
v.	)	CONCLUSIONS AND ORDER
	)	
Township Committee of the Township of Matawan, and Towne and Country Liquor Store, Inc., t/a Towne and Country Bar & Liquors,	)	
	)	
Respondents.	)	

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Frederic Baar, Esq., Attorney for Appellant.  
 Richard T. Schwartz, Esq., Attorney for Respondent Township.  
 Vincent C. DeMaio, Esq., Attorney for Respondent Towne and Country Liquor Store, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is an appeal from the action of respondent Township Committee (hereinafter Committee) whereby on August 24, 1964, by a unanimous vote of four members of the Committee (one member thereof being absent) it approved an application of respondent Towne and Country Liquor Store, Inc. for a person-to-person and place-to-place transfer of a plenary retail consumption license from Margaret E. Marcewicz, t/a Club 35, to Towne and Country Liquor Store, Inc., t/a Towne and Country Bar & Liquors, and from the easterly side of State Highway 35 to proposed Strathmore Shopping Center, State Highway 34, Matawan.

Appellant's petition of appeal alleges that the action of the Committee was erroneous for reasons which may be summarized as follows:

- (a) Appellant "contemplates the exercise of privileges normally afforded strictly package sales license under the guise of a 'C' or consumption license;"
- (b) There is no public need or necessity for a liquor license in the proposed area;
- (c) The proposed location for the license in question is totally unsuitable because of its proximity "to residential areas, proposed church and school installations."

The respective respondents, in answers filed, deny the allegations contained in appellant's petition of appeal and in substance contend that the decision of the Committee in approving the transfer to respondent licensee for the proposed site constituted lawful exercise of discretion.

William Daniels (an officer of appellant corporation, which is the holder of a plenary retail distribution license) testified that appellant's premises are located on Highway 34, Matawan Township, less than one-quarter of a mile away from respondent

licensee's proposed premises; that "the bulk" of appellant's trade comes from the Strathmore section of the Township which has approximately 1,900 homes; that there are two other distribution licenses issued and outstanding in the Township, one located in Cliffwood Shopping Center on Route 35, being "possibly four or five miles" from appellant's premises, and the other license in the "Cliffwood section;" that there are two plenary retail consumption licenses, one being "Stardust Tavern, which is, roughly, 600 feet from me, and White Gate Inn, which is, oh, about quarter of a mile to the right of me;" that the Committee approved the transfer of a consumption license to a bowling alley adjacent to the Strathmore Shopping Center; that at present appellant does not have more business that it can adequately handle.

J. Arthur Fell (executive director of Monmouth County Retail Liquor Stores Association) testified that there are eight liquor outlets "within a radius, circumference, of one mile", four of which are located within Matawan Township; that "In my estimation the area is adequately serviced at the present time without any additional licenses of any kind."

On cross examination Mr. Fell agreed that most of the eight liquor outlets (which include respondent licensee and the license transferred to the bowling alley) have been at their present locations before construction of 2,000 homes in the Strathmore section. Both Daniels and Fell were in accord that, when the transfer of the license was approved for a bowling alley located adjacent to the shopping center, the spokesman for said bowling alley said that from past experience only one per cent. of the liquor sales would be in original containers for off-premises consumption.

Robert Tulin (a real estate broker associated with Harold H. Goldberg and Company, Inc.) testified that his firm specializes in "shopping center leasing, commercial leasing" and negotiated the lease with respondent licensee for use of premises in the Strathmore Shopping Center, and that, based on information from various sources, he estimated the present population of the Township to be in excess of 15,000 persons. Mr. Tulin also testified that, in his opinion, there is a definite need for the license in question in the shopping area.

Harold H. Goldberg (president of Harold H. Goldberg and Company, Inc.) testified that the company specializes in shopping center development and that "The land allocated for the Strathmore Shopping Center is, roughly, twenty acres. The shopping center is going to be built in sections. Currently under construction is an Acme Supermarket of a little less than 20,000 square-foot and ten thousand square feet of smaller stores. It is anticipated that construction will start on a second section of an additional 10,000 square feet of smaller stores sometime around the first of the year. Our further projection calls for a variety store, variety store of approximately fifteen to twenty thousand feet and an additional ten thousand square feet of stores within the next year or so;" that in his opinion, the establishment of the type of liquor outlet as proposed would serve a public convenience and would be a necessary adjunct to the shopping center.

Mayor Henry E. Traphagen testified that he voted to approve the application for transfer to the proposed site for the following reasons:

"To depict the picture properly you have to consider our township, its background. We have a unique geographic

formation. Actually we have two sections that comprise the town. Up to 1961 the bulk of our population was up in the Cliffwood-Cliffwood Beach area. Consequently, all the licenses in town had a tendency to accumulate up in that area. Since 1961 we've had a population increase of over 100 per cent all situated in the other section of town. Now, based on the evidence developed at the second hearing clearly showed to us that the licenses weren't equitably distributed in the town. We had fifty per cent of the population being served by most of the licenses. We at that time then knew that the shopping center was going to be constructed; something that we didn't know at the first hearing, and we then knew that there would be a lot of demand by the shoppers in the area for purchasing their package goods.

"Up to this time the people had been shopping, all the new people had been shopping, out of Matawan Township. They had been going to all the adjoining towns to shop. Based on that and we discounted some of the complaints that had come before us, the township counsel had advised us that the issue that was raised was whether or not a C license was a proper use wasn't necessary for us to consider; that there was precedent for it and we didn't have to worry about that aspect. Our only concern was whether or not the distribution of these licenses would best serve the township and that's what we based our decision on."

On cross examination by the attorney for respondent licensee with reference to a prior hearing, when a similar application for transfer of the license in question was denied, the Mayor testified:

"It was mainly shown at the second hearing that the distribution of the licenses was imbalanced in the town; it was clearly shown to us on the second hearing that the magnitude of the shopping center would be considerable. We didn't know this on the first hearing. We didn't know on the first hearing if the shopping center would only consist of a liquor store."

On further cross examination by the attorney for appellant, Mayor Traphagen testified:

"I think one thing the graph brought more to our attention the fact the licenses were unevenly distributed; secondly, we could see the shopping center would be large enough that there would be a great deal of purchasing going on at the shopping center, buying that was now going out of the community and taking place in other communities. People would be going there; they would be buying there."

When questioned further by appellant's attorney regarding the contemplated erection of a school approximately 660 feet distant, the Mayor testified that he saw nothing illegal in having a liquor license in the shopping area.

Considering the fact that the existing liquor licensed premises are fairly well distributed throughout the Township, it is apparent that the transfer in question to the proposed site will not in any appreciable degree aggravate the number of licenses in the area. Thus, in view of the construction of numerous homes and the tremendous increase in population in the Strathmore section wherein the shopping center is located, appellant's contention that the Committee erred in approving the transfer because of lack of

need for a liquor outlet carries little weight.

The number of licensed premises to be permitted in any particular area has been held to be a matter confided to the sound discretion of the local issuing authority. DiGiacchino v. Atlantic City, Bulletin 1030, Item 3. In cases of the kind now under consideration, the Director's function is to determine whether reasonable cause exists for the issuing authority's opinion and, if so, to affirm its action. Curry v. Margate City, Bulletin 460, Item 9; Mulcahy v. Maplewood and Topf, Bulletin 658, Item 4; Krogh's Restaurant, Inc. v. Sparta et al., Bulletin 1258, Item 1; Jacobs v. Newark et al., Bulletin 1398, Item 4; Smith et als. v. Newark et al., Bulletin 1481, Item 2.

In Fanwood v. Rocco and Div. of Alcoholic Beverage Control, 59 N.J. Super. 306, 321, it is stated:

"The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to issue licenses (R.S. 33:1-24) and place-to-place transfers thereof '[O]n application made therefor setting forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license, as to said premises.' N.J.S.A. 33:1-26. As we have seen, and as respondent admits, the action of the local board may not be reversed by the Director unless he finds 'the act of the board was clearly against the logic and effect of the presented facts.' Hudson Bergen County Retail Liquor Stores Ass'n, Inc. v. Board of Com'rs. of City of Hoboken, supra, 135 N.J.L., at page 511."

At the instant hearing, the testimony of William Daniels (an officer of appellant corporation) when he stated that appellant does not have more business than it can handle, the inference is that the transfer of the license of respondent licensee to the shopping center would have an adverse effect on appellant's business. In Kelley v. Manalapan, Bulletin 531, Item 3, a transfer of a license to a location directly opposite Kelley's tavern was permitted. On appeal from the action of the local issuing authority, former Director Davis stated:

"An issuing authority is not obligated to consider, when reaching a determination of whether to grant a liquor application, whether the financial interests of any pre-existing licensee will be promoted or harmed. The test in the issuance of liquor licenses is the welfare of the entire community and not the interference with the private rights of any individual. It is settled that a denial of a license may not be predicated upon the sole ground of injury to the profitable conduct of the business of existing licensees. Sobocienski et al. v. Newark et al., Bulletin 239, Item 8; Licata v. Camden, Bulletin 342, Item 1; Delia v. New Providence et al., Bulletin 408, Item 3; Turetsky v. Garfield, Bulletin 524, Item 3."

There has been no evidence presented which might in any way indicate that the Committee acted arbitrarily or abused the discretion vested in it by approving the grant of the transfer in question. After examination of the entire record presented herein, it is apparent that appellant has failed to sustain the burden of proof in showing that the action of the Committee was erroneous. Rule 6 of State Regulation No. 15. Shiloh Baptist Church v.

Atlantic City et al., Bulletin 1387, Item 2, and cases cited therein.

Apropos of the matter now under discussion will be a description of the proposed licensed premises pursuant to the plan submitted with the application for transfer. It appears that the building to be constructed for use as a licensed premises will have a frontage of 20 feet and a depth of 85 feet. The part of the building which is to constitute the barroom, wherein alcoholic beverages are to be displayed and sold both for on-premises consumption and in original containers for off-premises consumption, is 20 feet by 50 feet. The entrance door is at the extreme right of the front of the building. Immediately to the left, as one enters the premises, is a window extending from the entrance for a distance of 14 feet, to be used as a display window for bottled goods. Along the right wall, beginning near the entrance and extending the entire length of the barroom, are to be shelves for display of wines. On the opposite wall of the barroom are to be shelves of similar length for display of bottled goods, with the exception that near the rear of the barroom there is to be a sink and drain installed. Approximately 17 feet from the entrance, and 6 feet from the left wall of the premises, is to be a 3 feet by 10 feet sales counter; 3 feet from the sales counter, and extending toward the rear of the barroom, there is shown to be a bar 3 feet wide and 14 feet in length, in front of which are to be installed seven bar stools.

I am satisfied that the room wherein the alcoholic beverages will be sold, as proposed, does not constitute a bona fide public barroom with adequate bar facilities to extend an invitation to the public to be served and to consume alcoholic beverages therein within the contemplation of R.S. 33:1-12.23. Cf. Monmouth County Retail Liquor Stores Assn. et als. v. Middletown et al., Bulletin 1572, Item 1. However, if a revised plan of the interior layout, to be recommended herein, is submitted to the Director and approved by him, there will be no merit in appellant's contention that there has been a conversion of the license in question from a plenary retail consumption license to a plenary retail distribution license.

It is recommended that an order be entered affirming the action of the Committee in approving the transfer in question and dismissing the appeal.

It is further recommended that, before respondent licensee actually undertakes installation of its bar facilities and operation of the licensed business, it submit to the Director for approval a revised plan of the interior layout. This does not change the result in so far as the transfer of the license is concerned since the matter of the proposed interior arrangement of the premises to be licensed is not material to the fundamental question whether the proposed building and its intended location should be licensed. Monmouth County Retail Liquor Stores Assn. et als. v. Middletown, supra.

#### Conclusions and Order

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 14 of State Regulation No. 15.

I have carefully considered the entire record herein and, as a result, concur in the recommendations in the Hearer's Report and adopt the same as my conclusions herein. I also conclude that since the license in question does not include the

so-called "Broad Package Privilege", respondent Towne and Country Liquor Store, Inc. must change the proposed interior layout of its to-be-licensed premises (with respect to the size and location of its public bar) in order to comply with the "Broad Package Privilege Law", R.S. 33:1-12.23, et seq., and State Regulation No. 32, in connection with its proposed sale and display for sale of package goods, and that it should submit to me for approval revised plans for such purpose.

In addition, I find that respondent licensee's corporate name is improper by reason of the use of the words "Liquor Store". In this connection, this name is misleading since it leads the public to believe that the licensee will be maintaining a package liquor store separate and apart from its public barroom, while it may not permissibly do so under the license in question. See Rule 2 of State Regulation No. 26; Rule 6 of State Regulation No. 21. The licensee is therefore advised to change its corporate name and to submit to me for approval a proposed new name, such as its trade name "Towne and Country Bar & Liquors", or any other acceptable name.

Accordingly, it is, on this 22nd day of December, 1964,

ORDERED that the action of respondent Township Committee be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed.

JOSEPH P. LORDI  
DIRECTOR

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

In the Matter of Disciplinary Proceedings against )

Nicholas J. Costanzo )  
t/a Downtown Tavern )  
97 Water Street )  
Morristown, N. J., )

CONCLUSIONS  
AND  
ORDER

Holder of Plenary Retail Consumption License C-6, issued by the Board of Aldermen of the Town of Morristown. )  
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Louis Winer, Esq., Attorney for Licensee  
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

- "1. On July 16, 1964, and prior thereto, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets in a lottery, commonly known as the 'numbers

game'; in violation of Rule 7 of State Regulation No. 20.

- "2. On July 16, 1964, and prior thereto, you allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the 'numbers game', to be sold and offered for sale in and upon your licensed premises and on the aforesaid date of July 16, 1964, you possessed, had custody of and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

Three Division agents, in cooperation with officers of the Morris County Prosecutor's office, participated in the investigation leading to the charges preferred in this matter.

Agent S testified that, pursuant to specific assignment on Thursday, July 16, 1964, he entered the licensee's premises and seated himself at the bar. Several other agents at the same time were stationed immediately outside the premises in the company of investigators from the Morris County Prosecutor's staff. This agent ordered and was served drinks by the bartender (later identified as James Norman Banks - also known as Cuz). There were about ten or twelve other patrons in the bar at this time.

Agent S observed an individual (later identified as Thomas F. Wynder) enter a telephone booth, which was located immediately to the left of the bar near where the agent was seated, and answered the phone which was then ringing. The door of the booth was left open so that the agent was able to hear Wynder's voice. Wynder stated, "Wait a minute," placed the receiver down and went to the cash register behind the bar where he picked up a brown paper bag. He then returned to the telephone booth and started to write down numbers on the paper bag which he was obviously receiving from the party at the other end of the telephone. The agent observed that he was making notations, "Number notations. He was making three digit notations with dashes and figures." While he was making these notations, another colored male ran into the tavern and shouted "Get out of that booth, stop writing those numbers, get rid of that bag, they got them all next door, everyone of them." This verbal alarm was clearly heard by everyone, including the bartender who was standing directly in front of the agent. This person added, "they got them all next door, everyone of them, and where is Red Sam."

Right at this time Prosecutor's Investigator Spann entered the premises while Wynder was still writing numbers, and immediately placed him under arrest. The agent went on to describe the numbers recorded on the bag as being clearly lottery numbers, and explained the method used in setting up those numbers as a lottery.

Immediately after Wynder was placed under arrest, the telephone rang again and another patron answered the phone and then shouted to the bartender "Where is Red Sam?" The bartender stated that he did not know, and the agent asked the bartender to give him a pen, which he did. As the patron re-entered the telephone booth, Banks admonished him "Don't write any numbers in their, get out of that booth. Can't you see they got them all next door." At this time several other agents entered the

premises in company of Prosecutor's detectives, and Wynder and Banks were thereupon taken from the tavern and brought to the Prosecutor's office.

Wynder was thereafter questioned and executed a signed, voluntary statement which was admitted into evidence. On cross examination the agent described more fully the notations on the bag, identified the bag as a lottery slip because it contained lottery numbers, then further described the search of Wynder and the interrogation that followed. He also emphasized that the bartender was standing facing him on the service side of the bar and was in a position to observe what was going on and to hear the conversation and loud warning as hereinabove set forth.

Investigator Francis J. Spann, Jr., of the Morris County Prosecutor's office, testified that he arrived in the vicinity of the premises at approximately 3 p.m. on the date alleged herein, accompanied by two ABC agents and Inspector Schaufberger of the Morris County Prosecutor's office. He stated that ABC Agent S first entered the premises at 3:23 p.m. and that he followed him therein shortly after 3:30 p.m. As soon as he entered the premises he arrested Wynder and found in his possession the bag containing the lottery numbers as above described. After questioning Wynder he requested that he sign the bag, which he characterized as a lottery slip, and then brought him to the prosecutor's office where the statement was taken. He also insisted that he observed Wynder writing the numbers on the bag as he walked toward him, whereupon he placed him under arrest. On cross examination he admitted that at no time did he see the licensee on the premises at that time. His search of Wynder disclosed a total of \$35 in cash in his wallet and \$9.91 in his pocket. Wynder had no other lottery slips in his possession.

Agent D participated in this investigation and entered the premises at about 3:40 p.m. At the time of his entrance therein he observed that Wynder had already been placed under arrest for alleged possession of and writing lottery slips on the premises. He was shown the brown paper bag which he identified as a "lottery slip commonly known as a numbers game." While he was in the premises the telephone rang again and he answered the phone. A male voice asked if Cranshaw was there. He told him that he was not there and asked whether he could be of any help. The voice said, "I have some stuff for him and it is late. Can you get him to the phone." Agent D answered, "He is busy outside, what do you have, some numbers, you can give them to me and I will give them to him." The voice then said, "never mind, I will see him myself, and he hung up."

On cross examination it was developed that Wynder was a part-time bartender employed by the licensee on week-ends; that Banks denied having any knowledge of numbers activity or participating in such operations.

Thomas F. Wynder, testifying on behalf of the licensee, presented the following version: He is employed as a part-time bartender and works on Friday and Saturday nights. He was admonished by the licensee not to engage in any "gambling, number writing, horse betting or any other gambling" on the premises at any time. On the date in question, which was a Thursday, he played golf during the morning at the Masdabrook Golf Club and returned to his home about 3 p.m. His home is located next door to the licensed premises. He then entered the premises as a patron and heard the telephone ring. Someone said it was for "Wynder," and,

when he answered the phone, he learned that it was a friend of his by the name of Willie Jones, who discussed with him the possibility of playing golf later that afternoon. As he left the phone booth he was accosted by police officers who placed him under arrest. He insisted that the lottery slip, which was the paper bag in evidence, contained numbers in his handwriting but that in fact they were not written that afternoon but, rather, in the morning while he was on the golf course. He was thereafter taken to the prosecutor's office where he admitted giving a statement prepared in question-and-answer form and signing the said statement voluntarily. He specifically denied answering certain questions in the statement to the effect that he was writing numbers in the telephone booth at the time he was apprehended. He also denied that he had given a number of the other answers to questions contained in the statement. Specifically he denied the answer to the questions as follows:

"Q Any other questions and answers that you say you didn't give?

A I didn't give this: 'Where did you get this bag that you have written the number bets on this date in the Downtown Tavern in the presence of Inspector S, whom you know now to be an Agent of the New Jersey Division of Alcoholic Beverage Control?'

Q Were you asked that question?

A Yes, I was asked that question.

Q What was the answer that you gave?

A 'I had it when I went in the bar. I took it in the bar.'

He also denied that he answered the question set forth in the statement that he went behind the bar and picked up the paper bag. He further denied that he heard a man running into the bar and shouting "get rid of the bag, don't say anything." His answer to that was "If he was, I didn't hear him." He similarly denied that he had written any numbers in the licensed premises on the date in question. Finally he asserted that, although he signed the statement, he did not read it prior thereto.

On cross examination the statement was used by counsel for the Division to contradict the testimony heretofore given by Wynder. The witness asserted that, when he entered the tavern, he did not go for the purpose of purchasing any drinks but "I just happened to be walking in," and that in fact he was there as a patron. When he entered the phone booth he remained in there for three or four minutes and spoke to his friend Willie Jones. He further described the bag on which the lottery numbers were written as one of several bags which he kept in the glove compartment of his automobile, and that the numbers inscribed thereon were actually so inscribed on the morning of the date alleged.

He was then asked the following:

"Q What did you write them for?

A Well, I don't know what I was going to do with them.

\* \* \* \* \*

Q Did you write them out as numbers bets?

A Not particularly as number bets.

Q What are they? Aren't these numbers bets?

A They could be any number of things."

And further:

"Q These numbers didn't mean anything to you and you were

just doodling, why then did you put the bag up on the sun visor? Do you have any answer to that?

A No, I couldn't answer that."

And further:

"Q Why did you put it in your pocket? You say the bag had no value to you with these numbers on, did they?

A No.

Q Why did you put it in your pocket? You have no answer to that?

A No, I have no answer to that."

He was then questioned about the statement as follows:

"Q But you did answer the questions that were asked of you in the statement but you say some of the answers are different from what appears on the paper. Is that right?

A That's right.

Q Particularly when Investigator Spann from the Prosecutor's Office charged you with number writing or possession of numbers, you knew what he was charging you with, didn't you?

A On that bag, yes.

Q You knew what he was charging you with?

A Yes.

Q Did you at any time say to him, 'These aren't numbers, this is just some doodling I've been doing'? You never said that to him, did you?

A They'd make a joke out of it."

And further:

"Q Do you know anything about numbers?

A No.

Q Did you ever take a number?

A No."

At this point I asked the witness the following questions:

"The Hearer: Well, now, didn't you tell us on direct examination, Mr. Wynder, that you write numbers except that you didn't write them in these premises?

The Witness: No.

The Hearer: Didn't you say that you wrote numbers that morning?

The Witness: At no time.

The Hearer: Didn't you say these were your own bets?

The Witness: Yes, right here, the ones on this bag.

The Hearer: Yes. Those numbers were your own bets?

The Witness: Yes."

And further:

"The Hearer: Yes. But didn't you say that they were your own bets?

The Witness: No.

The Hearer: You mean you didn't say that?

The Witness: If I did, I didn't intend to say that."

The witness was then further examined upon his contention that his answers to the questions put to him were merely "yes" or "no." A number of other questions were directed to his

attention from the statement and he admitted that the full answers given to those questions were given by him. He maintained that, when he was specifically asked whether he was writing numbers in the phone booth, he gave no answer. It was further developed that this witness knew how to read and write, and had completed two years of high school.

Willy F. Jones, testifying on behalf of the licensee, recounted an alleged telephone conversation that he had with Wynder on July 16. When he called Wynder at the licensed premises he stated that he made an appointment to play golf with him later that afternoon but that appointment was never kept because he didn't have his golf clubs with him. However, he admitted that he didn't try to communicate with Wynder to tell him that he could not keep that appointment.

Nicholas J. Costanzo (the licensee) testified that he operated these premises personally for the past sixteen years and that the tavern was owned by his late father prior to that time. He employed Wynder as a part-time bartender on Friday and Saturday evenings, and Wynder was not employed on any other days.

James N. Banks (the bartender and manager of these premises) testified that he personally instructed Wynder with respect to the rules and regulations, and specifically with respect to gambling on the premises. He denied knowing that Wynder was engaged in any number activities and stated that the first he saw Wynder was when he was arrested by the police officers. He explained that, because of the construction of the bar and the arrangements of bottles on the bar, his view was obstructed so that he could not see persons coming into the tavern. Although he admitted that someone had asked him for a pen, which he handed to him, he specifically denied saying, "Don't write any numbers in the booth." On cross examination he stated that he had known Wynder for three or four years and never knew him to write any numbers. He also reiterated that he did not see Wynder come into the tavern that afternoon because "I was busy."

In rebuttal Agent S testified that the bag was not in the pocket of Wynder, but was actually in Wynder's hand. He also restated his former testimony to the effect that the answers given by Wynder, as reflected in the statement, were those taken verbatim from that witness.

I have set forth in considerable detail the testimony for the Division and for the licensee in order to obtain an objective perspective of the actions which transpired on the date in question. We are dealing here with purely disciplinary measures and their alleged infraction. Such proceedings are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252. These cases require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956); Freud and Pittala v. Davis, etc., 64 N.J. Super. 242, 248.

One further principle should be set forth. No testimony need be believed in these cases but, rather, the hearer must always credit as much or as little as he finds reliable. 7 Wigmore, Evidence, sec. 2100 (3rd Ed. 1940); Greenleaf, Evidence, sec. 201. Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circum-

stances. Spagnuolo v. Bonnet, 16 N.J. 546; Gallo v. Gallo, 66 N.J. Super. 1. The accepted standard of persuasion relating to testimony governing the trier of the facts is that the determination must be founded in truth. Riker v. John Hancock Life Ins. Co., 129 N.J.L. 508, 511.

My careful analysis and evaluation of the testimony lead me to the unmistakable conviction that the version as given by the agents of what transpired on the date in question is a credible, factual and true version. On the contrary, I was singularly unimpressed with the credibility of either the bartender Banks or of Wynder. It is obvious that the agents had no improper motive in testifying as they did, nor did they enter into any conspiracy against the licensee. They had never seen the licensee before, had not visited his premises either before or after the date in question.

I find particularly incredible the testimony of Wynder. His testimony is full of contradictions and inconsistencies and, indeed, of absurdities. For example, he first testified that the lottery slip in the form of the paper bag containing lottery numbers was prepared by him for his own use on the morning of the date charged and that he did not engage in writing numbers in or at the licensed premises. On cross examination he went even further. He not only denied that he wrote any lottery numbers, but insisted that he didn't even know what lottery numbers are. He further denied that the numbers, which were manifestly in the form of lottery numbers, were ever prepared as such and that they were just random numbers which he had inscribed on the bag earlier that day. He was then very closely cross examined with respect to a statement that he had voluntarily given and executed in the prosecutor's office, in which he admitted taking lottery numbers on the telephone in the licensed premises. At first he stated that he merely answered "yes" or "no" to questions that were propounded but, when it was pointed out that sixteen or seventeen of the questions were answered narratively, he admitted that at least some of those were given by him in verbatim form. For the purpose of contradicting his testimony, this confessional statement was admitted into evidence. In view of the fact that he was merely a part-time employee, working on week-ends, and this offense took place on Thursday, I shall not take this statement into consideration as affirmative or supportive evidence in basing my determination herein. However, the statement was used to contradict this witness' testimony and in effect wipes the slate clean, so far as his testimony is concerned.

Therefore, we are left with the consideration of the merits upon the testimony of the agents as against the testimony of the bartender Banks, Jones and the licensee. Banks' testimony is substantially a denial that he knew what was happening at that time. He states in effect that he was too busy with serving the other patrons to make any observation; that in fact his view was obstructed so that he did not see Wynder enter the tavern; that he heard no telephone calls; that he did not see Wynder come behind the bar to pick up one of the bags on which he allegedly took a bet over the telephone; that he handed a pen to a person without knowing what the purpose was; that, indeed, he did not even hear the admonitory shout of the person who entered the tavern while the agents were there present.

I consider all of this unbelievable because I feel it was patently impossible for him not to have witnessed and observed what transpired at that time from where he was standing.

Agent S testified that Banks was standing in front of him at the service end of the bar while Wynder was taking the bets on the telephone. Banks was in the immediate vicinity when this person came in and warned Wynder to discontinue taking bets because of a raid that was taking place next door. It was testified that Banks himself shouted to Wynder, "Don't write any numbers in there, get out of that booth. Can't you see they got them all next door."

I am also persuaded that Banks knew of Wynder's activities because there is testimony that Wynder had frequented these premises and apparently was receiving telephone calls. Even Jones admitted that, when he wanted to reach out to Wynder, he would phone the licensed premises.

There is also some evidence that one of the agents received a phone call for another person known as "Red Sam", in order to have bets placed with him. I, therefore, conclude that the bartender knew of these unlawful activities which were being carried on on these premises.

There is no evidence to suggest that Costanzo (the licensee) was on the premises at the time that this activity was going on. However, it is a well established and fundamental principle that a licensee is responsible for the misconduct of its employees and is fully responsible for their activities during their employment on licensed premises. Kravis v. Hock, supra; In re Schneider, 12 N.J. Super. 449; Rule 33 of State Regulation No. 20. Thus the responsibility of the agent (Banks) becomes the responsibility of the licensee and does not depend upon his personal knowledge or participation. In fact it has been held that the licensee is not relieved even if the employee violates his express instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); F. & A. Distributing Co. v. Division of Alcoholic Beverage Control, 36 N.J. 34. Cf. Mazza v. Cavicchia, 28 N.J. Super. 280; 15 N.J. 498.

So far as Banks is concerned, it is obvious that he cannot avoid his responsibility as a manager of these premises by merely closing his eyes and ears. It has been consistently held that licensees or their agents must use their eyes and ears, and use them effectively, to prevent improper use of the premises. Re Ehrlich, Bulletin 1441, Item 5; Bilowith v. Passaic, Bulletin 527, Item 3.

Most certainly, from the evidence presented it is clear that the licensee "suffered" numbers writing and gambling to take place on the licensed premises. As the Supreme Court said in Essex Holding Corp. v. Hock, 136 N.J.L. 28, at p. 31:

"Although the word 'suffer' may require a different interpretation in the case of a trespasser, it 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. Guastamachio v. Brennan, 128 Conn. 356; 23 Atl. Rep. (2d) 140."

Under all of the circumstances appearing herein, I find that the licensee allowed, permitted and suffered gambling upon the licensed premises, i.e., the making and accepting of bets in a lottery, and that he allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the

"numbers game," in and upon the licensed premises, as charged, in violation of Rules 6 and 7 of State Regulation No. 20. I conclude that the Division has established the truth of these charges by a fair preponderance of the believable evidence, and indeed by substantial evidence.

Licensee has no prior adjudicated record. In the memorandum submitted by counsel for the licensee he urges that, since the licensee has had no prior adjudicated record, the penalty should be held to a minimum, citing earlier cases. Effective April 27, 1964, the Director established a schedule of higher penalties in gambling cases. Re Mellolark, Inc., Bulletin 1573, Item 2. There appear to be no mitigating circumstances presented in this case which would warrant the imposition of any penalty less than the minimum now meted out in violations of this kind. It is therefore recommended that an order be entered suspending the license for sixty days. Re My Place, Inc., Bulletin 1577, Item 3.

#### Conclusions and Order

No written exceptions to the Hearer's Report were filed with me within the time limited by Rule 6 of State Regulation No. 16.

I have considered the transcript of testimony, the exhibits, the memorandum of counsel for the licensee and the Hearer's Report, and make the following comments:

A careful reading of the testimony in this case discloses certain inaccuracies in the Hearer's Report which should be corrected. On the last line of Page 2 of the Hearer's Report the words "other patron" should be substituted for the word "agent", and on Page 11, line 12, the words "the other patron" should be substituted for the word "Wynder."

In addition, on Page 10, bottom of paragraph 1 of Hearer's Report, the Hearer states in reference to Thomas F. Wynder's testimony:

"...I shall not take this statement into consideration as affirmative or supportive evidence in basing my determination herein. However, the statement was used to contradict this witness' testimony and in effect wipes the slate clean, so far as his testimony is concerned.

Therefore, we are left with the consideration of the merits upon the testimony of the agents as against the testimony of the bartender Banks, Jones and the licensee...."

In my opinion, the Hearer was in error when he commented "and in effect wipes the slate clean, so far as his testimony is concerned" and did not consider the testimony of Wynder along with all of the other testimony. This is not a situation in which a party is surprised by adverse testimony of a witness called by him introducing a prior contradictory statement for the purpose of neutralizing the effect of such adverse testimony. See State v. D'Adame, 84 N.J.L. 386 (E. & A. 1913). The witness herein testified on behalf of the licensee and not the Division. On cross examination he was confronted with the inconsistencies contained in the statement. Such contradictory statement by a witness may always be shown if a suitable foundation be laid therefor for the purpose of affecting his credibility and not as substantive evidence. Schneider v. Preis, 79 N.J. Super.

400 (1963). The Hearer should have considered the testimony of Wynder along with all of the other testimony in arriving at his conclusion.

Upon consideration of all of the testimony in the case, including that of Wynder (whose testimony can be given little, if any, weight) and without giving any affirmative or substantive value to the statement in and of itself, I adopt herein the findings of fact and law of the Hearer except as they have been modified as above and find the Division has established by a preponderance of the evidence that the licensee, through his agents, knew or should have known that gambling was taking place on the licensed premises as alleged in the charges. I therefore find the licensee guilty as charged.

Accordingly, it is, on this 28th day of December 1964,

ORDERED that Plenary Retail Consumption License C-6, issued by the Board of Aldermen of the Town of Morristown to Nicholas J. Costanzo, t/a Downtown Tavern, for premises 97 Water Street, Morristown, be and the same is hereby suspended for sixty (60) days, commencing at 2 a.m. Monday, January 4, 1965, and terminating at 2 a.m. Friday, March 5, 1965.

JOSEPH P. LORDI  
DIRECTOR

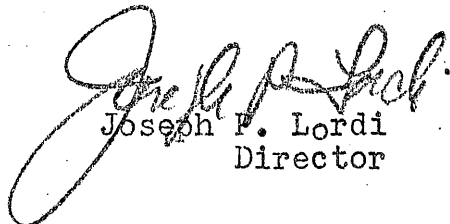
4. STATE LICENSES - NEW APPLICATIONS FILED.

Spatola Wine Company of Pennsylvania, Inc.  
1900 South Delaware Avenue  
Philadelphia, Pennsylvania

Application filed January 27, 1965 for place-to-place transfer of Wine Wholesale License WW-14 to maintain a warehouse at Route 38 East of Maple Shade Circle, Maple Shade, New Jersey.

Herman Weiner  
t/a Silk City Beverage Co.  
8-10 Amity Street  
Paterson, New Jersey

Application filed January 27, 1965 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-93 from Arnold Sacks and Doris Sacks, t/a Frank's Beverage Distributors, 256 Water Street, Paterson, New Jersey.

  
Joseph P. Lordi  
Director