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

January 16, 1981

BULLETIN 2384

TABLE OF CONTENTS

ITEM

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January 16, 1981

BULLETIN 2384

1. COURT DECISIONS - FACES, INC. v. WEST ORANGE - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2368-79

FACES, INC., t/a CREATION,

Appellant,

v.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE TOWN OF WEST ORANGE,

Respondent.

Submitted: April 15, 1980 - Decided May 7, 1980

Before Judges Crane, Milmed and King

On appeal from the Division of Alcoholic Beverage Control

Greenberg, Margolis and Ziegler, attorneys for appellant (Stephen N. Dratch, On the Brief)

John J. Degnan, Attorney General of New Jersey, attorney for respondent, New Jersey Division of Alcoholic Beverage Control (Kenneth I. Nowak, Deputy Attorney General, On the Brief).

Matthew J. Scola, attorney for respondent, Town of West Orange.

PER CURIAM

(Appeal from the Director's decision in Re: Faces, Inc. v. West Orange, Bulletin 2379, Item 1. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. COURT DECISIONS - RAYMOND J. BODLEY, INC. v. BOUND BROOK.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2178-79

RAYMOND J. BODLEY, INC.,

Plaintiff-Appellant,

v.

BOROUGH COUNCIL OF THE BOROUGH OF BOUND BROOK,

Defendant-Respondent.

Argued: June 30, 1980 - Decided July 15, 1980

Before Judges Botter, Morgan and Joelson

On appeal from final determination of the Administrative Agency of the Division of Alcoholic Beverage Control

Thomas C. Brown on the brief for the appellant

William Welaj on the brief for the appealee (Bissell, Welch & Welaj, attorneys)

PER CURIAM

(Appeal from the Director's decision in Re: Raymond J. Bodley, Inc. v. Bound Brook, Bulletin 2382, Item 1. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

3. DISCIPLINARY PROCEEDINGS - ALLOWED, PERMITTED AND SUFFERED ILLEGAL ACTIVITY (CONTROLLED DANGEROUS SUBSTANCES) UPON LICENSED PREMISES - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against

S.G.B., Inc.
t/a Carnegie Tavern
380 Carnegie Place
Union, New Jersey

Holder of Plenary Retail Consumption License No. 2019-33-055-001 issued by the Township Committee of Union Township (Union County)

S-12,277
X-44,385-E

CONCLUSIONS
AND
ORDER

Horowitz, Bross & Sinis, P.A., Esqs., by Robert H. Rich, Esq., Attorneys for Licensee.
Charles Mysak, Esq., Deputy Attorney General, for the Division.

Initial Decision Below

Hon. Joseph Rosa, Jr., Administrative Law Judge

Dated: January 17, 1980 - Received: January 21, 1980

BY THE DIRECTOR:

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

The licensee takes exception to Finding No. 3 of the Initial Decision which states that, on March 20, 1979 ABC Agents B & J conducted an undercover investigation of the premises to ascertain illegal narcotic activities being conducted at the premises. The licensee alleges that this was not a complete statement because the agents observed "no evidence of any narcotic activity" on this date.

The fact is, however, that the licensee is not charged with narcotic activity on that date. The charges relate to March 22, 1979 and March 30, 1979. Thus, this Exception lacks substance.

It is well-established normal Division procedure for ABC agents to be specifically assigned to investigate complaints of alleged unlawful activity in liquor licensed premises. The agents in the instant matter were so spec-

ifically assigned, and the fact that they did not observe any such activity on a particular day is totally irrelevant to the propriety of the allegations with respect to the dates alleged.

The licensee also takes exception to the finding of Fact No. 7 where he challenges the testimony that the bartender was able to overhear the statement made by the agent that "it is a nice count" or even that he understood what that meant.

However, this is disputed by the agents who stated that, after the purchase of narcotics was made from a black male (identified as Chris), Agent B returned to the bar and displayed the tinfoil package to the other agent. The agent displayed the tinfoil package in the presence of the barmaid and said it was "a good count." Furthermore, on March 30, 1979, Agent B called Jerry the bartender over and told him about the purchase and asked him if the seller was "OK." In reply, the bartender stated "I do not have anything to say, just be careful."

It is quite apparent, therefore, that the licensee's employee knew or should have known that narcotics were being sold in the premises and was apparently quite aware of the risks involved when he told the agent to be "careful."

As former Director Driscoll admonished:

> "Licensees may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees must use their eyes and ears, and use them effectively, to prevent the improper use of their premises."

Bilowith v. Board of Commissioners of Passaic, Bulletin 527, Item 3. I, therefore, reject this contention.

The next exception relates to the matter of alleged entrapment by the ABC agents. I believe that this issue was fully identified and correctly involved by the Administrative Law Judge in the Initial Decision. See State v. Dolce, 41 N.J. 422; State v. Dennis, 43 N.J. 418 (1964). For the most recent exposition of the definition and defense of entrapment, see State v. Molnar, 81 N.J. 475 (1980).

It is unnecessary to decide, in the matter sub judice, whether the defense of entrapment is a viable defense in administrative proceedings.

Finally, the licensee argues that it failed to call witnesses in its defense because in its opinion, there were no facts presented by the Agency which required rebuttal. It then further argues that even the Administrative Law Judge did not "properly invoke any adverse inference, as required by the case law."

In its Initial Decision, however, the Administrative Law Judge points out that neither the barmaid nor the licensee's principal officer and manager was called to testify with respect to "the incident and their understanding of the conversations of the statements made by the agents." He adds that "the failure to call witnesses who may have relevant testimony and who are available to testify creates an adverse inference; that is, if they are called they could not have truthfully contradicted the testimony of the opposing party's witnesses and their testimony would have been unfavorable to the licensee. Yacker v. Weiner, 109 N.J. Super. 351, Aff'd 114 N.J. Super 526 (App. Div. 1970); O'Neill v. Bilotta, 18 N.J. Super. 82 Aff'd 10 N.J. 308 (1952); Cf. State v. Clawans, 38 N.J. 162 (1962). I find this exception to be without merit.

I have reviewed the other matters raised in the exceptions and find they are equally lacking in merit.

Having considered the entire record herein, including the transcript of the testimony, the exhibits, the Initial Decision and the written exceptions filed thereto, on behalf of the licensee, I concur in the findings and recommendation of the Administrative Law Judge and adopt them as my conclusions herein. I, therefore, find the licensee guilty as charged.

Accordingly, it is, on this 28th day of February, 1980,

ORDERED that Plenary Retail Consumption License No. 2019-33-055-001 issued by the Township Committee of the Township of Union to S.G.B., Inc., t/a Carnegie Tavern for premises 380 Carnegie Place, Union be and the same is hereby suspended for thirty (30) days commencing at 2:00 a.m. on Monday, March 10, 1980 and terminating at 2:00 a.m., on Wednesday, April 9, 1980.

JOSEPH H. LERNER
DIRECTOR

APPENDIX

INITIAL DECISION BELOW

IN RE:) INITIAL DECISION

S.G.B., INC. t/a) **OAL. DKT. NO. ABC 4953-79**
CARNEGIE TAVERN

APPEARANCES:

Horowitz, Bross, & Sinins, P.A., Esq., by **Robert H. Rich, Esq.**, for Respondent, S.G.B., Inc.

John Degnan, Attorney General of the State of New Jersey, by **Charles Mysak**, for the Petitioner, Division of Alcoholic Beverage Control

BEFORE THE HONORABLE **JOSEPH ROSA, JR.**, A.L.J.:

Pursuant to N.J.S.A. 33:1-31, the Division of Alcoholic Beverage Control (hereinafter the Division) preferred charges against S.G.B., Inc., (a New Jersey corporation), t/a Carnegie Tavern, Union, New Jersey by notice dated June 14, 1979. The charges were that:

1. On March 22, 1979 and March 30, 1979, you allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance, viz., that on the aforesaid dates, you allowed, permitted and suffered offers to and arrangements with customers and patrons on your licensed premises to obtain, procure and distribute to the said customers and patrons controlled dangerous substance as defined by the New Jersey Controlled Dangerous Substances Act (N.J.S.A. 24:21-1 et seq.): in violation of NJAC 13:2-23.6.

On March 30, 1979, you allowed, permitted and suffered in and upon your licensed premises unlawful activity pertaining to controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substance Act (N.J.S.A. 24:21-1 et seq.); viz., you allowed, permitted and suffered the possession and distribution of marijuana and cocaine in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.5.

3. On March 22, 1979, you allowed, permitted and suffered unlawful activity pertaining to controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substances Act (N.J.S.A. 24:21-1 et seq.); viz., you allowed, permitted and suffered offers to and arrangements with customers and patrons on your licensed premises to obtain and procure and distribute to the said patrons and customers cocaine; in violation of N.J.A.C. 13:2-23.5.

By letter dated October 11, 1979, of Howard L. Kaplus, Esq., Respondent entered a plea of not guilty to the charges and requested that the matter be set down for a hearing. On November 1, 1979, 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. Hearing was scheduled to be heard for December 6, 1979 at the Office of Administrative Law, before Administrative Law Judge Joseph Rosa, Jr. At the hearing, pursuant to N.J.A.C. 13:2-19.6, all parties were given the opportunity to be heard and to cross-examine witnesses.

The relevant testimony was as follows:

Testifying initially on behalf of the Division was Agent B, a member of the New Jersey State Police, Alcoholic Beverage Division for the last two and a half years. He testified that : On March 20, 1979, he conducted an initial investigation of the premises which did not indicate any narcotics activity on the premises. On March 22, 1979, he again was assigned to investigate alleged narcotics traffic at the Carnegie Tavern located at 378 Carnegie Place, Union Township. He entered the premises at approximately 8:50 p.m. along with Agent J. They were dressed in a fashion so as to make them indistinguishable from any of the tavern's patrons. At the time of entry there were approximately 45 patrons in the premises. He went by the pinball machine where he was approached by a black male who said to him, "I heard you are looking for some coke."

Agent B said he was, and the black male told him he could procure it at a price of $85 per gram. Agent B agreed on the price and left the premises with the black male, who subsequently was identified as a Chris McDowell, and made the alleged purchase approximately one block away from the Carnegie Tavern. The purchase was given to Agent B in a small tin foil packet, which he put in his pocket, and then returned to the tavern. He and Agent J both sat at the bar and in the presence of the barmaid, Agent B told Agent J, while showing him the tin foil packet, that it was "a nice count." He felt the barmaid overheard this remark but she did not acknowledge it. Agent B then left the premises along with Agent J and performed a field test on the powdery white substance, contained in the tin foil packet, which test proved positive for cocaine.

On March 30, 1979 at approximately 12:35 p.m. Agent B, again with Agent J, re-entered the Carnegie Tavern. They ordered drinks from the bartender, a white male by the name of Jerry. At this time they were approached by a black male. Agent B asked him where he could get a "nickel" of marijuana. The black male said, "I have it." A sale then took place at the bar. Agent B then asked the black male for some "coke". At this time a second black male, by the name of Seleme, joined the conversation. The first black male was later identified as Al Leaks. Seleme said that he could get the "coke", but Agent B would have to wait. Agent B told him "Get me two spoons". Leaks and Seleme then left the tavern. Agent B called the bartender over to him and told him about the narcotics transaction, to which the bartender replied "I don't have anything to say, just be careful." A short time later, Leaks and Seleme returned and handed Agent B two tin foil packets of a substance alleged to be cocaine in return for which Agent B gave Seleme $40 in cash.

All the packets, were forwarded to the New Jersey State Police Laboratory for analysis. The first packet, from the March 22nd transaction, proved positive for cocaine (P-2 evidence): the second packet, the alleged marijuana, prove positive for marijuana, (P-4 evidence), and the two packets of alleged cocaine from the third sale, proved to be sugar.

Under cross-examination, Agent B stated that he used the term "count" in the presence of the barmaid as a colloquial term to indicate the weight of a narcotics transaction. He admitted that on the occasion of the first sale the seller did not have the cocaine on his presence but had to leave the tavern to obtain it. He didn't know if the seller would have sold the drugs to him, unless he, that is, Agent B had actively solicited

it. He recalled the barmaid lifting up her head when the conversation between him and conversation of Agent J came to the subject of "Coke". He further admitted that no employee at the Carnegie Tavern actively assisted making the narcotics transaction, and stated that by appearance of dress and activity he and Agent J were not readily distinguishable from any of the other patrons of the tavern on either occasion.

Under further cross-examination Agent B recounted the chain of custody with reference to the first narcotics transaction. He stated that when he and Agent J left the premises, he put the tin foil packet in an envelope which was placed in a briefcase in the trunk of his car on a Friday evening. That weekend, the briefcase remained in his residence. On Monday, March 26, the packet was brought into his office where the field test was performed. After the field test proved positive for cocaine, the packet was forwarded to the State Police Laboratory for final analysis. He readily admitted that he went to the Carnegie Tavern to actively solicit a purchase of narcotics and that on both occasions neither the barmaid or the bartender would have known of the purchase of narcotics unless they had been specifically informed of them by both Agent B and Agent J.

On redirect examination, Agent B stated that he was able to make the narcotics transaction after contacting only one person. He did not have to make any inquiries of any other patrons. On the second date in question, March 30, he again consummated a transaction by contacting only one person. He stated that the sellers on both occasions did not appear "surprised" at the request for narcotics.

Testifying next on behalf of the Division was Edward Zogheb, who is employed by the New Jersey State Police, North Regional Laboratory in Little Falls, for the past five years as a chemist. He testified that he did perform the chemical analysis on the first sample sent to him and it proved to be 1/50th of an ounce of cocaine.

The next witness on behalf of the Division was Monina Weijt, a forensic chemist for the New Jersey State Police for the last three years. She testified that she made the analysis on the second and third substances that were sent to her, one of which proved to be marijuana and the second of which proved to be a non-narcotic substance.

The next witness on behalf of the Division was Agent J, a member of the New Jersey State Police Alcoholic Beverage Division for the last three years. He testified that: On March 22, 1979, at 8:50 p.m., he had entered the Carnegie Tavern with Agent B.

After sitting a short while at the bar, Agent B went over to the pinball machine and had a conversation with an unidentified black male. Agent B returned to the bar and told Agent J that he had just made a deal to purchase some "coke", (for $85.00) from the black male whom he had identified as "Chris". Agent J recalled that at the time of the purchase, he and Agent B had been in the tavern for approximately 15 minutes. After the purchase was made, Agent B returned to the bar. He displayed the tin foil packet to Agent B in the presence of the barmaid and said that it was a "good count". After this brief conversation they left the tavern at approximately 9:20 p.m.

On March 30, 1979, he again entered the Carnegie Tavern, this time at approximately 12:35, with Agent B. When they entered there were approximately 10 to 15 patrons present in the tavern. A white male by the name of Jerry was behind the bar. A black male, later identified as Al Leaks, came up to them, while they were sitting at the bar. Agent B asked Leaks where he could get a "nickel bag of marijuana". Leaks replied that he had some on him, and a sale was made. This sale transpired within five to ten minutes after their initial entry into the tavern. Agent B then asked Leaks for some "coke". At this time another black male, later identified as Seleme, joined the conversation and said he could get the "coke". Seleme then left the tavern, allegedly to secure the "coke". After Seleme and Leaks left, Agent B called Jerry the bartender over and told him about the purchase, and asked him if the seller was "okay". In reply the bartender stated "I don't have anything to say, just be careful."

Under cross-examination, Agent J admitted that on the evening of the 22nd, the actual sale of the cocaine took place outside of the Tavern and that no employee of the tavern took part in the transaction. He further stated that in regard to the alleged incident of March 30th, he was not sure whether the bartender had heard the conversation between Seleme, himself, and Leaks.

The licensee did not call any witnesses on his own behalf.

After carefully reviewing all of the evidence and testimony and having observed the demeanor of the witnesses, **I FIND:**

1. Respondent S.G.B., Inc., is the holder of plenary retail consumption license No. 2019-33-055-001 issued by the Township Committee of the Township of Union.

2. S.G.B., Inc., is currently trading as the Carnegie Tavern located at 380 Carnegie Place in Union, New Jersey.

3. On March 20, 1979, Agent B and Agent J conducted an undercover investigation of the premises to ascertain possible illegal narcotics activities being conducted at the premises.

4. On March 22, 1979, Agent B and Agent J again conducted an undercover investigation at the Carnegie Tavern.

5. On March 22, 1979, Agent B was able to effectuate the purchase of a controlled dangerous substance,to wit: cocaine, at the Carnegie Tavern.

6. The sale transaction was initiated inside of the Carnegie Tavern, but the actual delivery of the substance was accomplished at a location outside of the Tavern.

7. After completing the purchase of the substance, outside of the Tavern, Agent B returned to the Tavern, sat at the bar next to Agent J and in the presence of an employee of the Carnegie Tavern held the substance in his hand and said "It was a nice count".

8. The purchase of the substance was made from a patron, and not an employee of the Carnegie Tavern.

9. The sale had been made after Agent J had approached one patron.

10 The substance purchased by Agent B on March 22nd was subsequently chemically analyzed and identified as the narcotic drug cocaine.

11. Agent J and Agent B again entered the Carnegie Tavern in an undercover capacity investigation on March 30, 1979.

12. On March 30, 1979, Agent J and Agent B again attempted to purchase narcotics at the Carnegie Tavern.

In the present case the Division must show initially that the:

(1) the licensee allowed, permitted and suffered certain conduct on its premises and

(2) that such conduct was of such a nature as to be a nuisance and/or unlawful activity.

Respondent has also raised the defense of entrapment to any conduct of his.

The sale of intoxicating liquor has traditionally been dealt with by legislation in an exceptional fashion. In legal significance, it is "sui generis" and subject to treatment not applied to other industries. Hudson, Bergen & Co., Assn. v. Hoboken, 135 N.J.L. 502 (E & A 1947); see also In Re Gutman, 21 N.J. Super. 579 (App. Div. 1952). The license itself is considered a "temporary permit or privilege" Mazza v. Cavicchia, Supra. It is, however

> "protected against arbitrary revocation, suspension or refusal to renew" The Boss Co., Inc. v. Board of Com'rs of Atlantic City, 40 N.J. 379, 384 (1963); see also Blanck v. Mayor & Borough Council, 38 N.J. 484, 489 (1962); N.J.S.A. 33:1-22; 33:1-31.

Even though the license is thus protected, it may be "carefully supervised" Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946), and because it is a business fraught with "danger to the community" Crowley v. Christensen, 137 U.S. 86, 92 (1890), conditions may be placed on it as will "limit to the utmost its evils". Crowley Supra at 92 See also: In Re 17 Club, Inc. 26 N.J. Super. 43 (App. Div. 1953).

With these principles in mind, the broad language contained in N.J.A.C. 13:2-23.5 and 13:2-23.6 has been adopted. They prohibit not only actual conduct by the licensee, but the allowance or sufferance of prohibited conduct. In the present case, there is uncontradicted testimony, by two agents, that two sales of narcotics were initiated in the licensed premises. The first transaction on March 22, 1979, resulted in the sale of a substance which proved to be a controlled dangerous substance (to wit: cocaine). The second transaction, on March 29, 1979, resulted in the sale of one substance which proved to be marijuana, and a substance which proved to be sugar. Although it is not unlawful to sell sugar, it certainly is unlawful to sell marijuana. This type of conduct has been held "contra bonos mores" and is an immoral activity. 279 Club v. Municipal Board of

13. On March 30, 1979 Agent B and Agent J were approached in the Carnegie Tavern by a patron and after a brief conversation, Agent B was able to purchase a quantity of a substance from him which later was chemically analyzed and proved to be the narcotic drug marijuana.

15. Agent B asked the patron who had sold him the marijuana if he could arrange the purchase of some cocaine.

16. A second patron approached Agent B and stated that he would be able to procure the cocaine.

17. The two alleged patrons left the premises to procure the cocaine.

18. Agent B told the bartender who at the time was identified as a man by the name of Jerry, and who was the owner of the premises, about the alleged purchase of cocaine.

19. In response to the agent's statement about the sale of the cocaine Jerry replied, "I don't have anything to say. Just be careful."

20. Shortly thereafter the two patrons returned and gave Agent J and Agent B a package containing a white substance which under chemical analysis later proved to be sugar.

In view of the foregoing, **I CONCLUDE** that Respondent has proven its case by a preponderance of the believable evidence.

Violations of Alcoholic Beverage Control Law may be criminally prosecuted, but are civil in nature. Guilt, therefore, need not be proved beyond a reasonable doubt but only by a preponderance of the believable evidence. Mazza v. Cavicchia, 28 N.J. Super. 280 (App. Div. 1953), rev'd on the grounds so N.J. 498 (1954); Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948).

Alcoholic Beverage Control of Newark, 73 N.J. Super. 15 (App. Div. 1962); In Re Schneider, 12 N.J. Super. 449 (App. Div. 1951). It is thus not dispositive that the second substance purchased on March 29, 1979 was sugar. The sale of the marijuana was in and of itself sufficient to be violative of the regulations on that date.

The Respondent also contends that neither the licensee or his agents participated in the sales, and once the transactions were made, there was little, if anything, the licensee could do about them. He further contends that the information he received regarding the sale was not based on any actual knowledge on his part but "mere suspicion" aroused from casual bar conversation with the agents, who at the time had not made their identities known. In some circumstances, regardless of knowledge, where the licensee fails to prevent a prohibited act on his premises, he may be charged with responsibility therefor. Cedar Restaurants & Cafe Co. v. Hock, 135 N.J.L. 156 (Sup. Ct. 1947); Galsworthy, Inc., v. Hock, 3 N.J. Super. 127 (App. Div. 1949). In the present case, it appears that narcotics were readily available on the premises. Under the circumstances, I CONCLUDE that the licensee knew, or should have known about this type of activity and should have taken steps to remedy it. There is no indication that he ever took any remedial action. After the fact of the second transaction was made known to him, all he did was say, "just be careful". There was not even a subsequent notification of the appropriate law enforcement authorities in an effort to prevent future such occurances. Such an action would have demonstrated a degree of good faith on the part of the licensee. This differs greatly from the conduct of the licenseee in Ishmal v. Div. of Alcoholic Beverage Control, 58 N.J. 347 (1971), relied on by the Respondent. There the licensee "seriously endeavored" to correct the "situation". In the instant matter, I FIND no similar effort on the part of the licensee.

I CONCLUDE that although the licensee did not take an active part in any of the transactions, they were done at his "sufferance". Sufferance has been defined as toleration; negative permission by not forbidding; or passive consent. Black's Law Dictionary, page 1284. The word "suffer", when taken in the context of an alcoholic beverage violation imposes a certain responsibility on a licensee. This responsibility is,

> "regardless of knowledge, where there is a failure to prevent the prohibitive conduct by those occupying the premises with his authority." Essex Holding Corp., v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947).

In such cases, the licensee is given the duty of taking such measures, as the circumstances of each particular case require, to prevent prohibited conduct on his licensed premises which arise out of the grant of the privilege of the general public to enter. Greenbrier, Inc., v. Hock, 14 N.J. Super. 39 (App. Div. 1951).

I CONCLUDE that the present matter is substantially similar to the holding in Benedetti v. Board of Commissioners of Trenton, 35 N.J. Super. 30 (App. Div. 1955). There in upholding the revocation of a plenary retail liquor distribution license, the Court held,

> "The appellant argues that in the absence of direct proof that he knew of, or consented to the charged activities upon the licensed premises, the evidence adduced at the hearing was insufficient to sustain the revocation of license. Rules 4 and 5, (the predecessors of N.J.A.C. 13:2-23.5 and N.J.A.C. 13:2-23.6), impose the responsibility upon the licensee not to allow, permit, or suffer, upon the premises, persons, or the character and acts of the nature above described, and such responsibility adheres regardless of knowledge where there is a failure to prevent the prohibited conduct by those in the premises with his authority. ...The charges are amply sustained by substantial evidence that the unlawful acts in fact occurred and that Benedetti (the licensee) knew, or should have known, about them and allowed them to continue." Benedetti v. Bd of Com'rs at 33, 34.

I CONCLUDE, therefore, that the proofs, and legitimate inferences which might be drawn therefrom, are sufficient to support a finding that the licensee suffered the prohibitive conduct. He knew or should have known what was going on but turned his back on it, and in so doing failed in his duty to take effective measures to prevent prohibited conduct by those occupying his premises, through the means provided to him. C.f. Guastamachio v. Brennan, 128 Conn. 356, 23 A. 2d 140 (Sup. Ct. of Error. Conn., 1941), cited in Greenbrier, Inc., v. Hock, Supra.

I similarly CONCLUDE that the Respondent's defense of entrapment is without merit. Initially, I can find no authority for the proposition that the defense of entrapment is available in an A.B.C. hearing. The Division has submitted for consideration the matter of Kiefer's Taver, Inc. (unpublished App. Div. Dkt. A-398-71), however, that matter specifically does not pass on the issue of whether or not the defense is maintainable in an

alleged ABC violation case. However, in the present matter, I still **FIND** and **CONCLUDE** there is no factual basis to support the defense even if it should be found that the defense is available in an A.B.C. violation hearing.

Entrapment is concerned only with the manufacturing of crime by law enforcement officials or their agents. State v. Dolce, 41 N.J. 422, 432 (1964), and see Lopez v. United States 373 U.S. 427, 434 (1963)

It has specifically been held in State v. Dennis, 43 N.J. 418 (1964), that

> "although the law does not tolerate traps for unwary innocence, it does not preclude traps for unwary criminals; thus, it does not prohibit police officials from affording opportunities or facilities for the commission of criminal offenses, nor does it bar them from using artifices and decoys in obtaining evidence against those engaged in criminal enterprises. Mere solicitation by officers posing as private citizens and resulting in ordinary sales between buyers and sellers repeatedly have been held not to give rise to any entrapment issues." State v. Dennis at 425; see also People v. Harris, 210 Cal. App. 2d 613, (D.C. App. 1963); People v. Rucker, 121 Cal. App 361, (D.C. App. 1932); and Lucadamo v. United States, 280 F. 653, 658 (2 car. 1922);

It is therefore clear that in the present matter, there has been no entrapment as defined in the foregoing precedent. The investigators did nothing beyond affording the patrons of the Carnegie Tavern opportunities for engaging in their illicit criminal activities.

It should also be noted that the best witnesses as to knowledge of the licensee and the barmaid would have been the licensee and the barmaid themselves. Neither, however, was called to the stand to testify as to the incident and their understanding of the conversations of the statements made by the agents. The failure to call witnesses who may have relevant testimony and who are available to testify creates an adverse inference: that is, if they are called they could not have truthfully contradicted the testimony of the opposing party's witnesses and their testimony would have been unfavorable to the licensee. Yacker v. Weiner, 109 N.J. Super. 351, Aff'd 114 N.J. Super 526, (App. Div. 1970); Hickman v. Pace, 82 N.J. Super. 43 App. Div. 1966; and O'Neill v. Bilotta, 18 N.J. Super. 82, aff'd 10 N.J. 308 (1952).

Since the Respondent-licensee did not produce these witnesses nor did they produce reasons for their non-appearance, it raises the inference that the licensee feared the exposure of such facts that would be testified to by these witnesses. C.f. State v. Clawans, 38 N.J. 162-170-171 (1962).

I therefore **CONCLUDE** that the Respondent in the present case was in violation of N.J.A.C. 13:2-23.5 and **CONCLUDE** that the charge of violation of N.J.A.C. 13:2-23.6 has merged with the violation of 13:2-23.5. I further **CONCLUDE** that the activity was continuous and therefore **FIND** the Respondent guilty of one continuous violation.

Having therefore found the licensee in violation of N.J.A.C. 13:2-23.5, it is hereby **ORDERED** that the plenary retail consumption license No. 2019-33-055-001, heretofore issued to S.G.B., Inc. t/a Carnegie Tavern by the Township Committee of the Township of Union, be and same hereby is **SUSPENDED** for a period of thirty (30) days commencing at a date to be fixed by the Director or in lieu thereof that the licensee be permitted to pay a fine in an amount to be fixed by the Director.

This recommended decision may be affirmed, modified or rejected by the head of agency, 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 head of the agency 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 Alcoholic Beverage Control, Joseph H. Lerner,** my Initial Decision in this matter and the record in these proceedings.

TRIAL EXHIBITS

P-1 Evidence	Request for examination of evidence dated March 28, 1979.
P-2 Evidence	Laboratory analysis of Edward Zogheb dated May 18, 1979.
P-3 Evidence	Transmittal for analysis dated April 2, 1979.
P-4 Evidence	Laboratory Analysis of Monina Wijt dated April 5, 1979.

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Joseph H. Lerner
Director