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

BULLETIN 1953 March 2, 1971

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ITEM

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

BULLETIN 1953. March 2, 1971

1. COURT DECISIONS - PILON and CRANER v. PATERSON - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-580-69

RAYMOND PILON and JOHN A. CRANER,
t/a Muggsy's Friendly Tavern,

Appellants,

v.

BOARD OF ALCOHOLIC BEVERAGE CONTROL
OF THE CITY OF PATERSON,

Respondent.

112 N.J. Super 436

- -

Argued November 9, 1970 - Decided December 8, 1970.

Before Judges Sullivan, Collester and Labrecque.

On appeal from determination and order of the Director, Division of Alcoholic Beverage Control.

Mr. Ronald J. Nelson argued the cause for appellant (Messrs. Craner & Brennan, attorneys).

Mr. Joseph A. LaCava argued the cause for respondent Board of Alcoholic Beverage Control of the City of Paterson (Mr. Joseph L. Conn, attorney).

Mr. Harry W. Leszchyn, Jr., Deputy Attorney General, argued the cause on behalf of the Division of Alcoholic Beverage Control (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel).

The opinion of the court was delivered by

LABRECQUE, J. A. D.

Appellants Raymond Pilon and John A. Craner (the licensees) are the holders of plenary retail consumption license C-224 for premises known as Muggsy's Friendly Tavern located at 839 Main Street, Paterson. On March 17, 1969 they were found guilty by the Alcoholic Beverage Control Board of the City of Paterson (the Board) of five violations and their license was suspended for a total of 75 days. On appeal to the Division of Alcobolic Beverage Control (the Division), the Director affirmed. The present appeal followed.

Appellants raise three points, summarized as follows: (1) the findings below were not supported by substantial evidence and should be set aside, (2) Rule 6 of State Regulation 15 is unconstitutional in that it deprives appellants of due process of law, and (3) since the charges arose out of a single incident the penalty is excessive and should be reduced to 30 days.

We find the first point to be without merit. There was testimony that at approximately 3:35 A.M. on December 8, 1968 Emil Peri, a Paterson police detective, while on routine patrol observed that the licensees' tavern was still open, notwithstanding the 3 o'clock closing hour. When he entered the premises he found from 20 to 30 people inside, many of them still sitting at the bar drinking. Pilon, one of the owners, was still serving customers at the bar. When he identified himself to Pilon, the latter allegedly became abusive and grabbed, pushed and assaulted him. During the affray one John Seager, a customer, came to Pilon's assistance and grabbed Peri, who thereupon placed them both under arrest. Later Pilon pleaded guilty to creating a disturbance while under the influence of liquor (N.J.S.A. 2A:170-30) and was given a suspended sentence. Peri testified Pilon had later apologized to him, stating "if he wasn't drinking this wouldn't have happened."

Thereafter, disciplinary proceedings were instituted against the licensees charging the following violations: (1) permitting a brawl to take place on the licensed premises in violation of Rule 5 of State Regulation 20, (2) hindering and delaying Peri in the performance of his duty, in violation of Rule 35 of State Regulation 20, (3) selling and serving alcoholic beverages after hours, in violation of the local ordinance, (4) failing to have the licensed premises closed between 3 A.M. and 3:35 A.M., in violation of the local ordinance, and (5) permitting Pilon to work in the licensed premises while actually or apparently intoxicated, in violation of Rule 24 of State Regulation 20. The Board found the licensees guilty and imposed a suspension of 15 days on each charge. On appeal the transcript of the testimony before the Board was received in evidence and additional testimony was adduced before a Hearer. His report and recommendations upholding the suspension were adopted by the Director.

The licensees argue that while the test here applicable is whether the factual findings of the administrative tribunal are supported by substantial evidence, Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501, 504 (App. Div. 1956), the evidence does not support the administrative determination because of the alleged incredibility of the testimony of Peri. They also argue that the Director failed to make an independent determination as to Peri's credibility. We find neither contention to be meritorious. The Hearer's report which was adopted by the Director specifically found Peri's testimony to be forthright and credible, rejected the testimony of appellants' witnesses as contradictory and incredible, and found that the charges had been established by the preponderance of the evidence. The factual findings of the Director were supported by substantial evidence, i.e., a reasonable man upon consideration of the entire record could reasonably have concluded that the violations charged did in fact occur. Hornauer v. Div. of Alcoholic Beverage Control, supra, at 504. See also Atkinson v. Parsekian, 37 N.J. 143,149 (1962). The choice of accepting or rejecting the testimony of witnesses rests with the administrative agency and where such choice is reasonably made it is conclusive on appeal. Hornauer, supra, at 506.

We likewise find no merit to the licensees' contention that the form of the appellate hearing in the Division, and the Division's requirement that an appellant carry the burden of establishing that the Board's action was erroneous, amounted to a denial of due process which compels reversal.

The Director of the Division of Alcoholic Beverage Control is empowered to hear and conduct all appeals and to establish appellate rules and procedures. N.J.S.A. 33:1-38. State Regulation 15 establishes the procedure for appeals. Rule 6 thereof provides that:

> All appeals [to the Director] shall be heard de novo except as otherwise provided in Rule 8 hereof *** but the burden of establishing that the action of the respondent issuing authority was erroneous and should be reversed shall rest with the appellant.

Rule 8 provides, in part:

> Where there is available a stenographic transcript of the proceedings before the issuing authority, either party may, if at least three (3) days notice of intention so to do has been given to opposing parties, or counsel therefor, offer the transcript of testimony of any witness or witnesses named in said notice in lieu of producing said witness or witnesses at the hearing of the appeal. In such event, any opposing party may subpoena such witness or witnesses to appear personally and any party may produce any additional evidence, oral or documentary, at the hearing of the appeal.

See Fanwood v. Rocco, 59 N.J. Super 306, 315-19 (App. Div. 1960), aff'd 33 N.J. 404 (1960) as to the scope of the Director's review.

When the stenographic record of the testimony below was received in evidence by the Hearer, counsel for the licensees objected and sought a de novo trial on the ground, inter alia, that they had not received a fair hearing before the Board and had been precluded from putting certain questions to Officer Peri, Although the Hearer suggested that Peri be produced by the licensees for further examination, stating that, since he was a hostile witness, wide latitude would be afforded the licensees in examining him, counsel for the licensees declined to do so. He did, however, produce four witnesses, three of whom had previously testified before the Board.

The licensees cite no case, and we know of none which holds that Rule 6 of Regulation 15 requires that all witnesses who testified before the issuing authority be required to give their testimony anew before the Division. Cino v. Driscoll 130 N.J.L. 535 (Sup. Ct. 1943) was decided before Rules 6 and 8 of Regulation 15 (formerly Rules 6 and 8 of Regulation 14) were promulgated in their present form. Compare Neiden Bar and Grill v. Municipal Bd., etc., of Newark, 40 N.J. Super. 24, 28 (App. Div. 1956); Florence Meth. Church v. Tp. Committee, Florence Tp., 38 N.J. Super. 85, 90 (App. Div. 1955); Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462, 467 (App. Div. 1955). Here the licensees were afforded a full hearing at which the burden of proof rested upon the issuing authority. At the subsequent appellate hearing in the Division they were afforded the opportunity of further examining any witness whose testimony appeared in the

transcript,[1] and of calling additional witnesses. At the close of the hearing they were furnished with a copy of the Hearer's report and their exceptions thereto were considered by the Director in arriving at his decision. The Director's decision was in the form of findings of fact and conclusions of law which were reviewable on appeal. This satisfied the requirements of due process. Cf. N.J. Zinc Co. v. Board of Review, 25 N.J. 235, 239 (1957); In re Masiello, 25 N.J. 590, 600 (1958).

Appellants urge that, notwithstanding the foregoing, the provision of Rule 6 which imposes the burden of proof on one who appeals from the action of a municipal board works a deprivation of due process. We disagree. Due process varies according to specific factual contexts, the type of proceeding involved and the different fields in which adjudicatory powers are exercised. 2 Am. Jur. 2d, Administrative Law, § 351, p. 164 (1962). The primary responsibility for enforcement of the laws pertaining to retail licensees rests upon the municipality. Benedetti v. Bd. of Com'rs of Trenton, 35 N.J. Super. 30, 33 (App. Div. 1955). In the case of Paterson that responsibility was vested in the respondent Board. Because of the great volume of matters coming before the Director and the fact that the local authority is generally well fitted to determine such matters at their initial stages, we are satisfied that the challenged portion of the rule is not so unreasonable as to deny due process. We are told that it was in the rule as originally promulgated by the first commissioner of Alcoholic Beverage Control, Cino v. Driscoll, supra, 130 N.J.L. at 539-40, and has continued in effect since that time. See Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598, 600 (App. Div. 1955), certif. den. 18 N.J. 204 (1955); 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).

It is urged that the requirement that an appellant carry the burden of proof was unfair in its application to the present appeal in view of the contention of the licensees that the Board below had been biased and prejudiced against them. We find no unfairness. The licensees were afforded the opportunity of demonstrating to the Director, both by testimony and argument, the Board's asserted prejudice. After considering the proofs the Director specifically determined that the asserted bias or prejudice did not exist and that the Board had leaned over backward in permitting cross-examination of Officer Peri by the licensees' attorney. He then proceeded to evaluate the testimony and arrived at the conclusion that guilt had been established. There was substantial credible evidence to support his findings. Hornauer, supra, 40 N.J. Super. at 504.

We find no merit to the licensees' final point. There were five separate offenses, i.e., when Officer Peri passed the tavern on routine patrol, he found it open after the closing hour fixed by the city ordinance; when he entered the tavern he found Pilon making sales to customers, also a violation of the ordinance;

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[1] While the record fails to reveal whether the three days notice of intention to use the transcript, prescribed by Rule 8, was given, the point is not raised by the licensees and it may be considered as having been waived if in fact the notice was not given.

Pilon was acting as bartender while intoxicated, a violation of the ABC regulations; he hindered Peri in the performance of his duty; he permitted - if he did not directly bring about - a fracas involving himself, another customer and Peri. We find no cause to disturb the quantum of the suspension in view of the nature of the offenses and the licensees' prior record. F & A Distrib. Co. v. Div. of Alcoh. Bev. Contr., 36 N.J. 34 (1961); Butler Oak Tavern v. Div. of Alcoholic Bev. Control, 36 N.J. Super. 512 (App. Div. 1955), aff'd 20 N.J. 373 (1956).

Affirmed.

SULLIVAN, P. J. A. D. (Concurring)

I agree we should affirm but, under the circumstances presented, do not see how the validity of Rule 6 is properly in issue. The Director did not base his decision on appellant's failure to establish that the action of respondent issuing authority was erroneous. Rather, he weighed the proofs and made independent findings that the charges had been sustained. I would affirm on the ground that the credible evidence supports these findings.

2. APPELLATE DECISIONS - CRANER & PILON v. PATERSON - SUPPLEMENTAL ORDER.

JOHN A. CRANER & RAYMOND PILON, t/a MUGGSY'S FRIENDLY TAVERN,	)	
Appellants,	)	SUPPLEMENTAL ORDER
v.	)	
BOARD OF ALCOHOLIC BEVERAGE CONTROL FOR THE CITY OF PATERSON,	)	
Respondent.	)	

John A. Craner, Esq., Attorney for Appellants
Joseph L. Conn, Esq., by Robert A. Pine, Esq., Attorney for Respondent

BY THE DIRECTOR:

On December 4, 1969 Conclusions and Order were entered herein affirming the action of respondent Board which suspended appellants' license for seventy-five days, effective December 11, 1969, after finding the licensees guilty of (a) permitting a brawl, (b) hindering investigation, (c) serving alcoholic beverages after hours, (d) failing to have premises closed, in violation of a local ordinance, and (e) permitting an intoxicated person to be employed in the said premises. Craner & Pilon v. Paterson, Bulletin 1895, Item 1. Prior to the effectuation of the suspension, upon appeal filed the Appellate Division of the Superior Court stayed the operation of the suspension until the outcome of the appeal. The court affirmed the action of the Director on December 8, 1970. In re Pilon and Craner v. Paterson (App.Div. 1969), 112 N.J. Super. 436; recorded in Bulletin 1953, Item 1. The suspension may now be reimposed.

Accordingly, it is, on this 14th day of January 1971,

ORDERED that Plenary Retail Consumption License C-224, issued by the Board of Alcoholic Beverage Control for the City of Paterson to John A. Craner & Raymond Pilon, t/a Muggsy's Friendly Tavern, for premises 839 Main Street, Paterson, be and the same is hereby suspended for seventy-five (75) days, commencing at 3 a.m. Thursday, January 28, 1971, and terminating at 3 a.m. Tuesday, April 13, 1971.

RICHARD C. McDONOUGH
DIRECTOR

3. COURT DECISIONS - PILON and CRANER v. PATERSON - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1736-69

RAYMOND PILON and JOHN A. CRANER
t/a MUGGSY'S FRIENDLY TAVERN

Plaintiffs-Appellants,

vs.

BOARD OF ALCOHOLIC BEVERAGE CONTROL
OF THE CITY OF PATERSON,

Defendant-Respondent,

and

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL OF THE STATE OF NEW JERSEY,

Respondent.

Argued January 12, 1971 - Decided January 21, 1971

Before Judges Kilkenny, Halpern and Lane

On Appeal from Division of Alcoholic Beverage Control

Mr. John A. Craner argued the cause for appellants (Messrs. Craner & Brennan, Attorneys; Mr. Ronald J. Nelson on the brief)

Mr. Joseph A. LaCava argued the cause for respondent, City of Paterson (Mr. Joseph L. Conn, City Counsel, Attorney; Mr. LaCava, on the brief)

Mr. Remo M. Croce, Deputy Attorney General, argued the cause for respondent, Division of Alcoholic Beverage Control of the State of New Jersey (Mr. George F. Kugler, Jr., Attorney General, Attorney; Mr. Harry W. Leszchyn, Jr., Deputy Attorney General, of counsel)

The opinion of the Court was delivered by

LANE, J.A.D.

Appeal from the Director's decision in Craner & Pilon v. Paterson, Bulletin 1895, Item 1. Director Affirmed. Pilon & Craner v. Paterson, 112 N.J. Super 436, Bulletin 1953, Item 1.

4. APPELLATE DECISIONS - MICWILL, INC. v. IRVINGTON.

MICWILL, INC. T/A ELMWOOD LOUNGE, Appellant, v. MUNICIPAL COUNCIL OF THE TOWN OF IRVINGTON, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

Herbert M. Barnes, Esq., Attorney for Appellant.
Samuel J. Zucker, Esq., by Herman W. Kurtz, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the respondent Municipal Council of the Town of Irvington (Council), which, on June 9, 1970 adopted a resolution ordering the suspension of appellant's plenary retail consumption license for premises 1180 Springfield Avenue, Irvington, for a period of sixty days, effective June 15, 1970, after finding it guilty to charges (1) that on March 10, 1970, it sold and served alcoholic beverages to three minors, in violation of Rule 1 of State Regulation No. 20; and (2) that on the same date, shortly after 11:00 p.m. it permitted, allowed and suffered a brawl to take place on its licensed premises, in violation of Rule 5 of State Regulation No. 20.

Appellant alleges that the action of the Council was erroneous because (1) the decision was against the weight of the evidence and (2) that the penalty imposed was harsh and oppressive, and therefore, constituted an abuse of discretion.

The answer of the Council denies the substantive allegations of petition and sets forth the following defenses:

(1) That it exercised its judgment properly upon the testimony; and

(2) That the finding of guilt on both charges was predicated upon the preponderance of the credible testimony of the witnesses adduced.

It further asserts that in assessing the penalties, it took into consideration the seriousness of the incident "as well as the prior violation record of the licensee."

Upon the filing of the appeal, an Order was entered by the Director staying the Council's order of suspension until the entry of a further order herein.

The appeal was heard de novo, and was based upon the transcript of the proceedings before the Council, supplemented by additional testimony adduced herein on behalf of the appellant, pursuant to Rules 6 and 8 of State Regulation No. 15.

The testimony in this matter was voluminous and reflected a sharp conflict.

My examination and evaluation of the transcript leads to the following findings of fact: On the evening of March 10, 1970, at about 11:00 p.m. three minors, Daniel--age nineteen years, Robert --- age nineteen and Douglas --- age nineteen, entered the licensed premises and seated themselves at the bar. Daniel --- ordered three Schaefer beers. The bartender, later identified as Kenneth Griggs, said that he was out of Schaefer, so he served them Bud (beer). After being served three bottles of beer, Daniel --- paid for it, and Griggs did not ask them for any identification, nor did he request or require that they make a written representation as to their ages. In fact, he later admitted to the local police officers that he served them the beer without asking for, or obtaining, any representation as to their ages.

Within a few minutes after the minors had received the beer and had merely taken a few sips from their glasses, Daniel --- walked over to the other side of the bar where he saw two girls seated. He first started to talk to them and then engaged in a conversation with three other patrons, who were seated at that side of the bar. These three patrons were apparently members of a motorcycle club known as the Pagans, and Daniel --- engaged in a conversation with them by asking what one must do in order to join their "gang". The conversation then led to discussion of service in Vietnam, with Daniel --- claiming that he was a veteran who had seen service there.

Within a few minutes the argument became rather heated, with voices raised, and one of the men identified as James Callaghan, disputed what Daniel --- had said, by calling him a liar. Within a minute or two after this exchange these three persons grabbed Daniel --- and struck him. Daniel --- then returned the blows and from that point on a free-for-all started. One of the men struck Daniel --- on the face and knocked him against the bar. Daniel --- picked up a bar chair, threw it and several other members of the Pagans started to throw bottles and chairs. Then one of the men pulled out a knife and cut Daniel--- on the arm.

When he saw the knife and was cut by it, he started to run towards the rear door with several of the participants in this brawl following him. When he reached the door it was closed and in order to escape further injury he crashed through the glass panel of the door; his chin was lacerated by the glass. He then ran down the street to the Kless Diner where an employee, John Dwyer, telephoned the police. Daniel --- was then taken to the Irvington General Hospital where his wounds were sutured and he was given first aid treatment.

The police then returned with Daniel --- to the licensed premises where he identified the bartender who had served beer to him and to his friends. At this point the persons who had engaged in this brawl had left the premises.

One of the go-go dancers identified as Patricia Goracy, who is employed by licensee recalled that these three patrons were members of the Pagans, since they had frequented these premises on prior occasions.

I further find that during this brawl which lasted somewhere between ten and fifteen minutes, the bartender (Griggs) took no affirmative steps either to prevent the brawl or to protect Daniel --- or any other patrons who may have been involved or were in danger of bodily injury. In fact, his call to the Irvington Police Headquarters, according to the testimony of police officers, came after the call was made to Police Headquarters by the employee at the Kless Diner. His explanation that he first phoned Newark Police Headquarters before phoning the Irvington Police is wholly unbelievable since it is obvious that these premises are not within Newark's jurisdiction.

At the plenary hearing before me numerous witnesses testified on behalf of the appellant. They included the bartender, performers and friends of the officer of the corporate appellant. The testimony of all of these witnesses seemed to have the same pattern. None of them could recall that there was ever a brawl, or any disturbance. All they knew was that Daniel --- went over to speak to these three men (Callaghan, Kenneth Lindner and another member) and within a minute after he went over there he started to run forward and crashed through the glass panel of the rear door.

Nobody was pushing him; nothing happened to put him in fear of bodily harm; no bar chairs were thrown around. Indeed, the actions of Daniel --- seemed to be the actions of a demented person who suddenly decided to run and crash through the rear door.

I reject the testimony of these witnesses as being woven out of whole cloth and outside the pale of truth.

Accordingly, I find that with respect to the first charge, the testimony clearly established that the licensee, through its bartender, sold and served alcoholic beverages to the minors on the licensed premises on the date alleged therein, and that no written representations were requested or obtained with respect to their ages.

With respect to the second charge, I find that a brawl took place on the licensed premises. A brawl is defined as "a loud, angry and disorderly quarrel; a rough, noisy and often prolonged hand-to-hand fight; (Webster's Third New International Dictionary); a "clamorous or tumultuous quarrel in a public place, to the disturbance of the public peace" (Black's Law Dictionary, 11 C.J.S. 767). Physical violence, while not a necessary ingredient thereof, may reasonably be expected to result therefrom, since words borrow one another and oft beget blows. Plikaytis v. Harrison, Bulletin 754, Item 1. I am persuaded that when the argument first started and it was evidently a very heated one, over a period of time, that it became the duty of the appellant's employees to control the patronage and to prevent the situation from developing, as it did into a fight with bottles being thrown, chairs being overturned and one of the minors being cut and otherwise injured. Seidel v. Upper, Bulletin 1246, Item 1; Mitchell's Cafe, Inc., Bulletin 1928, Item 1.

While it is true that a licensee has been held not to be responsible for a "sudden flare-up" on his premises where he could not have reasonably been aware of its imminence, such is not the case here. These members of the Pagan group had patronized these premises on prior occasions and according to at least one witness they were trouble makers. I believe that the bartender could have acted with dispatch to effectively intervene in this situation; but as noted before he did nothing. Jackson v. Newark, Bulletin 1600, Item 2.

The law is well-settled that the word "permit" is synonymous with "suffer" so that it may be said that one who suffers the doing of a thing, which he might have prevented, permits it. Connor v. Fogg, 75 N.J.L. 245 (S. Ct. 1907). Cf. Essex Holding Corp. v. Hock, 136 N.J.L. 28 (S. Ct. 1946).

Having carefully considered the entire record herein, I find that the credible evidence adequately supports the conclusions reached by the Council, that the licensee, through its employees, permitted, allowed or suffered the said occurrence (Rule 33 of State Regulation No. 20). Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (App. Div. 1956).

Appellant finally alleges that the penalty imposed was so harsh and oppressive as to constitute an abuse of its discretion. The measure or extent of a penalty to be imposed in disciplinary proceedings rests within the sound discretion of the issuing authority and will not be disturbed on appeal unless the evidence clearly shows an abuse of discretion. Re Schwartz v. Paterson, Bulletin 1577, Item 2; Bacus v. Guttenberg, Bulletin 1332, Item 4.

The legislature has invested the issuing authority (Council) with 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. The fact that a penalty may be severe does not, of itself, justify reduction on appeal. Ebony Corporation et al. v. Trenton, Bulletin 958, Item 1.

The power of the Director to reduce or modify a penalty imposed by a local issuing authority will be sparingly exercised and then only with the greatest caution. Engelhorn v. Belmar, Bulletin 1083, Item 1; Pete Jacobs, Inc. v. Winslow, Bulletin 1568, Item 1.

The Council properly took into consideration all of the facts and circumstances, together with the prior adjudicated record of the appellant (Butler Oak Tavern v. Division of Alcoholic Beverage Control, 36 N.J. Super. 512, Aff. 20 N.J. 373) in arriving at the penalty to be imposed. The penalty imposed is not so manifestly unreasonable or excessive as to require intervention by the Director. Skripko v. Raritan, Bulletin 1081, Item 1. I find that the Council acted within the limits of sound discretion. Benedetti v. Trenton, Bulletin 1040, Item 1. In view of the aforesaid, I conclude that the appellant has not sustained the burden of establishing that the action of the Council was erroneous, as required by Rule 6 of State Regulation No. 15.

I recommend, therefore, that an order be entered affirming the action of the Council, dismissing the appeal, and fixing the effective dates for the said suspension imposed by the Council, and stayed pending the entry of a further order herein.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the 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 18th day of December 1970,

ORDERED that the action of respondent 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 16, 1970, staying respondent's order of suspension pending the determination of the appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-2, issued by the Municipal Council of the Town of Irvington to Micwill, Inc., t/a Elmwood Lounge, for premises 1180 Springfield Avenue, Irvington, be and the same is hereby suspended for sixty (60) days, commencing at 2 a.m. Monday, January 4, 1971, and terminating at 2 a.m. Friday, March 5, 1971.

RICHARD C. McDONOUGH
DIRECTOR

5. APPELLATE DECISIONS - SENA v. UNION BEACH.

SALVATORE SENA, t/a VILLAGE INN, Appellant, v. BOROUGH COUNCIL OF THE BOROUGH OF UNION BEACH, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

Loring and Miele, Esqs., by Arthur D. Loring, Esq., Attorneys for Appellant
Blanda and Blanda, Esqs., by Philip J. Blanda, Jr., Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant seeks reversal of the unanimous action of respondent whereby it found appellant guilty of violations on March 2, April 20, April 25 and May 9, 1970, of failing to have the licensed premises closed and also found appellant guilty of permitting, allowing, serving and delivering alcoholic beverages on March 2, 1970 after 2 a.m., in violation of a local ordinance.

Appellant alleges in his petition of appeal that there was insufficient proof to sustain the finding of any guilt in this matter.

Respondent's answer denies the aforesaid allegation advanced by appellant.

Upon the filing of the appeal an order was entered by the Director staying the respondent's order of suspension until the entry of a further order herein.

At the opening of the hearing appellant's attorney moved for the dismissal of any alleged violations which had occurred more than thirty days before the date of the charges in this matter.

There is no provision in the Alcoholic Beverage Law or contained in the rules and regulations of the Division pertaining thereto, and thus this contention is without merit.

The ordinance in question, known as Ordinance No. 146, provides in pertinent part as follows:

> "Section 10(A): No licensee shall sell, serve, deliver, or allow, permit, or suffer the sale, service or delivery of any alcoholic beverage between the hours of 2 o'clock A.M. and 6 o'clock A.M. on each day of the week except January 1st when such sale shall be prohibited between 5 o'clock A.M. and 8 o'clock A.M. and except upon Sundays when such sale shall be prohibited between 2 o'clock A.M. and 12 o'clock noon.
>
> "During the hours sales are prohibited, the entire licensed premises shall be closed except that part of said licensed premises as shall be used exclusively for bona fide restaurant or lunchroom business."

Sergeant Joseph C. Nappi testified that at 2:18 a.m. on April 20, 1970 he saw people standing at the end of the bar although he saw no drinks being served. He further testified that at 2:11 a.m. April 25, 1970 he checked appellant's licensed premises and found the front door open. Although there was no light on the outside of the building, upon entering the tavern he found the night light on in the premises and there were three or four persons standing "at the rear of the bar, part of the barroom, near the kitchen door;" that he questioned the appellant why the people were there and the appellant said that they were working in the kitchen remodeling his kitchen and barroom. Sergeant Nappi further testified that one person remarked that he was a construction worker and another "was a fellow going to take over the kitchen; supposed to be opening up the kitchen." Sergeant Nappi also stated that on May 9, 1970, at approximately 2:44 a.m., he observed a police car and found that another officer had checked the premises and he (Sergeant Nappi) said he saw the bartender walking out of the door.

Officer Henry Riegler's testimony was that at 2:42 a.m. on March 2, 1970, while making a normal routine check of the licensed premises, he observed quite a few people inside the premises but, to avoid trouble when he saw a woman there "who doesn't like me too well", he tried to avoid trouble by not going into the tavern but, instead, radioed to police headquarters to contact the licensed premises and request that it be closed; that at 3:10 a.m. the people started leaving.

On cross examination Officer Riegler said he counted eleven persons, which did not include the appellant, in the place and, although he did not see anyone actually served, he saw drinks and money on the bar.

Officer Joseph C. Nappi, Jr. testified that on March 2, 1970, at approximately 2:42 a.m., while on duty at the desk, he received a call on the radio from Officer Riegler requesting that appellant's establishment be called and ordered to get the people out as it was past closing time; that he then telephoned to the licensed premises and told the person who answered the phone to have the people leave. In response thereto, that person said "O.K., we would."

Appellant testified that the door of the premises was open at exactly 2:11 a.m. on March 2, 1970, when he first saw Officer Riegler looking through the window; that at the time "there was four women and three men, seven" but he never served any drinks after 2 a.m. but asked the patrons to leave; he requested that they leave "a million times. Instead, one of the women threw a glass at the bar. I couldn't get rid of them." Appellant further stated that "the reason I didn't call the police department was because the cop looked in, and I figured he would come in and held me." Appellant said that, to his recollection, all the people had left the premises at 2:30 a.m. according to the clock but it was actually only 2:10 a.m.

Ida Sena (wife of the appellant) stated that on April 25, 1970, when Sergeant Nappi came into the appellant's licensed premises, there were no patrons present but a man "was working" with cement "and he was ripping down part of the wall for the sheet rock. There was other work;" that the man stopped working "between 2:30 and a quarter to 3 in the morning."

The provisions of the ordinance concerning sales of alcoholic beverages during prohibited hours and that the licensed premises shall be closed (with certain exceptions not applicable in this case) are clear and unambiguous. Moreover, there is no exception permitting anyone to remain on the licensed premises after the closing hour.

There is insufficient proof that the sale and service of alcoholic beverages was made to patrons after 2 a.m. on March 2, 1970. Officer Riegler testified that there were eleven people, not counting appellant, in the premises at 2:42 a.m. and stated that, although there were glasses containing beer, he did not see any persons at any time being served.

It is recommended that the finding by respondent that appellant was guilty of permitting, allowing, serving and delivering alcoholic beverages during prohibited hours be reversed. However, it is recommended that the action of respondent with reference to its finding of guilt that on March 2, April 20, April 25 and May 9, 1970, appellant failed to keep his licensed premises closed between the hours of 2 a.m. and 6 a.m., as provided in Ordinance No. 146, be sustained.

In view of my recommendation to reverse the action of respondent as to the allegation in the charge that on March 2, 1970 appellant did permit, allow, serve and deliver alcoholic beverages during prohibited hours, it is recommended that the matter be remanded to respondent for reconsideration and reimposition of the suspension to be imposed herein.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by both the appellant and the respondent

and written answer to said exceptions was filed by respondent pursuant to Rule 14 of State Regulation No. 15.

I have carefully considered the matters contained in the said exceptions and find that they have either been answered in the Hearer's report or are without merit. However, I shall sustain that part of the respondent's exceptions to the Hearer's report which opposes the remand of this matter for penalty purposes to the respondent. The fifteen-day suspension heretofore imposed by respondent is consistent with the established minimum penalty usually imposed by this Division for failing to keep the licensed premises closed during hours prohibited by municipal ordinance (cf. Re Play Pen, Inc., Bulletin 1927, Item 5).

Accordingly, it is, on this 21st day of December 1970,

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

ORDERED that the order heretofore entered staying the effect of the said suspension be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-11, issued by the Borough Council of the Borough of Union Beach to Salvatore Sena, t/a Village Inn, for premises 900-902 Union Avenue, Union Beach, be and the same is hereby suspended for fifteen (15) days, commencing at 2 a.m. Tuesday, January 5, 1971, and terminating at 2 a.m. Wednesday, January 20, 1971.

RICHARD C. McDONOUGH
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
FRANCELLO'S PEN & PENCIL, INC. 12-14 Beaver Street Newark, N. J.	) CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-12, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	)

Licensee, by Joseph Francello, President, Pro se
Walter H. Cleaver, Esq., Appearing for the Division

BY THE DIRECTOR:

Licensee pleads guilty to charge alleging that on October 6, 1970 it possessed an alcoholic beverage in a bottle bearing a label which did not truly describe its contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for ten days, with remission of five days for the plea entered, leaving a net suspension of five days. Re Poole's Restaurant, Inc., Bulletin 1932, Item 7.

Accordingly, it is, on this 18th day of December 1970,

ORDERED that Plenary Retail Consumption License C-12, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Francello's Pen & Pencil, Inc., for premises 12-14 Beaver Street, Newark, be and the same is hereby suspended for five (5) days, commencing at 2 a.m. Monday, December 28, 1970, and terminating at 2 a.m. Saturday, January 2, 1971.

RICHARD C. McDONOUGH
DIRECTOR

7. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (ROOM RENTING) - LICENSE SUSPENDED FOR 90 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
ADVANCE MOTOR LODGE AND RESTAURANT ENTERPRISES, INC. t/a Howard Johnson Motor Lodge Route #22 State Highway Greenwich Township (Warren County) PO Phillipsburg, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Greenwich (Warren County).	)	

Norman Bruck, Esq., Attorney for Licensee
Edward F. Ambrose, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on July 28 and August 4, 1970 it permitted lewdness and immoral activity (renting of rooms for purpose of illicit sexual intercourse and other illicit sexual relations) on the licensed premises, in violation of Rule 5 of State Regulation No. 20.

Absent prior record, the license will be suspended for ninety days, with remission of five days for the plea entered, leaving a net suspension of eighty-five days. Re Brierhurst Associates, Inc., Bulletin 1919, Item 6.

Accordingly, it is, on this 28th day of December 1970,

ORDERED that Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Greenwich (Warren County) to Advance Motor Lodge and Restaurant Enterprises, Inc., t/a Howard Johnson Motor Lodge, for premises Route #22 State Highway, Greenwich Township, be and the same is hereby suspended for eighty-five (85) days, commencing at 2 a.m. Monday, January 11, 1971, and terminating at 2 a.m. Tuesday, April 6, 1971.

RICHARD C. McDONOUGH
DIRECTOR

8. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL ORDER.

In the Matter of Disciplinary Proceedings against	)	
JULE'S BAR, INC. 100 North Avenue Dunellen, N. J.	)	SUPPLEMENTAL ORDER
Holder of Plenary Retail Consumption License C-10, issued by the Borough Council of the Borough of Dunellen.	)	

Abrams, Kestenbaum, Hendricks & Reina, Esqs., by Norman J. Abrams, Esq., Attorneys for Licensee
Edward F. Ambrose, Esq., Appearing for Division

BY THE DIRECTOR:

On September 18, 1970, I entered an order herein suspending the subject license for seventy days and deferring the effective date thereof because it appeared that the licensed business was not then being conducted on a substantial basis. Re Jule's Bar, Inc., Bulletin 1939, Item 2.

The attorney for the licensee has advised me that the licensee is now operating at these premises on a substantial basis, and requests an immediate suspension. This was confirmed by a report of investigation by this Division. Consequently, the suspension may now be effectively imposed.

Accordingly, it is, on this 31st day of December 1970,

ORDERED that Plenary Retail Consumption License C-10, issued by the Borough Council of the Borough of Dunellen to Jule's Bar, Inc., for premises 100 North Avenue, Dunellen, be and the same is hereby suspended for seventy (70) days, commencing at 1:00 a.m. Monday, January 4, 1971, and terminating at 1:00 a.m. Monday, March 15, 1971.

Richard C. McDonough
Director