

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2394

March 26, 1981

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March 26, 1981

1. COURT DECISIONS - QUEEN CITY LOUNGE, INC. v. PLAINFIELD - DIRECTOR
AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1255-79

QUEEN CITY LOUNGE, INC.,

Appellant,

v.

COMMON COUNCIL OF THE CITY OF
PLAINFIELD,

Respondent.

Submitted February 9, 1981 - Decided February 19, 1981

Before Judges Bischoff and Milmed.

On appeal from an order of the Director of the Division of
Alcoholic Beverage Control.

Tutela & McKinley, attorneys for appellant
(Jeffrey K. McKinley on the brief).

Sachar, Bernstein, Rothberg, Sikora & Mongello
attorneys for respondent (David H. Rothberg on the brief).

John J. Degnan, Attorney General of New Jersey, attorney for
Division of Alcoholic Beverage Control (Jerome A. Ballarotto,
Deputy Attorney General, of counsel and on the statement in
lieu of brief).

PER CURIAM

(Appeal from the Director's decision in Re Queen City Lounge,
Inc. v. Plainfield, Bulletin 2353, Item 1. Director affirmed.
Opinion not approved for publication by the Court Committee
on Opinions).

2. DISCIPLINARY PROCEEDINGS - SALE, SERVICE AND DELIVERY OF AN ALCOHOLIC BEVERAGE TO AN APPARENTLY INTOXICATED PERSON - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary
Proceedings against

Ken Lav Corporation
t/a Partytime Inn
34-39 Ocean Highway
Brick Township, NJ

Holder of Plenary Retail Consumption :
License No. 1506-33-007-001 issued :
by the Township Committee of the :
Township of Brick. :

CONCLUSIONS

AND

ORDER

S-12,450

OAL DKT. NO. ABC
5133-79

-----:
John J. Mulvihill, Esq., Attorney for Licensee.
Kenneth I. Nowak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

DATED: March 3, 1980

RECEIVED: March 4, 1980

BY THE DIRECTOR:

Written Exceptions with supportive argument were timely filed on behalf of the Division pursuant to N.J.A.C. 13:2-19.6.

I have reviewed and assayed the exceptions which asserts that the Initial Decision was not based on the actual record before the Administrative Law Judge and was grounded upon an incorrect interpretation of the applicable law. I find that the exceptions have substantial merit based upon my review and analysis of the entire record herein, which I shall discuss infra.

Preliminarily, it should be pointed out that the licensee, Ken Lav Corp., t/a Partytime Inn was incorrectly designated variously as "petitioner" and "appellant", and the Division of Alcoholic Beverage Control which instituted these proceedings was incorrectly designated as the "respondent, State of New Jersey". In disciplinary proceedings instituted by the Division, the licensee should be designated as such, and the Division of Alcoholic Beverage Control should be designated as the "Division".

These proceedings involve a charge against the licensee alleging that on October 7, 1979, it sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated, and allowed, permitted and suffered the consumption of an alcoholic beverage by such person in and upon its licensed premises, in violation of N.J.A.C. 13:2-23.1(b).

The Administrative Law Judge made the following findings of fact: "(4) That the patron, Kevin McCarthy was observed to drink approximately four drinks in a one hour period of time, to stumble into a bar stool while walking, to use four matches to light a cigarette, to knock over a drink either when reaching for it or talking with his hands." "(5) That McCarthy's speech was described as being slurred when heard by the agents"; "(11) That the patron was heard to yell at the barmaid after knocking over his drink; and "(12) That the patron was observed to be served another Gin and Tonic after knocking over his previous drink."

Notwithstanding the fact finding, the Administrative Law Judge concludes that a person who stumbles into a bar stool, and exhibits the other characteristics referred to hereinabove, is not necessarily intoxicated.

The specific issue of the meaning of the prohibition of a sale of alcoholic beverages to a person actually or apparently intoxicated was discussed by the Court in Division of Alcoholic Beverage Control v. Zane, 99 NJ Super. 196 (App. Div. 1968). As the Court stated in Zane on Page 201 "Whether the man is sober or intoxicated is a matter of common observation not requiring special knowledge of skill". See Castner v. Sliker, 33 NJL 95 (E. & A. 1968); Freud v. Davis, 64 NJ Super. 242 (App. Div. 1960). In reviewing the language of the subject regulation, the Court in Zane found that it provided "sufficiently understandable description of the conduct of persons to whom sale of alcoholic beverages is forbidden".

The words "person actually or apparently intoxicated" portrays a "person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior". Zane, supra at 201. In the New Jersey Courts our cases have held that it is sufficient to show that the sale, service or delivery was made to persons apparently intoxicated without the necessity for showing that the person was actually intoxicated. Re Carbone and Benedetto, Bulletin 1236, Item 8; Re Subar, Inc., Bulletin 1586, Item 2.

I am persuaded, from the findings of fact and from the record itself that McCarthy was apparently or actually intoxicated based upon the agents' descriptions and observations of his conduct and his mannerisms. Re James B. Sullivan, Bulletin 1450, Item 4; State ex rel Gutter v. Hawley, Ohio App. 41 N.E. 2d 815.

The agents observed that within a period of 45 minutes McCarthy consumed no less than 4 Gin and Tonics as well as part of the spilled drink. They also observed his eyes to be bloodshot or glazed; and they could detect in speaking to him a strong smell of alcohol on his breath. Finally, when they identified

themselves to him, ultimately he responded boisterously and with profanity.

The Administrative Law Judge was apparently using a criminal law standard rather than an administrative agency standard in reaching his determination as to whether or not the patron was actually or apparently intoxicated. This standard was also used as a basis by the attorney for the licensee in his written summation, when he cites cases involving motor vehicle violations. Thus, he speaks of a blood alcohol reading higher than .05% or in motor vehicle terms a presumption of sobriety or under the influence but not to a degree of an apparently or intoxicated person.

I find nothing in the record to support the Judge's statement with respect to the amount of blood alcohol which would amount to intoxication for motor vehicle purposes. Furthermore, this is not the type of fact of which the Judge may properly take "judicial notice". There is no definitive statement of McCarthy's physical height, weight, age, etc., or testimony with respect to a percentile relationship between the amount of alcohol consumed and the person's physical size or condition. Nor was there evidence produced to establish that the drinks contained only one ounce of gin. Finally, there was no testimony concerning any blood analysis.

The Judge made further findings as follows: "(6) That no balance or physical dexterity tests were administered to the patron." The short answer to this is that ABC agents do not have the statutory authority to make any physical dexterity or balance test on patrons. Their function is merely to observe actions of patrons to determine whether the licensee had violated the relevant regulation and any action in this Division would be preferred against the licensee and not against any patron. The other function of the agents with respect to patrons under ATRA will be described infra.

"(7) That the patron was not taken to his home nor to a detoxication center." Thus, the Judge concludes that the State Troopers and the ATRA personnel "were able to make a determination that the individual was not apparently or actually intoxicated and that a mistake had been made." The fact is that the agents repeatedly stated that under the ATRA program a person is taken either to a detoxication center or home. In this case McCarthy was taken to a Marina. There is nothing in the record to indicate that that was not McCarthy's residence at the time. One thing is clear - McCarthy was taken out of the tavern. If the State Police believed that McCarthy was not actually or apparently intoxicated as the Judge asserts that they did, they would have permitted him to return to the tavern. Obviously, he was not permitted to return and was driven by ATRA personnel, and was followed by his friends. The fact that McCarthy's friends drove him back to the bar after the ATRA unit left the scene is totally irrelevant.

"(10) That the agents had been to five other premises prior to arrival at the Partytime Inn and made no apprehensions at the other premises." What is implied there is that the agents either set up the licensee in this instance or simply testified falsely as to what occurred.

The record establishes, however, that these agents were part of a team operating under a pilot program sponsored under the Federal Alcohol Treatment and Rehabilitation Act. In its operation, there are several teams, each of which consist of 2 ABC Agents, 2 State Troopers and 2 ATRA personnel. The objective of this program is to save lives by preventing persons who are apparently or actually intoxicated from driving their own motor vehicles after they leave liquor licensed premises and becoming involved in motor vehicle accidents.

The ABC Agents enter certain specified premises upon specific assignment to observe whether or not any patrons there are actually or apparently intoxicated. If such persons are observed, the agents then identify themselves, escort that particular patron or patrons to the outside of the premises where they are met by State Troopers who inform them that they may be taken to a detoxication center or their home; but in no event are they permitted to enter into and operate their own motor vehicle. It is significant to emphasize that the condition of the said patron is confirmed by the State Police and ATRA personnel before he is delivered into their custody.

Since this program started, in September 1979, licensees have become more circumspect about sales to persons who are actually or apparently intoxicated, so that, in many instances, apparently intoxicated patrons are not found on licensed premises. During a period of 10 weeks, 203 licensed premises were checked, 35 licensees were found to have violated the regulation; and 45 patrons were detained and placed in the custody of ATRA personnel. Thus, it is clear that only a very small percentage of licensed premises have been found to be in violation of this regulation.

It would have been very simple for these agents to have closed their eyes to this patron's condition and left the premises. The fact that they did not do so reflects credit upon them. The agents affirmed that there is no pressure put on them to "make a case". To draw a negative inference from the fact that the agents had visited other premises, prior to their entry to the subject premises, without finding a violation is to reflect unfairly upon both the integrity and credibility of the ABC agents.

I, therefore, conclude that the findings and conclusions of the Administrative Law Judge are not supported by the record and the applicable law. Thus, having carefully examined the entire record herein, including the transcript of the testimony, the written

summations of counsel for the licensee and the Division, the Initial Decision below and the written exceptions to the Initial Decision, I reject the findings and conclusions of the Administrative Law Judge, and find that the charge against this establishment has been established by a fair preponderance of the credible evidence, indeed, by substantial evidence.

Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 B,H, 373 (1956). I shall, therefore, suspend the subject license for 25 days.

Accordingly, it is, on this 10th day of April, 1980,

ORDERED that Plenary Retail Consumption License No. 1506-33-007-001 issued by the Township Committee of the Township of Brick to Ken Lav Corporation, t/a Partytime Inn for premises 34-39 Ocean Highway, Brick Township, be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. on Thursday, April 24, 1980 and terminating 2:00 a.m. on Monday, May 19, 1980.

JOSEPH H. LERNER
DIRECTOR

In the Matter of:)

KEN LAV CORP., t/a PARTYTIME INN)

INITIAL DECISION

) OAL DKT. NO. A.B.C. 5133-79

Agency Dkt. No. 12450 H 7079-214

Appearances:

John J. Mulvihill, Esq.
attorney for Petitioner

Charles J. Mysak, Esq.
Deputy Attorney General

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violation by Petitioner of N.J.A.C. 13:2-23.1(b), the selling, serving, delivering and allowing, permitting and suffering the sale, service and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and allowing, permitting and suffering the consumption of an alcoholic beverage by such person in and upon a licensed premise.

Petitioner is the holder of Plenary Retail Consumption License No. 1506-33-007-001, located at 34-39 Ocean Highway, Brick Township, New Jersey. Said violation allegedly occurred on October 7, 1979 and an answer and plea of not guilty was entered on December 7, 1979 with the Director of the Division of Alcoholic Beverage Control. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The hearing was held on January 7, 1980 and the final papers were received from Respondent, State of New Jersey, on January 18, 1980 and from Petitioner on February 1, 1980

The issue of the hearing is whether or not on Sunday, October 7, 1979 Petitioner did sell, serve, deliver and allow, permit and suffer the sale, service, and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and allowed, permitted and suffered the consumption of an alcoholic beverage by such person in or upon their licensed premise.

The State called two witnesses, Inspector K.J. McN and Inspector R.L. who are connected with the New Jersey State Police Bureau of Alcoholic Beverage Enforcement.

Inspector K.J. McN testified that he had been with the agency for approximately nine years as an investigator and had recently been assigned to the A.T.R.A. program, which incorporated two troopers, two undercover investigators and two A.T.R.A. personnel. On the date in question of October 6 and 7, 1979 he had been, along with his partner, to approximately four other establishments and arrived at the Partytime Inn at approximately midnight. Upon arrival they entered the bar and sat towards the left front of the bar. Present was a barmaid, an organist, a host and approximately 10 patrons.

The purpose of the A.T.R.A. investigations were to visit various licensed establishments and make observations at said establishments for the sale of an alcoholic beverage to an intoxicated or apparently intoxicated individual. On the night in question, prior to arriving at the Partytime Inn, they had not observed any violations at the other establishments, but after being at the Partytime Inn for a short period of time their attention was drawn to a group of individuals, more particularly one male within that group, later identified as Kevin McCarthy, who appeared to be consuming Gin and Tonics at a rapid pace.

During the hour that Inspector J.K. McN was present he observed the individual order approximately four or five drinks. At one point Mr. McCarthy was observed to stand up and walk to the juke box and while so doing was observed to stagger and fall into a bar stool. Upon his return he again was seated at the bar, attempted to light a cigarette and had to use four matches to do so. Upon lighting his cigarette he was observed, while reaching for his drink, to knock same over, shout to the barmaid and order another drink. From where Inspector K.J. McN was seated he observed the patrons's eyes to be bloodshot, his face flushed and speech slurred.

Under cross-examination Inspector K.J. McN testified that he had previously cited other taverns for the same type of violation approximately four times in eight years. When questioned with regard to whether or not any physical dexterity tests were administered to Mr. McCarthy he admitted that none were given nor was the breath test. He stated that he ordered two shots of Scotch with a water chaser. He dumped the alcoholic beverages on the floor and his partner had a bottle of beer which he observed him to carry into the bathroom and pour same out.

When questioned with regard to what he actually observed when Mr. McCarthy was walking towards the juke box stated that he observed him to waiver to his left and stumble into a bar stool. He testified that it was not normal for individuals to knock over a drink but it was not an indication of intoxication. He also did not state what the effect of four Gin and Tonics consumed in one hour would have on an individual, but again reiterated that it was a combination of things that contributed to his forming the opinion that the individual was intoxicated.

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After all the observations were made the troopers were informed, as well as the A.T.R.A. personnel, Mr. McCarthy was approached and advised that he was being placed under immediate protective custody and would be driven from the premise. Mr. McCarthy became boisterous when informed that he could not have his drink after he had demanded to be reimbursed for same which request was denied.

The investigator testified that the drink was seized and poured into a brown bottle and sealed. Said brown bottle being stipulated to as containing Gin and Tonic.

He admitted that he received no special training to work with the A.T.R.A. program, had not been advised or familiarized with the protective custody procedure nor did he receive any instructions as to what characterized being intoxicated.

Under redirect examination the investigator admitted that the patron was reaching for his drink when it was knocked over and that no owner or employee of the Partytime Inn discussed the patron's condition with him.

Again under recross-examination he stated he did not fill out any reports as to his observations, no physical dexterity tests were administered and he was not aware of the purpose of such test. He was then asked if he felt if he was being pressured by his agency to make arrests, to which he responded "No". The officer did make a freudian slip in that he stated he drank two Scotches with water chasers and corrected it to state that he ordered two Scotches with water chasers.

Inspector R.L. testified that he was with the agency approximately five and one half years and had been assigned, along with Agent McN, to investigate the Partytime Inn to determine whether or not any violations with regard to serving intoxicated individuals were transpiring. He stated that they entered the establishment through a package store, up a few steps and into the bar.

At some point while seated at the bar his attention was drawn to one white male seated with a group of other individuals who appeared to be drinking his drinks at a "good pace". During the hour that he was present. and observing said individual, he counted approximately four or five drinks being ordered by him.

His observations of Mr. McCarthy were that he appeared to be mechanical in his movements and when he was able to hear him speaking, his speech appeared to be slurred. He also observed Mr. McCarthy to have difficulty lighting his cigarette and walking while going to the juke box. The patron knocked over the last drink he ordered, called the barmaid for another one, was served a Gin and Tonic and then proceeded to consume it.

Agent R.L. then went outside to the backup unit and returned. When he returned he spoke to Mr. McCarthy, who's speech appeared to be inaudible and slurred, his eyes glazed and who had difficulty comprehending the questions put to him by the agent.

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Under cross-examination Investigator R.L. admitted that this was only his second night out on an A.T.R.A. patrol and that he had received verbal and paper instructions as to what to look for in a potential A.T.R.A. candidate. He admitted that after the patron was placed in protective custody no physical dexterity tests were administered to him nor were they ever requested.

He made a determination that the patron was under the influence of an alcoholic beverage from observing the patron not to look at his friends when they were conversing with him, as well as the previously testified to observations. After Mr. McCarthy was placed into protective custody it was explained to him as well as to the barmaid and the owner of the bar what the purpose of A.T.R.A. was and the owner was advised that he would receive some sort of communication from the Director of the Division of Alcoholic Beverage Control.

Agent R.L. admitted to having ordered two 7 & 7's, served separately, of which he poured part of the Seagrams Seven on the floor and the remainder from the shot glass in the bathroom. He denied having anything to drink of an alcoholic nature on the evening in question.

The State rested its case and there was a motion by Petitioner's counsel for dismissal based on failure of the State to state a cause of action or efficiently define intoxication. The Petitioner relied on State v. Johnson, 42 N.J. 146 and State v. Emery, 27 N.J. 358. The decision was reserved with regard to the motion and Petitioner presented its case.

The Petitioner called three witnesses, Mary Ann Ferrante, barmaid, Jack D. Howell, manager, and Joseph P. Kenney, principal owner of the Partytime Inn.

Mary Ann Ferrante testified that she had been employed by the Partytime Inn as a bartender for the hours of 6:00 p.m. until closing. On the evening in question the patron, Mr. McCarthy, entered with two friends who she knew but she was not familiar with Mr. McCarthy. She admitted to serving Mr. McCarthy three or four Gin and Tonics. According to her memory the agents arrived at approximately 11:30 p.m., they were seated at the bar and she served them a drink. As far as she could determine there was nothing unusual about Mr. McCarthy's speech or appearance and she stated that she was at the other end of the bar when Mr. McCarthy knocked over his drink and called to her for assistance. She stated that at the time Mr. McCarthy called her the organist was playing and it was necessary for him to yell in order to be heard above the music.

She testified that she has flagged individuals in the past for too much to drink and saw no reason to flag Mr. McCarthy in that there was nothing about his speech or mannerisms that indicated he was intoxicated or apparently intoxicated.

As to the glasses that were heretofore described by the agents as being sunglasses, she described them more particularly as tinted glass or photoray lenses, which lighten when inside and darken when outside. She did not observe Mr. McCarthy when he walked to the juke box but recalled that the juke box was not operable on the night in question since the organist, when not playing, would provide taped music.

Under cross-examination she agreed that an individual who was swaying, loud, vulgar, cursing and had difficulty lighting his cigarette could be under the influence or apparently under the influence of intoxicating liquor.

She was then asked to describe the mannerisms of the agents. She stated that they appeared to be different from their normal patrons, they were not friendly or talkative. When observing Mr. McCarthy she noticed that he, on several occasions, had picked up his glass with no difficulty but had the tendency to talk with his hands. She felt that the patron might have knocked his glass over while talking with his hands but she did not see the actual knocking over of the glass.

According to her recollection it was shortly after the patron had knocked over his glass and reordered another drink when the troopers entered the premises and advised Mr. McCarthy that he was being placed in protective custody because he was intoxicated. It was the fourth drink that was knocked over which was partially consumed and the fifth drink was the replacement which was partially consumed when seized.

Mr. Howell testified that he was employed as the manager and had been so employed for one week prior to the incident. According to his testimony there were approximately five patrons on the premises and that he had observed Mr. McCarthy on several occasions, walked passed him and did not note anything about the patron's behavior as being unusual except the fact that he had knocked over his drink, called the barmaid, apologized to her for making a mess and his speech at that time was not noted to be slurred. The patron, when removed from the premises, walked out under his own power and was not observed to stumble or sway when doing so. After the patron left his two friends exited the premises.

In his opinion the patron was definitely not intoxicated and was aware of everything that was transpiring.

Under cross-examination he again reiterated that he was reasonably sure that the patron was not intoxicated and on the night in question.

According to his testimony the patron arrived approximately 11:00 p.m., and shortly thereafter the agents arrived. He did not know how many drinks the patron had but recalled speaking to him when he first entered. He stated that a person who is swaying, hands fumbling, speech slurred may or may not be under the influence of intoxicating liquor depending upon the circumstances.

Mr. Kenney, the principal owner of Partytime Inn, testified that he arrived between 7:00 and 9:00 p.m. and became cognizant of the patron's presence at approximately 11:15 p.m. He also recalled that the agents arrived at approximately 11:55 p.m. When the agents arrived the patron and two of his friends were the only persons present other than employees of the establishment. He testified that neither of the agents

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went to the mens room on the night in question. He also did not observe either of the agents to spill their drinks on the floor.

He noted that Inspector L. went into the parking lot at approximately 12:45 or 12:50 a.m. and that prior to going to the parking lot the patron in question had not done anything unusual. According to his testimony, Mr. McCarthy did not operate a motor vehicle on the night in question but rode with one of his friends whose name was Sullivan. In addition, approximately 15 minutes after Mr. McCarthy was led from his establishment he returned with his friends to pick up money he had left on the bar. Again he noted nothing wrong with regard to him, he was not swaying, his speech was not slurred and he was not intoxicated. He described the area where the patron was seated as having no lighting and stated that the walls are dark brown and the ceiling cork.

Under cross-examination he stated that he first observed the patron with a drink in front of him at approximately 11:15 p.m. and was positive in regard to that time in that he had just returned from closing the kitchen which he had went into at 11:00 p.m. In addition he was able to remember the time the agents arrived because he had just looked at his watch and had made a determination that at 12 midnight they were going to close the establishment.

Eugene S. Hennicke testified that he worked as an alcoholic beverage control inspector for 22 years and is retired at present. He has known the Petitioner since early 1940's and stated that the Petitioner has a good reputation in the community or honesty and integrity. He described the establishment as being a family type restaurant.

There was no cross-examination of that witness.

After having observed all the witnesses for both sides and having considered the entire record including the testimony and arguments of counsel, the Court makes the following findings of fact:

1. That Ken Lav, t/a Partytime Inn is the possessor of Plenary Retail Consumption License No. 1506-33-007-001 located at 34-39 Ocean Highway, Brick Township, New Jersey and was so owned on October 7, 1979.
2. That on October 7, 1979, two inspectors with the New Jersey State Police Division of Alcoholic Beverage Control, two state troopers and two ATRA agents were assigned to investigate the Partytime Inn.
3. That two investigators entered the premises at approximately 11:55 p.m. and observed a white male seated approximately 14 feet from them.
4. That the patron, Kevin McCarthy was observed to drink approximately four drinks in a one hour period of time, to stumble into a bar stool while walking, to use four matches to light a cigarette, to knock over a drink either when reaching for it or talking with his hands.

5. That Mr. McCarthy's speech was described as being slurred when heard by the agents.

6. That no balance or physical dexterity tests were administered to the patrons.

7. That the patron was not taken to his home nor to a detoxication center.

8. That the agents were confused as to what each of them were drinking.

9. That the bar area in which the patron, Mr. McCarthy, was seated was dimly lit, if lit at all.

10. That the agents had been to five other premises prior to arrival at the Partytime Inn and made no apprehensions at the other premises.

11. That the patron was heard to yell at the barmaid after knocking over his drink.

12. That the patron was observed to be served another Gin and Tonic after knocking over his previous drink.

The motion presented by counsel at the end of the State's case is denied for the following reasons. The State is only required to present a prima facie case and the court finds that they had done so at the time they rested. There was testimony from the two investigators that they observed the patron to consume approximately four or five drinks in a one hour period of time, to have slurred speech, bloodshot eyes, stagger and move mechanically. Given that testimony and with it being viewed in the most favorable light the court can only conclude at that juncture of the case that the State had met its burden and Petitioner must then move to rebutt same.

The owning of an alcoholic beverage license is a privilege and not a right, and should be protected as such. It is clear that the Appellant did make a sale of an alcoholic beverage to an individual on the date in question and that they did permit the consumption of said alcoholic beverage by the individual. The main question is whether or not there was sufficient evidence presented by the State to convince the Court that the individual was intoxicated or apparently intoxicated. In State v. Garrido, 60 N.J. Super. 505, 511, (App. Div. 1960) it was stated that "****whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skill, and is habitually and properly inquired into by witnesses who have occasion to see him and who's means of judging correctly must be submitted to the trier of facts****." The Court held in Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 504, 510 (1956) that the general accepted gauge of

administrative factual finality is whether the findings are supported by substantial evidence. Additionally in Frued v. Davis, 64 N.J. Super. 242, 247 (App. Div. 1960) "****as our highest court said almost a century ago, it is 'the constant established practice' to permit lay opinion evidence on the question of intoxication." Kastner v. Slicker, 33 N.J.L. 507. 509-510 (E&A 1969).

The evidence presented before the court is that two diverse tangents, the State on one side and the Petitioner on the other. It was a long evening for the agents involved in that they had been to five prior establishments before arriving at the Partytime Inn. At each establishment they followed the same procedure of ordering drinks, each ordering the same as previously, yet Agent McN was confused as to what Agent L had been drinking on the date in question. In addition there was a distinct difference in the number of patrons as testified to by the agents versus that of the establishment. The court additionally finds the testimony of the agents as incredible when they stated that they were able to overhear and detect Petitioner's voice as being slurred over the sounds of the organ music being played. The court in reviewing that testimony finds that it was not possible to hear Petitioner's voice nor was it possible for the agents to make the detection that Petitioner's eyes were bloodshot and glazed especially with him wearing tinted glasses.

Therefore the Court does not find the agents testimony with regard to those observations as credible. The court does not find that an individual who stumbles into a bar stool is necessarily intoxicated. In addition the court finds that an individual who had consumed approximately four shots of gin with tonic in an hours period of time would only have an approximate blood alcohol reading of slightly higher than .05%, or in motor vehicle terms, a presumption of sobriety or under the influence but not to the degree of apparently intoxicated or intoxicated.

The investigators were relying upon a totality of what they observed, that being the spilled glass of liquor, the inability to light a cigarette and the stumbling into a bar stool and the court finds that two agents gratuitously added the other factors without actually observing same or hearing same prior to their making this apprehension.

The court is not convinced that the individual in question, Mr. McCarthy, was apparently or actually intoxicated since one of the requirements of the ATRA program is to either take the individual home or to a detoxication center and in this particular instance neither was done. It leaves the court with the conclusion that after removing the individual from the premises the ATRA personnel as well as the State Troopers were able to make the determination that the individual was not apparently or actually intoxicated and that a mistake had been made. The court bases

its conclusion with regard to this on the facts that the patron returned to the bar within 15 minutes of having exited same and an admission by the agents that the patron was not taken either home or to a detoxication center.

Therefore, the COURT CONCLUDES that Mr. McCarthy was not apparently or actually intoxicated and a mistake was made on the part of the two agents who investigated this establishment. The court having concluded that there was an error or misjudgment on the part of the agents doesn't find that the establishment sold, serve or delivered, allowed, permitted, or suffered the sale, service or delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated or permitted, suffered the consumption of an alcoholic beverage by such person in or upon the licensed premises. Therefore, the court recommends that this matter and the charges against this establishment be DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

I HEREBY FILE with the Director, my Initial Decision in this matter and the record in these proceedings.

3. DISCIPLINARY PROCEEDINGS - SERVICE OF AN ALCOHOLIC BEVERAGE TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary
Proceedings against

Gladys V. and Thomas P. Regan
t/a Regan's Tavern
616 Cliffwood Avenue
Aberdeen Township
PO Cliffwood, NJ 07721

CONCLUSIONS

AND

ORDER

Holders of Plenary Retail Consumption
License No. 1330-33-011-001 issued
by the Township Council of the Township
of Aberdeen.

S-12,403

Licensee, Pro se.

Kenneth I. Nowack, Esq., Deputy Attorney General appearing for Division.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: March 14, 1980

Received: March 18, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by the licensees pursuant to N.J.A.C. 13:2-19.6.

In their exceptions, the licensees allege that the patron who was observed to be apparently or actually intoxicated was "never given any coordination test, and when he asked to take a breathalyzer test to prove his sobriety he was refused same."

The short answer to this is that ABC agents are not statutorily authorized to administer breathalyzer or balance tests to patrons. They are limited to making observations to determine whether the mannerisms, conduct, physical appearance and characteristics of the patron would lead them to conclude that the individual is apparently or actually intoxicated. Division of Alcoholic Beverage Control v. Zane, 99 NJ Super 196 (App. Div. 1968); State v. Guerrido 60 NJ Super. 505, 511 (App. Div. 1960). The authority of the ABC agents differs from that of a State Trooper who apprehends drunken drivers. That driver may be compelled to take a breathalyzer test, pursuant to the statute relating thereto.

I have analyzed the other exceptions, and find that they have either been identified and correctly resolved in the Initial Decision, or are lacking in merit.

Thus, having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Initial Decision, and the written Exceptions to the said Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge and adopt them as my conclusions herein. I find the licensees guilty as charged.

Accordingly, it is, on this 22nd day of April, 1980,

ORDERED that Plenary Retail Consumption License No. 1330-33-011-001 issued by the Township Council of the Township of Aberdeen to Gladys V. and Thomas P. Regan, t/a Regan's Tavern for premises 616 Cliffwood Avenue, Aberdeen Township, be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. on Friday, May 2, 1980 and terminating 2:00 a.m. on Monday, May 26, 1980.

JOSEPH H. LERNER
DIRECTOR

IN THE MATTER OF GLADYS)
AND THOMAS REGAN - T/A)
REGAN'S TAVERN)

INITIAL DECISION

OAL DKT. NO. ABC 0140-80
AGENCY DKT. NO. S-12,403

APPEARANCES:

Eugene Regan, Pro Se

Kenneth Nowak, Deputy Attorney General

BEFORE THE HONORABLE GERALD I. JARRET, A.L.J.:

This is a hearing concerning the alleged violation by Petitioner of N.J.A.C. 13:2-23.1(b) which provides that no licensee shall sell, serve, deliver or allow, permit, or suffer

the sale, service or delivery of any alcoholic beverage directly or indirectly to any person actually or apparently intoxicated or permit or suffer consumption of any alcoholic beverage by any such person in or upon the licensed premises. Petitioner is the holder of plenary retail consumption license No. 1330-33-011-001 for the premises located at 616 Cliffwood Avenue, Aberdeen Township, New Jersey. Said violation allegedly occurred on September 14, 1979. Petitioner was served with notice of the alleged violation on October 5, 1979 and an answer and plea of not guilty was filed with the Director of the Division of Alcoholic Beverage Control on October 15, 1979. The matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

A hearing was held on March 5, 1980. The issues of the hearing are whether or not on September 14, 1979, petitioner sold, served, delivered and allowed, permitted and suffered the sale, serves and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and/or allowed, permitted and suffered consumption of an alcoholic beverage by such person in or upon licensed premises.

The State presented two witnesses P.M. and G.B., inspectors with the Alcoholic Beverage Control, Division of State Police. Inspector P.M. testified that on September 14, 1979, he and his partner were on an ATRA patrol and as a result of same went to the tavern owned by Gladys and Thomas Regan t/a Regan's Tavern to make a determination as to whether or not said establishment was serving an alcoholic beverage to intoxicated individuals. They arrived at the premises at approximately 10:50 p.m. and entered same. While at the premises they ordered a soda each and seated themselves at a table. They were at the premises approximately 20 minutes observing a pool game when Michael DeRoche entered the premises, staggered to the bar, ordered two six packs of beer in a slurred speech, paid for same with a \$10 bill, received his change and staggered out. They followed the individual outside where he was stopped and they made the observations that he had red bloodshot eyes and an odor of alcohol on his breath. They advised him that in their opinion, he was under the influence of an alcoholic beverage and request the backup unit of State troopers and ATRA personnel.

The agents returned to the tavern, advised the bartender, Mr. Regan as to what had transpired, took the necessary information with regard to the premises license and left. Inspector G.B. testified that he went to the bar, entered and ordered a coke for himself and ginger ale for his partner and that while seated at a table in the establishment, he observed Mr. DeRoche enter, order two six packs of beer in a slurred speech, pay for same and leave the premises. He stated that he followed Mr. DeRoche out of the premises, stopped him, made the observations that he had bloodshot eyes and a strong odor of alcohol on his breath, seized the beer and turned him over to the ATRA personnel. The agent then introduced into evidence two six packs of beer marked R-1. He stated after seizing the beer, he reentered the premises, advised the bartender as to the purpose of their being

there, took the necessary license information and exited the premises.

Under cross-examination, he was asked whether or not he had ordered a shot of scotch in addition to the sodas and he stated no.

Mr. Regan testified that on September 14, 1979, there were approximately 15 people in the tavern when Mr. DeRoche entered and that he did not observe his entering. Mr. DeRoche removed the two six packs from the cooler which is near the door and placed them on the bar, along with money for same and never spoke to him at all. He stated that he did not have any opportunity to make any observations as to the patron's sobriety.

Under cross-examination, he stated that the two six packs of beer were placed on the bar and that he did not receive a ten dollar bill from Dr. DeRoche, but received a five to which he gave seventy cents change and Mr. DeRoche exited the premises.

Michael DeRoche testified that he was at home sleeping when a friend of his awoke him and requested that they go purchase some beer and return to the home and consume a few. He exited his premises, rode in the company of his friend, Mark Brennan to the Regans' bar, Mr. Brennan gave him \$5, he entered the premises took two six packs of beer from the cooler, placed same on the bar at which time Mr. Regan came over put the beer in a bag, gave him his change and he exited the premises. Upon exiting the premises, he was stopped by the two agents and then turned over to the State police, who advised him that he could not have the beer and he was to go home. He stated that he requested the breath alcohol test from the State police to determine his sobriety but was refused same and upon being refused left and went home.

All parties then rested their case.

After having observed all of the witnesses from both sides and considered the entire record including testimony and arguments of counsel, the court makes the following findings of facts:

1. Gladys and Thomas Regan t/a as Regan's Tavern are the possessor of plenary retail consumption license No. 1330-33-011-001, located at 616 Cliffwood Avenue, Aberdeen Township, New Jersey and it was so owned on September 14, 1979.
2. That on September 14, 1979, two inspectors of the New Jersey State Police, Division of Alcoholic Beverage Control, two State troopers and two ATRA agents were assigned to investigate the Regan's tavern.
3. That approximately 10:50 p.m. the two investigators entered the premises, were served drinks and seated themselves at a table.

4. That after approximately 20 minutes, they observed a white male, later identified as Michael DeRoche enter the premises, stagger to the bar, order two six packs of beer, received and paid for same and exited the bar staggering.
5. That upon being stopped outside, they observed that Mr. DeRoche's eyes were red and bloodshot and he had a strong odor of alcoholic beverage on his breath.
6. That both agents after making the heretofore stated observations arrived at the conclusion that the individual was intoxicated or apparently intoxicated.
7. That they reentered the premises, advised the bartender, Eugene Regan as to their observations and obtained the necessary documentary statements to present this matter to the Division of Alcoholic Beverage Control

The owning of an alcoholic beverage license is a privilege and not a right and should be protected as such. It is clear that the appellant did make the sale of an alcoholic beverage to an intoxicated or apparently intoxicated individual on the date in question. I have reached this decision based upon the following. In State v. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960) it was stated that

"...whether a man is sober or intoxicated is a matter of common observation, not requiring any specific knowledge or skills and is habitually and properly inquired into by witnesses who have had occasion to see him and whose means of judging correctly must be submitted to the trier of facts..."

The court held in Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 405, 510, (1956), that the generally accepted gauge of administrative factual finality is whether the findings are supported by substantial evidence. Additionally, in Freud v. Davis, 64 N.J. Super. 242, 247 (App. Div. 1960)

"...as a highest court said almost a century ago, it is 'the constant established practice' to permit lay opinion evidence in the question of intoxication." Kastner v. Slicker, 33 N.J.L. 507, 509-510 (E. & A. 1869)

Evidence presented before the court was that of an individual staggering to the bar, ordering two six packs of beer in slurred speech, receiving and paying for same and staggering out of the bar, as well as the observations outside of the bar that the individual had red bloodshot eyes and a strong odor of alcohol upon his breath. The argument

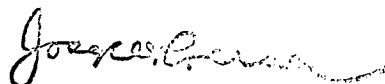
by Mr. Regan that the individual removed the two six packs of beer from the cooler and placed them on the bar, never spoke to him and therefore did not give him an opportunity to determine the sobriety of the individual, must fail since it is the duty and obligation of a bartender and owner of a liquor establishment to determine (1) whether or not an individual is or is not intoxicated (2) whether he is of age. The Bartender in this particular instance, failed to make the proper determination as to sobriety. Therefore the court based upon its conclusions, directs the Director of the Division of Alcoholic Beverage Control to impose a penalty of suspension of license for 25 days for violation of N.J.A.C. 13:2-23.1(b).

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

4. STATE LICENSES - NEW APPLICATION FILED.

Atlantic Wine & Liquor Imports Inc.
110 Hillside Avenue
Springfield, New Jersey
Application filed March 20, 1981
for plenary wholesale license.



Joseph H. Lerner
Director