

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

BULLETIN 2076

January 10, 1973

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1. APPELLATE DECISIONS - JOHNSON v. NEWARK.

Ralph L. Johnson,	)	
	)	
Appellant,	)	On Appeal
v.	)	
	)	CONCLUSIONS and ORDER
Municipal Board of Alcoholic	)	
Beverage Control of the City	)	
of Newark,	)	
Respondent.	)	

-----  
Mary Seidman-Brownlee, Esq., Attorney for Appellant  
William H. Walls, Esq., by Beth M. Jaffe, Esq., Attorney for  
Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal by appellant from the action of the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Board) which denied renewal for the current licensing period of his plenary retail distribution license D-135 for premises 457 Clinton Avenue, Newark.

Appellant in his petition alleges that the action of the Board was unreasonable and improper. The Board's answer asserts that its action was within its sound discretion and that appellant had no situs for the license; hence its action was reasonable.

When the matter came on for hearing pursuant to Rule 6 of State Regulation No. 15, counsel stipulated the facts as outlined in the petition of appeal, and the transcript of the proceedings before the Board was admitted into evidence pursuant to Rule 8 of State Regulation No. 15.

The factual background giving rise to the denial of the renewal of the license and this appeal is as follows:

The license, heretofore issued to Schwartz Drug Stores Inc., was located in a building owned by the Newark Board of Education. Schwartz Drug Stores Inc. apparently went into bankruptcy and/or receivership, pursuant to which a receiver was appointed, who sold the license to appellant on April 15, 1972. On June 5, 1972 the Board approved the person-to-person transfer from the receiver to appellant, in which application for person-to-person transfer the licensed premises was designated as 457 Clinton Avenue. At the time of transfer those premises were boarded up and, as admitted, did not then, nor could they now, be occupied as an operable facility for the license.

When application for renewal was made to the Board, appellant advised it that a new location had been secured at 488 Clinton Avenue (almost directly across the street from the former premises) and an application for a place-to-place transfer was in preparation.

Despite such notice, the Board rejected the application for renewal on the sole ground that appellant did not have possession of 457 Clinton Avenue, the address given by him for the licensed premises.

In consideration of appellant's substantive argument that there was no reasonable basis for the Board's action, it is observed that there is no inherent right to the renewal of a license. Zicherman v. Driscoll, 133 N.J.L. 586 (1946). If denied on reasonable grounds, it will be affirmed. Richmon Inc. v. Trenton, Bulletin 1560, Item 4. Further, the record of the proceedings before the Board confirm that the Board knew the building housing the license had been acquired by the Board of Education and the premises were boarded up. Furthermore, under the applicable local ordinance the appellant was precluded from making a joint application for a person-to-person and place-to-place transfer of his license. See Essex Co. Retail etc. v. Newark etc. Bev. Control, 77 N.J. Super. 70; Colony Rock Corp. et al. v. Newark et al., Bulletin 2023, Item 1.

It is patently obvious that the Board's refusal to renew the license was not justified under the facts. Cf. Bayonne v. B & L Tavern, Inc., 42 N.J. 131 (1964). It is elementary that the owner of a license or privilege acquires through his investment therein an interest which is entitled to some measure of protection. Lakewood v. Brandt, 38 N.J. Super. 462 (App.Div. 1955).

It has been repeatedly held that a licensee forced to vacate premises or unable to use the designated place of license for cause other than the licensee's action may obtain transfer (and renewal) under such circumstances. Club Warren, Inc. v. Newark, Bulletin 1585, Item 4. "When appellant took over Rothrock's bid (the bidder for the license from the receiver) it could have pursued other alternatives than to seek a person-to-person and place-to-place transfer of the license to store 9B...." (underscore added). Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246, 255 (App.Div. 1953).

The appellant in being denied the opportunity to renew the license was thus precluded from filing an application for a place-to-place transfer despite the Board's grant of the person-to-person transfer three weeks prior thereto without conditions or limitations whatever. This Division has consistently ruled that a license may be renewed and held pending determination and approval of the suitability of proposed new premises for the transfer of the license thereto. See Hudson-Bergen Package Stores Assn. et al. v. Lodi, Bulletin 1936, Item 2.

Since fairness is the touchstone of the administrative process, and in further view of the hardship situation herein presented, it appears reasonable to offer the appellant a fair opportunity within a limited time to obtain suitable premises and have his license transferred to those premises. Rallo's Bar v. West Orange, Bulletin 1914, Item 1.

Thus appellant has sustained his burden of establishing that the action of the Board was erroneous and should be reversed. Rule 6 of State Regulation No. 15. Cf. Bayonne v. B & L Tavern, Inc., supra.

It is therefore recommended that appellant be given the opportunity to apply for a place-to-place transfer of the licensed premises as a condition to the grant of renewal for the current licensing period. Such issuance may be so conditioned upon the Board's holding of the license in its possession for a reasonable period, i.e., three months from the date of the renewal, by which time the licensee may take effective steps to relocate the licensed premises to premises suitable to the Board in the reasonable exercise of its discretion and in accordance with the existing ordinance.

#### Conclusions and Order

No exceptions were taken to the Hearer's report within the time limited in Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including transcript of testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 2nd day of October 1972,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby reversed, and the respondent be and is hereby directed to grant renewal of appellant's plenary retail distribution license for the 1972-73 licensing period in accordance with the application filed therefor, subject to the express condition that the said license be held in the custody of the Board, and shall not actually be issued or effective unless and until the Board, in its discretion and within three months from the date of this order, or any extension of time thereof granted by the Board, approves appellant's application to be filed promptly for a place-to-place transfer to a suitable location; and it is further

ORDERED that upon the grant of appellant's application for transfer of said license held in custody of the Board, the license shall be in full force and effect as soon as the transfer is endorsed on the face of the license certificate ; and it is further

ORDERED that in the event the said transfer is not granted within the above stated period of time, or any extension of time thereof granted by the Board, the said license shall thereupon be cancelled.

ROBERT E. BOWER  
DIRECTOR



3. DISCIPLINARY PROCEEDINGS - SOLICITATION FOR PROSTITUTION - RECOMMENDED PENALTY OF 90 DAYS INCREASED TO 180 DAYS BY DIRECTOR.

In the Matter of Disciplinary Proceedings against  
 Marticrey Co., A Corporation  
 t/a Coronet Bar and Restaurant  
 179 and part of 181 Ellison Street  
 Paterson, N. J.,  
 Holder of Plenary Retail Consumption License C-137 (for 1971-72 and 1972-73 license periods), issued by the Board of Alcoholic Beverage Control for the City of Paterson.

CONCLUSIONS and ORDER

William J. Rosenberg, Esq., Attorney for Licensee  
Dennis M. Brew, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On January 11, 1972, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., solicitation for prostitution and the making of overtures and arrangements for acts of illicit sexual intercourse and/or acts of illicit perverted sexual relations; in violation of Rule 5 of State Regulation No. 20."

The Division offered the testimony of three ABC agents in substantiation of the charge.

Agent C testified that, acting under specific assignment to investigate an allegation of permitting solicitation for prostitution, he entered the licensed premises on January 11, 1972, at approximately 10:30 p.m. accompanied by Agent R. Both agents seated themselves at the bar. Agent C and a local law enforcement officer waited outside the premises. The patronage consisted of fifteen males and four females. They were served by a barmaid identified as Elizabeth Noel. He also observed a go-go dancer on the stage.

Shortly thereafter the agents left the bar and seated themselves at a table across from the go-go stage where a male identified as Jerome --- was seated. It was later ascertained by the agent that Jerome was the husband of the go-go dancer Jaya ---.

Agent C then testified that he engaged in conversation with Jaya as follows:

- "Q Will you describe your conversation with her?
- A Jerome upon the introduction, the conversation, I asked Jerome if she was available. Upon the introduction Jerome said, 'These men were going to take you out.'
- Q What was her reply?
- A She said, 'Well, it will cost you money.'
- Q Is that the exact words? To the best of your knowledge.
- A Yes. Then I asked, 'How much?' She said, 'Twenty dollars.'

Q Was that pursued any further?

A Yes. She said she had to do a few more dances. She asked if we had a place to go. I said, 'We only have the car.' She said she wouldn't [engage in sexual intercourse] in the car; she would only [engage in an act of oral perversion] us for ten dollars apiece.

Q What was your reply?

A 'Fine.'

Upon concluding this conversation Jaya resumed dancing and Agents C and R returned to the bar and ordered another drink. After ordering drinks, Agent C turned to Jaya and asked Noel (the bartender) if she (Jaya) was "all right" to have her engage in an act of oral perversion; was she "clean." Noel responded that she was "O.K." and "Don't worry."

Agent C then testified that, upon conclusion of the conversation, he and Agent R returned to the table. Immediately prior to leaving the premises, Agent C handed Jaya two marked ten-dollar bills. Upon leaving the premises the agents and Jaya proceeded across the street to a parking lot where their car was parked. Upon reaching the car, they identified themselves, retrieved the currency and handed the currency to Agent C and a local law enforcement officer who were waiting at the car. They then checked the currency with a marked-money list that had been previously prepared at the local police station. Thereafter the group returned to the licensed premises where Noel was informed of the occurrence.

It was stipulated that Agent R's testimony would be corroborative of the testimony offered by Agent C on direct examination.

Agent C testified that he and a local police officer waited at a post of observation while Agents C and R entered the licensed premises on January 11 at approximately 10:30 p.m. At approximately 11:20 p.m. he observed both agents depart from the licensed premises accompanied by a female identified as Jaya and, upon receiving a prearranged signal, the local officer and he identified themselves to Jaya and recovered from her the two marked ten-dollar bills.

In defense of the charge Elizabeth Noel testified that she was entering her second week of employment as a barmaid at the licensed premises and was so employed on the night of January 11. On that night she was catering to approximately twenty patrons, unassisted. The owner was out of the State. She had been acquainted with Jaya prior to January 11 and knew that she (Jaya) had been employed by an agent as a go-go dancer.

The questioning then revealed the following:

"Q Was she [Jaya] working as a go-go girl on the night of January 11?

A No, she wasn't. The regular go-go girl didn't come in. She called and said she wouldn't be able to make it. When she came in she asked where the go-go girl was. I said she wouldn't be in tonight. She said, 'Do you mind if I dance?' I said, 'I wouldn't be able to pay you' because she wasn't from an agent. She said she didn't care.

Q What did you say?

A I said, 'O.K., if you want to.'

Q Did you pay her?

A No."

Jaya had entered the licensed premises at approximately 10 p.m. She left for home in order to get her go-go outfit and, upon her return at approximately 10:30 p.m., started dancing accoutered in her two-piece costume. No one else performed that night.

Continuing, Noel testified that she observed Agent C enter the licensed premises at approximately 11:30 p.m. He ordered drinks and watched the dancer. There were no seats at the bar and she next observed him seated at a table with Jerome. On one occasion, after drinks were ordered, Agent C turned around, looked at the dancer, and said, "She is O.K." Noel replied, "I guess so" and walked away. Other than ordering drinks, she had no conversation with Agent C.

Shortly after midnight Noel observed Jaya and the agents walk out together and return almost immediately with another agent and a local police officer. The agents identified themselves. Agent C said he desired to examine the license and the employment sheets. She was not asked whether Jaya was employed at the licensed premises. She did not have advance knowledge that Jaya was coming to the licensed premises on January 11.

In explaining the circumstances leading Jaya to dance, Noel testified as follows:

- "Q After she [Jaya] got in the premises who engaged who in conversation? Did you ask her to dance?  
 A No. She said to me, 'Where was the go-go girl?' I said, 'She called. She wasn't coming tonight.' She said, 'How about letting me dance?' I said, 'I can't pay you because you aren't from the agent.' She said, 'I don't want to get paid. I just want to keep in practice.' I said, 'O.K.'"

On cross examination the witness testified that the go-go dancer who was hired for the evening was supposed to report at 9:30 p.m. Some of the patrons asked for the go-go dancer. The patrons enjoyed watching the go-go dancer's performance.

Jaya testified that, accompanied by her husband Jerome, she entered the licensed premises on January 11 at approximately 10 p.m. At approximately 10:15 p.m. she asked Noel for permission to dance. Upon receiving permission from Noel to perform without being paid therefor, she returned home for her costume and commenced dancing upon her return to the licensed premises. While performing, she observed Agents C and R at the table with her husband. Upon completing a set, she sat at the table, accepted a drink from the agents and engaged in conversation wherein she ultimately accepted their offer to engage in sexual intercourse with them for the sum of ten dollars each.

She did not engage in conversation with the barmaid, nor did the barmaid approach the table. Agent C did approach the bar to get drinks. He wasn't gone "very long." Upon his return they departed from the premises and they pushed the money in her hand. She attempted to push it back. Upon arrival at the car, she was told that she was under arrest.

Prior to leaving the barroom she did not request permission to leave since she asserts that she was not employed there. She had been previously employed there as a dancer on three occasions. The last time was two months prior to January 11. She and her husband patronized the licensed premises occasionally for drinks.

Jerome's testimony was mainly corroborative of the testimony given by his wife except that he asserted that he heard no conversation relating to engaging in sexual relations and he did not know what occurred during the short interval that the agents and Jaya were outside the premises.

I

In adjudicating this matter I find as an uncontroverted fact that overtures and arrangements were made in the licensed premises for acts of illicit perverted sexual relations as charged. Jaya candidly admitted the making of the arrangements.

II

I further determine that Jaya was a person employed within the intendment of the Division rules and regulations and therefore her conduct is the responsibility of the licensee.

In Re Jacobs, Bulletin 935, Item 3, it was held that salary or compensation is not a requisite to employment. This holding was followed in the more recent case of Re Neim, Bulletin 1772, Item 2, wherein it was held that the question of compensation is irrelevant to the determination of employment.

In Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960), an individual was allowed to come to a cocktail lounge with his drums for the purpose of accompanying the hired pianist and, although the individual received no compensation from the licensee, the court held that he was permitted to "work" in the licensed premises within the meaning of the pertinent State regulation. In Freud the court stated (at p. 248):

"The Division has consistently construed 'work' as embracing all persons whose services are utilized in furtherance of the licensed business, notwithstanding the absence of a technical employer-employee relationship. That construction was considered logical and approved in Kravis v. Hock, 137 N.J.L. 252, 255 (Sup.Ct. 1948), albeit in a different setting. Appellants, although admitting that 'work,' as used in Rule 24, is to be liberally interpreted, urge that the word be construed to mean 'something undertaken for gain,' as distinguished from 'something done for pleasure, sport or immediate gratification.' However, the administrative interpretation long given the rule by the agency charged with its enforcement, and the view expressed in Kravis, are commanding."

III

Although I deem the above fully dispositive of the charge herein, I shall consider licensee's forceful argument Jaya was not an employee and that it was completely unaware of and did not allow, permit or suffer the arrangements for prostitution.

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

Applying this principle, I am convinced that Agent C's testimony of his conversation with Noel (the barmaid) concerning the arrangements made with Jaya (corroborated by the testimony of Agent R) was not a fabrication or preconceived in order to falsely and maliciously inculcate an innocent licensee. Although he was subjected to intensive cross examination by the attorney for the licensee, his testimony remained unshaken and was forthright and credible.

From the evidence presented, it is manifest that the licensee permitted and suffered the solicitation for prostitution to take place on the licensed premises as charged.

As the Supreme Court said in Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947), 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."

It has long been held that the solicitation for immoral purposes and the making of arrangements for sexual intercourse cannot and will not be tolerated on licensed premises. The public is entitled to protection from these sordid and dangerous evils. Re 17 Club, Inc., Bulletin 949, Item 2, aff'd In re 17 Club, Inc., 26 N.J. Super. 43 (App.Div. 1953).

The licensee is clearly inculcated by the misconduct of its employee. Such conduct constitutes a grave threat to the public welfare and morals and must be eliminated. Furthermore, it is a basic principle that, in disciplinary proceedings, the licensee is fully accountable for all violations committed or permitted and suffered by his servants, agents or employees. Rule 33 of State Regulation No. 20; Kravis v. Hock, 137 N.J.L. 252 (Sup.Ct. 1948); In re Schneider, 12 N.J. Super. 449 (App.Div. 1951).

After carefully considering and evaluating all of the evidence adduced herein, and the legal principles applicable thereto, I conclude that the Division has established the charge by clear and convincing testimony, and by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty as charged.

Licensee has no prior adjudicated record of suspension of license. I further recommend that the license be suspended for ninety days. Re Caramazino, Bulletin 2044, Item 2.

#### Conclusions and Order

No exceptions to the Hearer's report were filed with me pursuant to Rule 6 of State Regulation No. 16. However, on my own motion, pursuant to said Rule 6 oral argument was had before me.

I have carefully considered the entire record herein, including the transcript of testimony and the Hearer's report and concur in the findings and conclusions of the Hearer, except that I disapprove the Hearer's recommendation with respect to the penalty to be imposed herein.

The Hearer has recommended a suspension of license for ninety days, citing Carmazino, supra, as a precedent for the said penalty. However, in his report, the Hearer found that the solicitation for prostitution was made by an employee of the licensee who was performing services for the licensee as a go-go dancer. Carmazino involved solicitation by a patron, not an employee.

It has been the long established policy of this Division that where the licensee or its employee arranges or procures or solicits for illicit intercourse, or perverted sexual acts, the penalty imposed will be suspension of license for one hundred-eighty days, and, in aggravated situations, even outright revocation. Re Tiny's Bar & Grill, Inc., Bulletin 1718, Item 1 (suspension of license of two hundred twenty-five days because of



It further appears from the said affidavit that Edward J. Phelan, Elizabeth T. Phelan, William L. Lloyd and Marion Rowland have no beneficial interest in nor are they in any way associated with the corporate transferee whose principal stockholders are William R. Young and George Harper.

Further, according to a letter sent to me by Edward J. Phelan, Esq., that on September 21, 1972, the City Council of the City of Trenton approved a person-to-person transfer of the subject license from Bar 13, Inc., t/a The Office to Bipage, Inc., a corporation, t/a Old Folks Home for premises 13 No. Willow Street, Trenton.

Thus, it appears that the unlawful situation has been corrected, and I shall grant the petition requesting termination of the suspension, effective immediately.

Accordingly, it is, on this 6th day of October 1972,

ORDERED that the suspension heretofore imposed herein be and the same is hereby terminated, effective immediately.

ROBERT E. BOWER  
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 10 DAYS.

In the Matter of Disciplinary Proceedings against  
Camden Liquor Corp.  
306 South Broadway  
Camden, N. J.,  
Holder of Plenary Retail Distribution License D-3 (for 1971-72 and 1972-73 ) license periods, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden.  
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CONCLUSIONS  
and  
ORDER

Charles, Pluese & Sturm, Esqs., by Robert T. Pluese, Esq.,  
Attorneys for Licensee  
Peter E. Rhatican, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on April 22, 1972 it sold alcoholic beverages to a minor, age 20, in violation of Rule 1 of State Regulation No, 20.

Agent B testified that on the date of the charge, about 8 p.m., pursuant to a specific assignment, he and another agent drove their car to a place directly opposite the licensed premises, waited a few minutes, and observed who appeared to be two minors enter the premises.

Leaving the car, he approached the door of the establishment through which he watched one of them walk away from the counter and toward the door. His observation of the purchase transaction was limited to observation of the clerk putting a

six-pack of beer into a bag and placing the bag on the counter. One of the minors (later identified as Joseph ---) picked up the bag from the counter and emerged with it. Accosted outside the door of the premises, the minor and his companion Donald Phillips, were asked for identification. The minor produced a green card which carried the name of Edwin George and a birth date of February 16, 1948. Agent B asked the minor when he was born; he replied that it was February 28, 1948. When apprized of this discrepancy, the minor admitted the card was not his and gave his true name and birth date (October 26, 1951). The companion (Donald Phillips) proved to be over twenty-one. The minor admitted having made the purchase of the said beer.

Returning to the inside of the licensed premises, Agent B asked the clerk (Theodore W. McCauley) to whom he had sold the beer, and the clerk pointed to Joseph ---. Both the Clerk and the minor were placed under arrest and were turned over to the Camden police.

On cross examination Agent B admitted that he saw no money paid or change received. He described the position of the companion Phillips as being about three feet behind Joseph when the package was removed from the counter.

The clerk of the licensee (Theodore W. McCauley) testified that he has been employed as such for about four or five months. He stated that both Joseph and Phillips were in the store and that Phillips selected two six-packs of beer from the refrigerator, paid for them with a ten-dollar bill for which he was given change. Joseph purchased potato chips and soda. The purchases were placed in a bag and the bag was laid on the counter between both Joseph and Phillips. His attention was then distracted by another customer so he did not see who actually walked out of the premises with the bag. He admitted that, upon the agent's inquiry as to who made the purchase, he first pointed to Joseph. Both Joseph and Phillips had been patrons before but the visits of Joseph had been merely to have checks cashed. On a prior occasion when Joseph wished to have a check cashed, a green card was produced which revealed Joseph to have been over twenty-one. On the night of the alleged offense he had no dealings whatever nor any conversation at all with Joseph.

Donald E. Phillips (the companion of Joseph) testified that they entered the licensed premises; he went to a freezer, took what he wanted and went to the counter. While doing this, Joseph got some potato chips. Phillips then handed the clerk money and received seven dollars in change. In addition to that purchase, he placed a dime on the counter for another article and asked Joseph to take the package containing the beer. On cross examination the witness admitted that he and Joseph had frequently drunk together on prior occasions.

The minor (Joseph ---) testified that he was born October 26, 1951 and that on the date charged herein he was twenty years old. He visited the licensed premises with Phillips merely to cash a check and, in the absence of the owner, did not do so. He had done so on previous occasions. He had been in the store in the past when he had displayed a birth certificate which did not show his true birth date. He had not, however, ever purchased alcoholic beverages at the licensed premises.

On the evening in question he made no purchase of any beer, did not pay for anything, nor had any conversation with the clerk. He carried out the package containing the beer only because he was asked to do so by Phillips who wished to make an additional purchase before leaving. When searched in the store by one of the Camden Police, neither his pockets nor wallet had

any money or change whatever. On cross examination he admitted he was planning to take the beer to his own home, which both he and Phillips had done before.

At the conclusion of the Division's presentation, counsel for the licensee moved for a dismissal of the charge, contending that there was no proof of a sale of alcoholic beverages to a minor as alleged in the charge. The Division countered by urging that the words in the charge were all-embracing as contained in the regulation, but the emphasis in this matter was on the "delivery" to the minor.

The crucial issue presented is: Was there a delivery of the package containing the beer to the minor.

In adjudicating this matter we are guided by the long established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960). Since there is a sharp conflict in the testimony herein, it became necessary to evaluate the testimony after observing the demeanor of the witnesses and giving weight to such testimony as was found credible. The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

The clerk McCauley admitted identifying the purchaser of the beer as the minor. He further admitted that on a prior occasion, when he asked the minor for identification preparatory to cashing a check, he was shown a green card similar to the one admitted into evidence which he claimed revealed the minor's age as over twenty-one. Joseph himself identified that document as a "birth certificate" which he stated contained a false age. The testimony of the licensee's witnesses appeared partially fabricated to obcloud the carelessness of the clerk in making the sale. The purchase of the beer was admittedly a joint endeavor of both Joseph and Phillips, its destination being the home of Joseph where both contemplated its consumption. The carrying out of the beverage by Joseph confirms the delivery to him by the clerk who admitted the sale to Joseph when initially questioned by the agent.

After carefully considering all of the testimony with respect to the charge, the conclusion is inescapable that this charge has been established by a fair preponderance of the believable evidence. Accordingly I recommend that the licensee be found guilty of the charge.

Licensee has no prior adjudicated record. It is further recommended that the license be suspended for ten days. Re Beck, Bulletin 2047, Item 4.

#### Conclusions and Order

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

I have carefully considered the matters contained in the said exceptions and find that they have either been considered and satisfactorily answered in the Hearer's report or are lacking in merit. Thus, having analyzed and considered the entire record herein, including transcript of the testimony, the exhibits, the Hearer's report, the exceptions with respect

thereto and the answer to the said exceptions, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 11th day of October 1972,

ORDERED that Plenary Retail Distribution License D-3, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden to Camden Liquor Corp., for premises 306 South Broadway, Camden, be and the same is hereby suspended for ten (10) days, commencing at 2 a.m. Monday, October 23, 1972, and terminating at 2 a.m. Thursday, November 2, 1972.

ROBERT E. BOWER  
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - SALE TO TWO MINORS ON DIFFERENT DAYS - PLEA ENTERED TO SECOND DATE - CHARGE DISMISSED AS TO FIRST DATE - LICENSE SUSPENDED FOR 10 DAYS.

In the Matter of Disciplinary Proceedings against  
Milli Hruska & Theodorine Axelson  
t/a Milli's  
1 East Church Street  
Sea Bright, N.J.,  
Holder of Plenary Retail Consumption License C-7 (for the 1971-72 and 1972-73 license periods) issued by the Mayor and Council of the Borough of Sea Bright.

CONCLUSIONS  
and  
ORDER

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Lum, Biunno & Tompkins, Esqs., by George J. Koelzer, Esq.,  
Attorneys for Licensees  
Dennis M. Brew, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to charge No. 1 herein and pleaded non vult to charge No. 2:

- "1. On June 25, 1971, you sold, served and delivered and allowed, permitted and suffered the sale service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Stephen J.---, age 16; in violation of Rule 1 of State Regulation No. 20.
- 2. On July 14, 1971, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Edward F.---, age 20; in violation of Rule 1 of State Regulation No. 20."

Accordingly, this Hearer's report will be confined to the consideration of the evidence presented with respect to charge No. 1.

On behalf of the Division Stephen J. --- testified that he was born on June 15, 1955, and on the date of the offense alleged in charge No. 1, was sixteen years of age.

On the date charged herein, and in the company of Jeff ---, he approached the licensed premises at approximately 11:00 p.m. and entered alone. He ordered three containers of beer from the bartender. While the bartender was preparing the containers another male (subsequently identified as Albert J. Hruska, husband of the co-licensee Milli Hruska) requested proof of age, whereupon Stephen presented "a draft card", a copy of which was submitted in evidence. The "draft card" proved to be a "selective service system notice of classification" certifying that one John P. Conley is classified 1-SH.

It further discloses that it was mailed on January 24, 1967. The reverse side of the card sets forth certain requirements imposed by law and sets forth the address of the local Draft Board. Nowhere does it contain the name of the witness named thereon. Hruska requested more proof of age; Stephen indicated he had no further proof; Hruska departed, the bartender returned and presented Stephen with the three containers of beer in a bag. Stephen handed the bartender \$3.00 and received 75¢ change.

He departed the premises, rejoined Jeff, crossed the street and, a few blocks further, was confronted by local Police Officer Lang. The Officer asked what was in the bag. Jeff replied, "Beer". Upon being asked by the officer for proof of age, he showed the same card referred to above. Officer Lang requested more proof and Jeff could not produce any. He advised Officer Lang that he had purchased the beer at the instant licensed premises and admitted that the proof of age shown earlier was false. He first insisted that he was twenty-one years of age, but thereafter admitted that he was only sixteen years of age.

On cross examination, he asserted that he was unable to identify the bartender. He further testified that a second police officer was later involved in the incident; his conversation with Lang was not in the presence of the other officer; the police station is immediately adjacent to the licensed premises; and there are several other licensed premises in the immediate area.

Peter J. Lang testified that he is a full-time special police officer for the Borough of Sea Bright. On the evening in question, at approximately 11:00 P.M., he was about one and one-half blocks from the licensed premises and observed Stephen walking from the front of the licensed premises with a brown paper bag in his hand. He confronted Stephen and Jeff approximately one and one-half blocks from the premises and was informed by Stephen that the bag contained beer. Upon requesting proof of age he was shown the classification notice described above and, upon further questioning, learned that Stephen was sixteen years of age. He thereupon seized the brown paper bag containing the three containers of beer and escorted Stephen and Jeff to police headquarters. At no time during the evening did he return to the licensed premises with Stephen or Jeff.

On cross examination, he testified that he observed Stephen in front of the licensed premises and that he made this observation from a distance of approximately one hundred fifty feet. He did not actually observe the front door of the licensed premises because it is recessed several feet from the facade of the building.

Milli Hruska, co-licensee, Albert J. Hruska, husband of the co-licensee and Frank Fahey, their son-in-law, all testified in defense of the charge. They admitted that containers of beer were available for sale at the licensed premises on the evening in question. They further testified that all three were on duty at 11:00 P.M. on the evening in question, but denied selling to Stephen or seeing him on the premises.

Preliminarily, I observe that disciplinary proceedings before administrative agencies are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Testimony to be believed must proceed from the mouth of a credible witness. Spagnuolo v. Bonnet, 16 N.J. 546 at p. 554 (1954).

I find that the testimony of Stephen with respect to the sale, service and delivery of alcoholic beverages to him stands totally uncorroborated. After observing the demeanor of the minor and weighing his testimony, I further find that the conduct of Stephen (during the course of events) is totally incredible and unworthy of belief.

We are left, therefore, with the testimony of Officer Lang. Accepting the officer's testimony as truthful it falls short of the quantum of proof necessary to support a finding of guilt. He has candidly admitted observing Stephen in front of the licensed premises. However, such observation was made at 11:00 P.M. from a distance of some one hundred fifty feet. Such testimony at best raises a mere suspicion of guilt. Mere suspicion is no substitute for actual proof. In fairness, doubtful questions must be resolved in favor of the defendant.

Accordingly, it is recommended that the licensee be found not guilty of charge No. 1 herein, and that the charge be dismissed.

With respect to charge No. 2 to which the licensees have entered a plea of non vult, it is recommended that the license be suspended for ten days. Re Plancey, Bulletin 2042, Item 9.

#### Conclusions and Order


No exceptions to the Hearer's report were filed in accordance with Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 12th day of October 1972;

ORDERED that Charge 1 herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-7, issued by the Mayor and Council of the Borough of Sea Bright to Milli Hruska & Theodorine Axelson, t/a Milli's, for premises 1 East Church Street, Sea Bright, be and the same is hereby suspended for ten (10) days, commencing at 3 a.m. Tuesday, October 17, 1972, and terminating at 3 a.m. Friday, October 27, 1972.

  
Robert E. Bower,  
Director.