

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

August 24, 1977

BULLETIN 2263

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25 Commerce Drive Cranford, N.J. 07016

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August 24, 1977

1. APPELLATE DECISIONS - BARR v. PHILLIPSBURG.

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|--------------------------|---|-------------|
| Frederick C. Barr and | : | |
| Anne Marie Barr, t/a | : | |
| Barr's Place, | : | |
| | : | |
| Appellants, | : | On Appeal |
| | : | |
| v. | : | CONCLUSIONS |
| | : | and |
| Town Council of the Town | : | ORDER |
| of Phillipsburg, | : | |
| | : | |
| Respondent. | : | |

D. Scott Curzi, Esq., Attorney for Appellants
Silverman, Hughes & Kinton, Esqs., by Robert S. Kinton, 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 Town Council of the Town of Phillipsburg (hereinafter Council) which, on August 10, 1976, adopted a resolution revoking appellant's plenary retail consumption license in consequence of a "guilty" finding on charges alleging that: "(1) on August 3, 1975 a sale of alcoholic beverage was made to a minor for off-premises consumption contrary to Rule 1 of State Regulation No. 20; and (2) on January 10, 1976 a sale of alcoholic beverage was made to a minor for consumption on premises, contrary to Rule 1 of State Regulation No. 20."

The appellants' petition of appeal alleges that the action of the Council respecting the August 3, 1975 charge was erroneous and against the weight of evidence in that:

(a) Appellants were given no notice of the charge until June 24th, eleven months after the alleged occurrence, and as a consequence appellant had no opportunity to investigate and prepare a defense.

(b) There were no witnesses to the alleged sale, the charge being grounded upon signed statements of the juveniles involved after they were questioned by the police regarding another matter which occurred one-quarter mile from the licensed premises.

With respect to the January 10, 1976 charge the appellant alleges that the action of respondent was likewise erroneous in that:

(1) No notice given until June 24, 1976 over six months after the alleged occurrence similarly depriving him of the opportunity to investigate and prepare a defense;

(2) It was appellant who notified police about the juvenile who was allegedly sold alcoholic beverages because said juvenile, with an adult, was caught attempting to steal two six-packs of beer;

(3) There is no evidence of the sale to this minor other than his own statement after his arrest for theft.

In its answer, the Council denied the substantive allegations contained in the petition of appeal.

Upon the filing of the appeal, the Director, by Order dated August 27, 1976, stayed the Order of Revocation imposed by the Council pending determination of the appeal, and the entry of a further order herein.

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 cross-examine witnesses.

I.

From the transcript of the testimony taken at the Division hearing, the following factual situation as to the first charge is reflected:

On August 3, 1975, Patrolman Dale Dunfee of the Phillipsburg Police Department, accompanied by Patrolman David Stone, responded to a call involving an automobile checkout at a location approximately one-quarter mile distant from appellant's licensed premises. There were four youths in the car which, when searched, was found to contain five six-packs of twelve ounce beer cans packaged in two paper bags.

Upon ascertaining that all four were under the age of 18, they were transported to Police Headquarters, and processed as juveniles for possession of alcoholic beverage by minors.

At Police headquarters, Bill C. admitted that he and the driver, Terry H, purchased the beer at Barr's Place a short time before detention. He stated that no proof of age or identification was requested of them when the purchase was made.

At the request of the police, both youths agreed to return to Barr's Place in order to identify the person who sold them the beer. However, they refused to enter the premises to make the identification, stating that they were fearful of what the other patrons might do to them. As a result, it was agreed that they would remain seated in the police cruiser and the bartender be brought outside for the identification.

The police officers parked their car in the parking lot and Stone entered the premises and requested that the bartender on duty, identified as George Murray, step outside. As the bartender stepped outside both youths stated that he was the person who sold them the beer. Murray was brought to the side of the vehicle where a flash light was shined on his face. The youths were asked again if they were sure this was the person who sold them the beer, and they responded affirmatively.

Murray was asked if he sold some six-packs to them. He recalled that he had sold them five six-packs, placing three in one paper bag and the remaining two in a second bag. When asked if he had requested any proof of age or identification, he stated he did not. He was then advised that both were juveniles.

There was no further contact between the Town authorities and the licensee or its employees relative to this incident until June 24th, 1976 when the subject charges were served upon the licensee.

Stone corroborated the testimony of his partner, Dunfee. Additionally, he testified that he frequented the tavern in his off-hours and it was his observation that the bartender does not request proof of age or identification "if you make it through the door".

George Murray, the bartender, testified that his responsibility was limited that evening to tending bar and not to checking proof of age; that checking proof of age was the responsibility of John Gerbino. He also stated that on the following day, he related the incident to Barr, who was not at the tavern the previous evening. When questioned by the Hearer what he, as bartender, would do if some one who appeared very young ordered an alcoholic beverage from him, he stated "I really wouldn't do any thing, I don't think I would do anything because there would be somebody at the door, and it was their responsibility, not mine."

John Gerbino testified on behalf of the licensee. On cross examination he explained that, at the time of the August 1975 incident, the "State Forms" (Representation and Statement form as prescribed by Part 5 of Appendix to the Rules and Regulations of the Division of Alcoholic Beverage Control, effective August 30, 1973) were not being employed at Barr's Place. He stated "I don't believe they were out at that time" but are employed now, when needed.

Frederick Barr, Co-proprietor of licensed premises testified that he initiated the use of these forms as a result of "getting busted so many times"; but he was uncertain of the date their use was instituted. His records (available at the hearing) reveal the earliest statement was signed in October 1975.

A written representation as to age is an absolute requirement of R.S. 33:1-77 which contains the following provision:

".....that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor:

(a) that the minor falsely represented in writing that he or she was twenty-one (21) (now 18) years of age or over, and (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be twenty-one (21) (now 18) years of age or over, and (c) that the sale was made in good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually twenty-one (21) (now 18) years of age or over."
(Emphasis ours)

Such alleged fraud and misrepresentation were specifically anticipated by this Division in a special note in its rules (page 89 of the Rules and Regulations, effective August 30, 1973) which, in explanation of Rule 1 of State Regulation No. 20, states in part:

"...(c) that the sale was made in reliance upon such written representation and appearance and in the reasonable belief that the minor was of age. Hence it is not a defense that mere verbal inquiry may have been made as to the age of the minor or that the minor had verbally misrepresented his age or that the minor had displayed some document (such as a driver's license, birth certificate, military identification card, selective service registration certificate, or any other similar document) which represented his age as over 21 (now 18). The representation in writing required by the Alcoholic Beverage Law is a writing made by the minor at or prior to the time of sale or service, Such a writing must be signed by the minor in the presence of the licensee or his employee and one in which the minor gives his name, address, age, date of birth,

and, by signing the writing makes a statement that he is making the representation as to his age to induce the licensee to make the sale. After the writing has been signed, the licensee should require that the person signing the representation adequately identify himself as that person and thus affirmatively avoid the acceptance of these representations from persons using fictitious names, addresses and ages. The signed representation should then be retained by the licensee....."

Obviously, the licensee did not take the minimum precaution of requesting a written representation be made as imperatively required by the rule. Thus, the licensee has not satisfied the regulatory requirements, in force long prior to his acquisition of the licensed premises.

In Re Wedemeyer, Bulletin 1050, Item 8; states:

"Experiences in cases similar to this indicates that for some reason licensees or their agents are reluctant to 'embarrass' a minor by requiring him to reduce to writing his name, age, and address. If licensees are willing to use their own methods of determining the age of a minor, rather than follow the statute, they do so at their peril and must accept the consequences of their own neglect. It would appear no more difficult for the licensee to follow the statutory requirement of having the patron sign a representation of his age than asking him to produce a draft card, diver's license or similar document for the licensee's purported examination, Where the licensee follows the statutory method, there is always the desirable and substantial possibility that the patron, if a minor, will refuse to commit himself to writing and will leave the establishment."

The doctrine expressed above has been followed most recently in Re Ano, Inc. Bulletin 2092, Item 4; Re Camden Liquor Corp., Bulletin 2076, Item 5; Re Urna, Bulletin 2042, Item 7; Obay, Incorporated, Bulletin 2014, Item 5, aff'd Appellate Division 1972, Opinion not approved for publication.

The prevention of sales of intoxicating liquor to a minor not only justified but necessitates the most rigid control. Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); in Re Schneider, 12 N.J. Super. 449 (App.Div.1951).

I, therefore, find that this charge was established by a fair preponderance of the credible evidence. Hence, as to this charge, appellant has failed to

establish that the action of the Council was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

II.

On January 10th, 1976 Patrolman James P. Stattner and Joseph L. Collura responded to a phone call from the subject premises. Upon arrival, they found two youths being restrained by employees of the tavern who informed them that the boys were caught in the act of stealing two six-packs of beer.

At Police headquarters, it was ascertained that Michael M was 17 years of age; Thomas Tamagnone, the other youth was an adult. A search of M revealed he had in his possession an expired driver's license issued to his older brother whose birth date, April 8, 1954 appears upon the face of it. They were processed and charged, M as a juvenile offender and Tamagnone as a disorderly person. During processing, M admitted to having purchased and consumed alcoholic beverages at the tavern over a period of several hours that evening, and added that he was not asked for proof of age or identification.

Frederick Barr, testified that he was on duty at the door that evening, and required proof of age of all who entered when he deemed it called for, but he did not see either of the two youths involved herein enter. He did, however, see them leave and the beer which was secreted under Tamagnone's coat, fall to the floor. His failure to observe the boys entry was explained in later testimony.

Upon visiting Police headquarters to prefer charges against the youths he learned, for the first time, that one was a juvenile. No one advised him that the minor stated he was served beer or that an investigation was being conducted.

Nicholas Luparelli, employed to assist at the door that evening testified that he was on duty at the door when the two youths arrived. He requested and was shown proof of age, and he admitted them. This occurred during the ten minute period that Barr was called away to repair a faulty hinge on the ladies room door. He stated that the youths were in the premises for no more than ten minutes when the aborted theft occurred. He assisted in their apprehension and recognized them as having been "carded" by him several minutes before, during Barr's short absence.

M, the juvenile, testified on behalf of the respondent that he purchased beer while sitting with a group of friends at a table. He did not arrive with Tamagnone, nor was he challenged upon entry.

Tamagnone testified he saw M, purchase a round of beer. He, too, stated he did not arrive in the company of M, but met him at the tavern.

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action 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. 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 persons, acting reasonably, have come to their determination based upon the evidence presented: Hudson Bergen County Retail Liquor Stores Association v. Hoboken 135 N.J.L. 502 (E. & A.1947); Nordco, Inc. v. State 43 N.J. Super 277, 282 (App.Div.1957); Lyons Farms Tavern v. Mun. Bd. of Alc. Bev. Newark 55 N.J. 292, 303 (1970).

Since there was a sharp conflict in the testimony adduced at the de novo hearing, it becomes the Hearer's function to evaluate the testimony, after observing the demeanor of the witnesses and giving weight to such testimony as he finds credible. It is axiomatic that 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 circumstances. Spagnuolo v. Bonnet, 16 N.J. 546, (1954); Gallo v. Gallo, 66 N.J. Super 1 (App.Div.1961).

I give little credence to the testimony of respondents witnesses, M and Tomagnone whose possible motivations are at least, highly suspect. I note too, that the juvenile was not asked to identify the person who served him at the time it was ascertained he was not an adult, or as soon thereafter, as was reasonable. Although this is not a fatal weakness, it may be indicative of the police attitude at the time. I note too, that the bartender was not charged pursuant to 33:1-77 of the Alcoholic Beverage Law, with the misdemeanor of sale to a minor. This, too, is not a fatal weakness, it is merely further evidence of the attitude at that time.

Unlike the August 25th charge, the licensee initiated police action in this instance, and actively pursued it to its conclusion. Nowhere is there corroboration of the alleged sale other than the statements of the two youths involved in the theft, and whose credibility I commented upon previously.

I have carefully evaluated the testimony presented before me at the de novo hearing as well as the documents in support thereof entered into evidence.

I, therefore, find that, under all of the circumstances there has not been the necessary quantum of proof, namely by a preponderance of the believable evidence of appellants' guilt. I conclude that the Appellants have successfully borne the burden of establishing that the Council's action was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15.

III

Accordingly, it is recommended, that the Council's finding of guilt on the first charge be affirmed and on the second count, be reversed.

I further recommend that the penalty assessed by the Council be modified as appears hereinafter.

Appellant's prior record discloses that they pleaded non vult to a charge of serving minors during July 1974. They paid a fine of \$1212.50 in lieu of a

suspension for twenty-five days. Less than one year later, they were again charged with serving minors on various dates in June 1975. This latter charge involved other offenses as well. They pleaded non vult and paid a fine of \$1,440.00 in lieu of suspension for forty-eight days on these charges.

It is obvious that appellants have chosen to pay little heed to the minimum age requirements. This established pattern of serving minors is viewed most seriously by this Division and warrants severe penalty. Appellants are pointedly warned that any further violation of Division's rules and regulations may very well result in an outright revocation of the subject license.

I recommend that appellant's license on the charge of selling alcoholic beverages to a minor, age 15, be suspended for thirty-five days, plus an additional thirty-five days for each of two similar violations within the past two years, to which should be added an additional five days for a dissimilar violation within the past five years.

In sum, it is recommended that the appellant's license be suspended one hundred-ten days.

Conclusions and Order

Written Exceptions to the Hearer's report with supportive argument, were filed by appellants, pursuant to Rule 14 of State Regulation No. 15. The Council did not file an answer to the said Exceptions, but, in reply to appellants proffer of payment of fine, in compromise, in lieu of suspension, asserted that it "...would strongly object to any change in form of this penalty to a monetary fine."

Appellants allege, as they had at the de novo hearing on appeal, that they were prejudiced by failure to receive notification of the Council's intention to prosecute for infraction of Rule 1 of State Regulation No. 20, for eleven months. However, the proofs clearly show that appellants, through their employee, had actual notice of the alleged violation on August 3, 1975.

The bartender on duty was confronted, in police presence, with two youths who identified him as the seller of alcoholic beverages, which he admitted. The bartender was then advised they were juveniles. Appellants were notified, by their employee, the following day of the incident.

The allegation that the Council withheld the preferment of this charge, to the detriment of appellants, is also without merit, since appellants were aware of the incident which involved specific police intervention. Simonsen, Inc. t/a Drift Inn v. Asbury Park, Bulletin 2217, Item 1.

The Exception concerning implementation of a "Representation and Signature Card" program, and the time considerations, has been correctly resolved by the Hearer, and is without merit.

The other matters advanced in support of imposition of fine, in compromise, in lieu of suspension, concerning employee infraction, in absence of licensee, and economic repercussions cannot be recognized in mitigation, in light of the past record and experience of licensee, specifically set forth by the Hearer in his report. The application for payment of a fine, in lieu of suspension, is, accordingly, denied.

Having carefully considered the entire matter herein, including the transcript of testimony, the exhibits, the Hearer's Report, and the Exceptions filed thereto; 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 April 1977,

ORDERED that the action of the Council in finding appellants guilty of violation of Rule 1 of State Regulation No. 20, on August 3, 1975, be and the same is hereby affirmed; and it is further

ORDERED that the action of the Council in finding appellants guilty of violation of Rule 1 of State Regulation No. 20, on January 10, 1976, be and the same is hereby reversed; and it is further

ORDERED that the penalty imposed by Council revoking appellants plenary retail consumption license be and the same is hereby modified to the imposition of a suspension of one-hundred and ten (110) days; and, as so modified, the Council's action is affirmed, and the appeal be and the same is hereby dismissed; and it is further

ORDERED that my order of August 26, 1976, staying the revocation imposed by the Council pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-10, issued by the Town Council of the Town of Phillipsburg to Frederick C. Barr and Anne Marie Barr, t/a Barr's Place for premises 273 Chamber Street, Phillipsburg, New Jersey, be and the same is hereby suspended for the balance of its term, i.e., midnight, June 30, 1977, commencing at 2:00 a.m. Thursday, April 14, 1977; and it is further

ORDERED that any renewal of said license for the 1977-78 license period, which may be granted, be and the same is hereby suspended until 2:00 a.m. Tuesday, August 2, 1977.

Joseph H. Lerner
Director

2. APPELLATE DECISIONS - EMERSONS LTD. OF WEST ORANGE, INC. v. WEST ORANGE.

Emersons Ltd. of West Orange,
Inc., t/a Emersons Ltd.,

Appellant,

v.

Municipal Board of Alcoholic
Beverage Control of the Town
of West Orange,

Respondent.

Maurer and Maurer, Esqs., by Barry D. Maurer, Esq., Attorneys for
Appellant
James Ospenson, Esq., Attorney for Respondent

On Appeal

CONCLUSIONS
AND
ORDER

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Respondent, Municipal Board of Alcoholic Beverage Control of the Town of West Orange (Board) suspended appellant's plenary retail consumption license for one-hundred fifty days, with remission of thirty days making an effective penalty of one-hundred twenty days, commencing July 1, 1976, after appellant pleaded non vult to charges alleging that, on September 13, 1975, December 20, 1975 and on February 5, 1976, it permitted and suffered a brawl or act of violence upon its licensed premises. It entered no plea that, on the said dates it allowed, permitted and suffered its premises to be conducted in such a manner as to become a nuisance; all in violation of Rule 5 of State Regulation No. 20.

In its petition of appeal, appellant contends that the suspension is unduly harsh and excessive.

No answer was filed by the Board.

At the hearing de novo herein, appellant submitted several exhibits with the consent of the Board and both parties agreed to submit for determination by the Division, upon oral argument, the sole issue raised, that is, the reasonableness of the penalty assessed.

In its plea for modification of the penalty, appellant explained that, when the appellant first commenced its operations, it catered to a budget-type menu and attracted a family patronage. In recent months, a building was constructed and attached to appellant's restaurant operation to house a discotheque operation known as "Dimples". All of the violations to which appellant pleaded non vult arose out of the operation of "Dimples".

Appellant urges that, although it was also charged with allowing and permitting the brawls and acts of violence on the dates charged, the Board accepted the plea to "suffering" those acts, as a mitigating factor.

The incident of September 13, 1975, as shown by the police report, involved an altercation on the parking lot involving a patron who had exited from Dimples. He was assaulted by several unknown males. Employees stated that, to their knowledge, there was neither verbal nor physical confrontation within the licensed premises. Two other males also complained to the police that they were assaulted by unknown males at the same time and place.

Concerning the incident of December 20, 1975, the police report manifests that, while a local detective was making an ABC inspection at the licensed premises, he saw an altercation occur between two males in the bar area, near the front entrance. After several punches were thrown, the detective, with the assistance of the management broke up the fight. No charge was brought by the Board until after the third incident.

The incident of February 5, 1976 may be summarized as follows: In the early morning hours of February 5, a person identified as John Penna was transporting David Dowd in his (Penna's) car. While on route, Penna decided to stop in Dimples Lounge to see a female acquaintance, while Dowd waited in the car.

When Penna did not emerge from Dimples, Dowd entered to look for him. An argument erupted inside Dimples between Dowd and another male which resulted in an assault on Penna by several males. Dowd attempted to assist Penna and was stabbed in the back by one of the males. The altercation spilled over to the stairs and finally onto the lawn of "Dimples". Another male attempted to assist Dowd and he was stabbed in the left hand. Both injured males were transported to a nearby hospital where Dowd died shortly thereafter. The incident was not reported to the police by the licensee's employees.

Appellant contends that the suspension was unduly harsh and oppressive, and is in effect tantamount to a revocation of its license. In mitigation, it urges that the charges were essentially a first offense which arose out of operation of the discotheque; and that there could not be a recurrence of the incidents complained of because, on advice of counsel, the management has permanently terminated the discotheque operation and has reverted to its strictly family-type operation.

Appellant further urges the Division to accept a fine in compromise in lieu of the license suspension. It explained that a lengthy suspension would cause its large number of employees to become unemployed.

Preliminarily, I observe that the hardship that may be imposed upon a licensee is of no moment in arriving at a determination of its status. It has been consistently held that in a conflict

between a licensee's financial concern and the public interest, the latter must prevail. Smith v. Bosco, 66 N.J. Super. 165 (App. Div. 1961).

Apparently, the Board was faced with the resolution of two questions: (a) was appellant worthy to continue this operation; and (b) under the circumstances, what would be a proper penalty consonant with the best interest of the public.

A liquor license is a mere privilege. No person is entitled as a matter of law to a liquor license. Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888); Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1935). Just as in the consideration of applications for the grant or renewal of licenses, so the continuance of such licenses must be vested in persons who are worthy of that privilege. The liquor business is one that must be carefully supervised and should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuance or operation of such licenses. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946). As the court said in In re 17 Club, Inc., 26 N.J. Super. 43 (App. Div. 1953):

"The governmental power extensively to supervise the conduct of the liquor business and to confine the conduct of that business to reputable licensees who will manage it in a reputable manner has uniformly been accorded broad and liberal judicial support."

In the exercise of that power, the Legislature invested the issuing authority (the Board) with the power to suspend or revoke licenses, after hearing, for certain enumerated violations including violations of the law or of State or local regulations. R.S. 33:1-31.

Upon the plea of non vult, the Board had the statutory mandate to determine in the exercise of its discretion, whether appellant's license should be suspended or revoked.

The adjudicated cases are legion which hold that the penalty to be imposed in disciplinary proceedings instituted by the Board rests within its sound discretion in the first instance, and the power of the Director to reduce or modify it on appeal should be exercised sparingly, and only where such penalty is manifestly unreasonable and clearly excessive. Harrison Wine and Liquor Company, Inc. v. Harrison, Bulletin 1296, Item 2; Kosinski v. Wallington, Bulletin 1744, Item 2; Gach v. Irvington, Bulletin 2058, Item 1, and cases cited therein.

The Director's function on appeal is not to substitute his personal opinion for that of the issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal view.

Tumulty v. Dunellen, Bulletin 1487, Item 4; Central Jersey PSA et als v. Pohatcong and Falk's etc., Bulletin 1768, Item 2. Indeed, as the court stated in Lyons Farms Tavern, Inc. v. Newark et al, 55 N.J. 292 (1970) reprinted in Bulletin 1905, Item 1:

"The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record."

Lyons Farms then added this guiding principle (55 N.J. at p. 307):

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

In the matter sub judice the fact that a fatality resulted from an incident which occurred upon the licensed premises, and the further fact that appellant failed to immediately notify the local police authorities of the occurrence, lead me to conclude that the Board acted reasonably and in the sound exercise of its discretion. I perceive no valid or compelling reason to intrude upon the Board's assessment of the penalty. Likewise, I find no warrant herein for a recommendation of the payment of a fine in lieu of suspension.

Appellant has failed to sustain the burden of establishing that the Board's action was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15. I recommend, therefore, that an order be entered affirming the Board's action and reimposing the aforesaid suspension of license for one-hundred twenty days. I further recommend that the appellant's application for the imposition of a fine in lieu of suspension, if made, be denied.

CONCLUSIONS AND ORDER

Written exceptions to the Hearer's report with supportive argument, were filed by the appellant, pursuant to Rule 14 of State Regulation No. 15.

In its exceptions, the appellant argues that the following factors mitigate against imposition by the Board, and the recommendation by the Hearer, of a suspension of one hundred and twenty (120) days: (a) the plea of non vult was only to "suffering" a brawl or acts of violence, as distinguished, from "permitting, allowing or engaging" same, as such terms are to be interpreted in Rule 5 of State Regulation No. 20; (b) the record does not support the reliance placed by the Hearer on the fact that the appellant failed to report an incident resulting in a death on February 5, 1976; (c) accumulation of charges for incidents of violence on September 13, 1975 and December 20, 1975; plus failure to proceed on nuisance charges sub judice should not warrant, with last offense, so severe a penalty; (d) the sentence imposed was "manifestly excessive," and "abusive of the Board's discretion."

My review of the record indicates that the incident of February 5, 1976 resulted in a fatality to a David Dowd. It is undisputed that the victim was stabbed within the licensed premises, while attempting to assist a friend who was then being assaulted.

This incident spilled outside, up the stairs, and onto the lawn, where another person, seeking to assist Dowd, was stabbed. The manager denied the assault occurred inside the premises. His testimony was contradicted by all the witnesses questioned by the police. The manager did not notify the police of this incident.

Initially, it is well settled that the licensee is responsible for conditions both inside and outside the licensed premises. Tyrone's Haven, Inc., v. South River, Bulletin 2214, Item 1; Gueche, Inc., v. Union City, Bulletin 2072, Item 5.

The distinction sought to be made as to "suffering" lacks, under the circumstances herein presented, any viable basis, if one exists at all. In the context of the Alcoholic Beverage Law, the term "suffer" imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent prohibited conduct by those occupying the premises with his consent or authority. Essex Holding Corp., v. Hock, 136 N.J.L. 28, 31 (Sup. Ct. 1947). The term "suffer" has often been used synonymously with "permit". Conner v. Fogg, 75 N.J.L. 245, 247 (Sup. Ct. 1907).

These concepts negate appellant's contention that it was not culpable. The record supports a finding of failure to notify the police; nor is there any indication that appellant sought to intercede to suppress incidents which occurred within its licensed premises.

The allegation that the Board retained charges to the detriment of appellant is devoid of merit, since appellant was aware of the incidents which required police intervention. Simonsen, Inc. t/a Drift Inn v. Asbury Park, Bulletin 2217, Item 1.

I am cognizant of the fact that appellant has now discontinued operation of the discotheque, and is presently operating a family type restaurant at the licensed premises.

I have considered the other exceptions set forth which were also argued before the local issuing authority and the Hearer, and find them to be without merit.

The Board, by letter dated August 26, 1976, to this Division, states that it is "strenuously opposed" to any payment of fine, in compromise, in lieu of suspension, as proffered by appellant. The application for the payment of a fine, in compromise, in lieu of suspension of license, is, therefore, denied.

The Director's function on appeals is not to substitute his personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion. Willner's Liquors v. Irvington, Bulletin 1192, item 2; Larion, Inc., v. Atlantic City, Bulletin 1306, item 1. The Hearer clearly set forth the applicable standard of review.

Having carefully considered the entire matter herein, including the transcript of the testimony, the exhibits, the Hearer's report, and the exceptions filed thereto; I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 11th day of April 1977,

ORDERED that the action of the Board in suspending appellant's plenary retail consumption license for one hundred and twenty (120) days, be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my Order dated June 11, 1976 staying the suspension imposed by the Board pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-35, issued by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange, to Emersons Ltd, of West Orange t/a Emersons Ltd. for premises at 615 Northfield Avenue, West Orange, New Jersey be and the same is hereby suspended for the balance of its term, i.e., midnight, June 30, 1977, commencing at 2:00 a.m. Friday, April 22, 1977; and it is further

ORDERED that any renewal of said license which may be granted be and the same is hereby suspended until 2:00 a.m., Tuesday, August 22, 1977.

Joseph H. Lerner
Director

3. STATE LICENSES - NEW APPLICATION FILED.

William Smith
t/a Beverage Center
546 N. Midland Avenue
Saddle Brook, N. J.

Application filed August 23, 1977 for State Beverage Distributor's
License.



Joseph H. Lerner
Director