

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

BULLETIN 2265

September 8, 1977

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

BULLETIN 2265

September 8, 1977

1. ORDER OF DIRECTOR APPOINTING DESIGNEE TO CONDUCT INVESTIGATION.

| | | |
|------------------------------------|---|------------------------------|
| IN THE MATTER OF AN INVESTIGATION |) | |
| OF LICENSES ISSUED WITHIN THE CITY |) | ORDER APPOINTING DESIGNEE TO |
| OF ATLANTIC CITY |) | CONDUCT INVESTIGATION |

Pursuant to the authority contained in N.J.S.A. 33:1-35, I hereby designate to act on my behalf such Deputy Attorney General as may be assigned to assist the Division of Alcoholic Beverage Control in the investigation of licenses issued within the City of Atlantic City for the purpose of examining under oath such persons as I may hereinafter direct to give testimony or statements under oath or present documents and things for inspection.

Such designation shall take effect immediately and so remain until further order of the Director.

JOSEPH H. LERNER
DIRECTOR

DATED: August 12, 1977

2. APPELLATE DECISIONS - KILBRIDES FAST FREIGHT, INC. v. JERSEY CITY.

| | | |
|---|---|-------------|
| Kilbrides Fast Freight, Inc. |) | |
| t/a Kilbrides Pub, |) | |
| |) | |
| Appellant, |) | On Appeal |
| |) | |
| v. |) | CONCLUSIONS |
| |) | and |
| Municipal Board of Alcoholic |) | ORDER |
| Beverage Control of the City |) | |
| of Jersey City, |) | |
| |) | |
| Respondent. |) | |
| -----) | | |
| George R. Wiggs, Esq., Attorney for Appellant | | |
| Dennis L. McGill, Esq., by Bernard Abrams, Esq., Attorneys for Respondent | | |

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter, Board) which, by resolution dated November 19, 1976, suspended appellant's plenary retail consumption license, for premises 57 Sip Avenue, Jersey City, for five days for violation of the following municipal ordinance:

"Sec. 4-23. Identification card of licensee and employees required.

The A.B.C. Board shall furnish to the licensee and to every agent, bartender, waiter and other employee connected with or employed by the licensee, an identification card showing compliance with the provisions of this Chapter which shall be on file on the premises of the licensee so that it can be exhibited upon demand at any time. Such identification shall expire on June 30 of each year, at which time new photographs shall be submitted, if requested by the A.B.C. Board and the identification card holder shall pay a fee of Five Dollars (\$5.00) for each original issue and renewal.

(Ord. No. K-1299, § 14; Ord. No. K-1485; Ord. No. J-428, § 1, 6/4/74)."

Appellant, in its petition of appeal, alleges that the action of the board was (a) erroneous and arbitrary; (b) discriminatory, vague and in contravention of the State and Federal Constitutions.

The Board, in its answer, denies the substantive allegations of the petition, and adds that the "appellant is also in violation of Sec. 4-24 and 4-25 of the Jersey City Municipal Code," as set forth in its resolution of November 19, 1976.

As a separate defense, the Board asserts that "ample testimony was presented at the hearing to show that appellant failed to comply with the provisions of Sec. 4-23, 4-24 and 4-25 of the Jersey City Municipal Code."

Upon the filing of the appeal, an order was entered by the Director on December 15, 1976, staying the Board's order of suspension pending determination of this appeal.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded the parties to present evidence and cross-examine witnesses.

Sec. 4-24 and 4-25 of the Jersey City Municipal Code, referred to in the pleadings state as follows:

"Sec. 4-24. Plenary Retail Consumption License;
New employees.

No licensee shall engage any agent, bartender, waiter, or other employee in connection with the business of the licensee until or unless such person has conformed to the requirements of this Article.
(Ord. No. K-1299, § 15)

Sec. 4-25. Plenary Retail Consumption License;
change of employment; notification
to A.B.C. Board.

Every agent, bartender, waiter, or other employee of a licensee shall forthwith notify the A.B.C. Board of any change in employment, and any licensee employing any agent, bartender, waiter, or other person who is the holder of an identification card from the A.B.C. Board shall forthwith report to the Department, the employment of such person.
(Ord. No. K-1299, § 16)"

Joseph J. Faccione, Sr., Secretary to the Board testified that, pursuant to his duties he was present on May 9, 1976, at 2:55 a.m. at appellant's licensed premises.

He asked the person behind the bar, Thomas Shannon, to exhibit his identification card, as issued by the ABC Board of Jersey City. Shannon complied with the request. The card was valid in all respects except that it did not have Kilbrides license number endorsed upon it, but that of another licensee; an apparent violation of 4-25.

It would appear that in framing the charge against the licensee, the wrong section of the Municipal Code of the City of Jersey City was cited.

No evidence was introduced that the licensee was in violation of Section 4-23, as charged. On the contrary, the testimony of Faccone was that the bartender has a valid identification card for the current year.

In order to arrive at a fair determination of the proceedings which is disciplinary in nature, an examination of the charge upon which the finding of guilt is based is of critical importance.

A reading of the charge in the case sub judice indicates that the charge is not based upon an alleged violation of 4-23 but upon 4-25, and that the record is completely devoid of proof of guilt under the former section.

The Board, at some point, realized its error; but, instead of amending the charge or a voluntary dismissal, and recharging licensee under the proper section, chose to find it guilty of 4-23 stating in its resolution that in considering the charge it applied Sections 4-23, 4-24 and 4-25.

I find, as a fact, that by applying 4-24 and 4-25 to arrive at its conclusion of guilt, it found the licensee guilty of charges not contained within the original written charge preferred against it. A conviction must be based upon the specifications of the charge. Miraph Enterprises, Inc. v. Paterson, Bulletin 2235, Item 4.

In consequence of the failure of the Board to substantiate its action by the production of any evidence to sustain the specific charge alleged, I find that appellant has met its burden of establishing that the action of the Board was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15.

Accordingly, it is, recommended that the action of the Board be reversed, and the charge herein be dismissed.

Conclusions and Order

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

Having fully considered the entire record herein, including the transcript of testimony, exhibits, written summation, and memorandum of law of the parties, and the Hearer's report, I concur in the findings and the recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 26th day of April 1977,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

- 3. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - LICENSE SUSPENDED FOR 20 DAYS - FINE PERMITTED IN LIEU OF SUSPENSION.

In the Matter of Disciplinary Proceedings against
Harry M. Stevens, Inc. of N.J.
t/a Atlantic City Race Track
Atlantic City Race Track
Hamilton Township
P.O. Mays Landing, N.J.
Holder of Plenary Retail
Consumption License C-32, issued
by the Township Committee of the
Township of Hamilton.

CONCLUSIONS
AND
ORDER

George R. Wiggs, Esq., Attorney for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

The licensee pleaded "not guilty" to the following charge:

On July 3, 1976, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to persons under the age of eighteen (18) years, viz., Thomas D --, age 17 and Joseph M --, age 16 and allowed, permitted and suffered the consumption of alcoholic beverages by such persons in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20.

ABC Agent G testified that, in the company of Agents D and W, he visited the Atlantic City Race Track, on July 3, 1976, in the course of his investigative duties. They stationed themselves near the bar, located in the grandstand area on the first floor.

Soon thereafter, he observed two young-looking males; each consuming a can of Budweiser Beer. They were, for part of the time, accompanied by an adult, later identified as Joseph Calciano. Not having observed a sale, service and delivery of the beer to the youths, they were merely kept under surveillance.

A short time later, the adult, Calciano, was observed to purchase a can of Pabst Blue Ribbon Beer, pour the contents into a cup provided for that purpose, walk approximately 20 feet to where one of the youths, Tom D--, was standing, and give the beer container to him. Tom consumed the beer.

Agent G did not know whether or not the bartender, James W. Durfor, who had made the sale, observed this activity, as the general area was crowded, the bar busy and Calciano's back was towards the bar.

Approximately 20 minutes later, the other minor, Joseph M--, was observed going to the bar, he ordered, was given, paid for and took possession of a container of beer. The crowd had already left, and there were only two patrons in the bar area.

The agents then apprehended the two minors, the adult Calciano, and the bartender, Durfor.

The remainder of the container of Joseph's beer was poured into a sample bottle and sealed with an official strip seal, which was initialed by Durfor but was inadvertently dated "6/3/76" instead of "7/3/76". The seizure and sealing of a sample of the subject beverage is Division procedure, to enable the Division chemist to analyze its contents.

Agents D and W's testimony were corroborative of Agent G's, with nothing of significance added to materially alter the version testified to by Agent G. They specifically verified that the investigation and subsequent arrests which resulted in this charge, took place on July 3, 1976, not June 3, 1976, as was erroneously noted on the official strip seal used on the seized alcoholic sample.

The testimony further disclosed that the minors were questioned and provided certain information regarding their identity. This included their place and dates of birth, their respective father's names, mother's maiden names, status as students in Pennsylvania, their resident phone numbers, etc.

The evidence discloses that diligent efforts were made to obtain the presence of both minors at the hearing held herein, but to no avail; possibly due to the several adjournments requested by and granted to the licensee and perhaps, due to the snowy conditions which prevailed on the hearing date.

Since the minors were non-residents of New Jersey, the subpoenas ad testificandum lacked legal force.

The Division offered in evidence certified copies of the certificates of birth, issued by the Commonwealth of Pennsylvania, Department of Health and Vital Statistics which disclosed:

(1) Thomas Edward D--, male, son of Thomas D--, and Julia Warrington was born in Philadelphia on June 21, 1959, File No. 23795-R.

(2) Joseph Thomas M--, male, son of Joseph M--, and Rose Callsen was born in Philadelphia on July 6, 1959, File No. 25905R.

James W. Durfor, the bartender denied the sale. He testified that it was a holiday (July 4th) weekend and that the track was crowded. However, he always observes the patrons as they order alcoholic beverages to ascertain if they are minors, show signs of intoxication or are one of several known troublemakers whom they are not allowed to serve. These are firm instructions from his employer, and violation of these rules can result in dismissal. He has been employed by the corporate licensee for nine years, and avers he is diligent in the performance of his job.

Following the incident, Durfor was confronted with both of the minors involved. He expressed shock that they were even admitted into the track. He estimated one boy to be 11 years old and the other 15, although it was later ascertained that they were 16 and 17 years respectively. He insisted that it would have been impossible for him to make a judgmental error as to age regarding these boys; nor could he have forgotten their faces had he seen them.

Durfor was one of six bartenders assigned to staff that bar that evening. Despite the holiday crowd at the track that evening, the customer traffic ebbed and flowed. Between races it is very crowded; immediately prior to and during the race, the bar was, on occasion, virtually devoid of patrons, allowing the bartenders to leave their stations for coffee or cigarettes.

During the hearing, the licensee's attorney raised several objections, which I shall address myself to before considering the charge itself.

He objected to the introduction into evidence of the certified copies of the Certificates of Birth of both minors involved, to establish their age.

I find as a fact, that the minors were unavailable within the meaning of Rules 63(23) and 62(6) of the Rules of evidence.

The crucial issue to be determined is, therefore: May the age of the minors be legally established through the testimony of the Division agents, considering the alleged admissions to them by the minors, coupled with an official record of each minor's birth?

In order to arrive at a determination herein, reference is made to Rule 63(23) of the Rules of Evidence adopted by the New Jersey Legislature, N.J.S.A.2A:84A, et seq., which by order of the Supreme Court of New Jersey were made effective September 11, 1967, which reads as follows:

"STATEMENTS CONCERNING ONE'S FAMILY HISTORY A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, ancestry, relationship by blood or marriage, or other similar fact of his family history is admissible, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the declarant is unavailable as a witness."

Since the hearsay relates to declarations made by the alleged minors concerning their birth, I find that the declarations are admissible as an exception to the hearsay rule.

Thus, I find that the alleged minors were sixteen and seventeen years of age respectively, on the date alleged in the charge.

Next, he pointed to a small discrepancy that existed between the certificate of Birth of one minor and the agents "Minor Data Sheet" regarding the spelling of the minor's mother's maiden name. The name is so uncommon, and the difference in spelling so slight, that I find, as a fact, that this point is lacking merit. Similarly, I find as lacking merit the argument that the second minor's birth certificate indicates a middlename and the agents "Minor Data Sheet" does not, and is, therefore, inconclusive.

Finally, licensee's attorney objected to the admissibility of the sample of seized beverage and the Report of Chemical Analysis submitted by the Division Chemist stating that "Sample is an alcoholic beverage fit for beverage purposes." His grounds are two fold. (1) the inconsistency of dates (as described hereinbefore) and (2) the doctrine of Collateral estoppel based upon the fact that the local Municipal Court Judge refused to admit the sample of beer and Report of Chemical Analysis into evidence and found the bartender "not guilty" of the charge of violation of N.J.S.A.33:1-77 (sale of alcoholic beverages to a minor).

I find, as a fact, that the sample was seized as stated by the three ABC agents on "7/3/76"; not "6/3/76" as erroneously written on the official seal strip.

The doctrine of collateral estoppel is not applicable for the following reasons:

1. The Municipal Court hearing on the misdemeanor charge was criminal in nature; and ABC hearings are civil in nature, requiring proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super 242 (App.Div. 1960).
2. The parties are different. In the Municipal Court hearing, the defendant was the bartender, Durfor. In this hearing the respondent is the licensee, Harry M. Stevens, Inc.
3. The Attorney General may not appeal the Municipal Court decision if he feels that said decision was in error, whereas there is no such prohibition with regard to ABC Conclusions and Orders.

Having disposed of Appellant's legal objections I shall now consider the charges.

The sharp factual conflict presented by the testimony herein makes the issue of credibility of critical importance. Actions of this kind, which are civil in nature, require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, supra. Testimony, to be believed, must not only proceed from the mouths of credible witnesses, but must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet. 16 N.J.546, (1954).

I have had the opportunity to observe the demeanor of the witnesses as they testified at this plenary hearing and have been able to evaluate and assess such testimony. I am persuaded that the testimony of the three ABC agents is both credible and forthright and stands in a much more favorable light than that of the licensee's sole witness.

Durfor testified in a straightforward manner, however, I can only conclude that Durfor did serve the alcoholic beverage to the minor as observed by three agents trained to use their powers of observation, and who were specifically assigned to observe any infractions of the Alcoholic Beverage Law on the evening of July 3, 1976.

Durfor testified that the evening was a very busy one, due to the July 4th weekend crowds. Patrons surged in large numbers between races requiring speedy, yet efficient service, only to disappear during the race, allowing the employees a brief respite to recover from the obvious fatigue that must have affected them under the existing circumstances.

It is natural that all the employees, Durfor included, looked forward to the periodic lulls to relax for a few minutes before the next charge of patrons. The testimony indicates that the incident occurred towards the end of the evening when, no doubt, the hectic activity had taken its toll and Durfor was fatigued. It was probably at just such a moment that Joseph requested, and was served the alcoholic beverage as witnessed by the three agents.

Accordingly, after a careful evaluation and consideration of the testimony adduced herein, and the legal principles applicable thereto, I find that the Division has established the truth of the charge as pertains to Joseph M--, by a fair preponderance of the credible evidence and recommend that the licensee be adjudged guilty of this aspect of the charge.

Testimony discloses that insofar as the charge pertains to Thomas D--, the indirect sale, service and delivery of an alcoholic beverage to the said minor occurred during one of the hectic periods between races when everyone is clamoring for service. The minor did not accompany the adult to the bar when the adult ordered the beer. He remained 20 feet distant from the bar and, as testified to by the bartender, was not viewed by him.

The adult accepted delivery of the beer and poured it into a cup, whereupon he departed the bar. Up to this point, there occurred nothing whatsoever to alert the most prudent bartender that anything might be amiss, and required continuous observation. The bartender then did what he was hired

to do; he served the next customer. There existed no grounds for him to tarry and keep the customer under observation. He had no reason to believe that the adult would then take the beer, walk 20 feet to where the minor was standing, and deliver it to him for consumption.

From the testimony of the agents, it is doubtful that the bartender could have viewed the delivery even if, by chance, his eyes were upon the adult, as the adult's back was toward the bar, blocking possible observation of the transfer.

Consequently, I conclude that insofar as this charge pertaining to Thomas D--, has not been established by a preponderance of the believable evidence, and that it be dismissed; and I so recommend.

In reaching this conclusion, I am mindful of the holding in Essex Holding Corp. v. Hock, 136 N.J.L. 29 (Sup. Ct. 1947), relative to the expression "suffer" as used in the regulations and the responsibility it imposes on the licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct. However, I find the physical circumstances existing in this huge, open, grandstand area, with the masses of milling horserace enthusiasts so different from those that exist in a hotel ballroom as to distinguish subject case. This is not to be construed in any way as a lessening of the Division's continuing policy of strict enforcement of the cited regulation.

Accordingly, I recommend that the Corporate licensee be adjudged guilty of violating subject State regulation with regard to the direct sale to the minor, Joseph M--, aged 16.

Licensee has no prior chargeable record. It is further recommended that the license be suspended for twenty days.

CONCLUSIONS AND ORDER

No Exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report and arguments of counsel, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Upon receipt and consideration of the Hearer's report, the appellant, although filing no exceptions, notified the Division that if the recommendations of the Hearer are adopted by the Director, the appellant desires to make application for the imposition of a fine in lieu of suspension, in accordance with the provisions of N.J.S.A. 33:1-31.

I have favorably considered the application, and shall accept an offer, in compromise, by the licensee to pay a fine of \$8,000.00, in lieu of suspension of license.

Accordingly, it is, on this 14th day of April 1977,

ORDERED that the payment of an \$8,000.00 fine by the licensee be and the same is hereby accepted, in lieu of a suspension of license for twenty (20) days.

JOSEPH H. LERNER
DIRECTOR

- 4. DISCIPLINARY PROCEEDINGS - IMPROPER SALE OF ALCOHOLIC BEVERAGES BY LICENSEE AND AT LESS THAN FILED PRICE - SALE BY HOLDER OF SOLICITOR'S PERMIT EXCEPT FOR CASH - CHARGES AGAINST RETAIL LICENSEE DISMISSED - FINE IMPOSED AGAINST HOLDER OF SOLICITOR'S PERMIT.

In the Matter of Disciplinary Proceedings against)

Gem Liquor Store Corporation)
 t/a Gem Liquor Store)
 1737 Atlantic Avenue)
 Atlantic City, N.J.)

Holder of Plenary Retail Distribution License D-7, issued by the Board of Commissioners of the City of Atlantic City.)

In the Matter of Disciplinary Proceedings against)

Alvin Lippman)
 301 North Fredericksburg Avenue)
 Ventnor, N.J.)

Holder of Unlimited Solicitor's Permit No. 548, issued by the Director of the New Jersey Division of Alcoholic Beverage Control.)

CONCLUSIONS
AND
ORDER

Gary Mangel, Esq., Attorney for Licensee
 Harold I. Garber, Esq., Attorney for Permittee
 Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

The subject cases are inter-related, involve substantially common issues of fact, and thus, will be the subject of and consolidated in a single Hearer's report.

I.

In Case No. S-10,844, Gem Liquor Store Corporation pleaded "not guilty" to the following charges:

- "1. On December 22 and 30, 1975, you sold alcoholic beverages to the Place Bar, Inc. t/a Place Bar & Liquors, 9-15 North Indiana Avenue, Atlantic City, a retail licensee, not pursuant to and within the terms of your plenary retail distribution license; in violation of N.J.S.A. 33:1-12 (3)(a) and Rule 15 of State Regulation No. 20.

2. On December 22 and 30, 1975, you sold and offered for sale at retail, directly or indirectly, alcoholic beverages at less than the price thereof filed with the Director of the Division of Alcoholic Beverage Control, viz., on December 22, 1975, two (2) quarts of Canadian Club Whiskey and on December 30, 1975 one (1) case of quarts of Dewar's White Label Scotch Whiskey; in violation of Rule 5 of State Regulation No. 30."

In behalf of the Division, Burtram Underberg, holder of a plenary retail consumption license, testified as follows:

He was approached by Alvin Lippman during the summer of 1974, to purchase alcohol in a manner contrary to the laws and regulations of the State of New Jersey.

In essence, Underberg stated that Lippman offered to sell "off record" liquor. Underberg was to see Lippman's associate at a certain liquor store approximately one mile distant from his tavern where he could purchase alcoholic beverages for \$3.00 a case over wholesale. The advantage to the buyer was to avoid paying taxes on the beverages. Underberg did not avail himself of this illegal offer; nor did he report it to the local or state authorities.

In December 1975, Lippman repeated the offer, this time directing him to Gem Liquor Store which is forty feet distant from Underberg's tavern. Underberg then wrote the Division complaining of this illegal scheme.

On December 22, 1975, ABC Agent F, pursuant to assignment, interviewed Underberg. Underberg, sensing that Agent F was not entirely convinced of the claims he made, volunteered to purchase two bottles of whiskey from Gem in the manner described. Agent F waited in Underberg's windowless office while Underberg left to make the purchase. Within ten minutes Underberg returned with two quart bottles of Canadian Club for which he had a printed tape which indicated \$7.18 (twice) and .50 subtotaling \$14.86 and then .74 for a final total of \$15.60.

He testified that \$7.18 represents the wholesale price of a quart of Canadian Club, the .50 is the markup, and the .74 is the local tax on the sale. There is no identification on the slip. It is indistinguishable from a common cash register or adding machine tape. Agent F left without taking possession of the two bottles of whiskey.

As a result of Underberg's persistence, Agent F returned to Underberg's tavern on December 30, 1975. In order to keep the investigation alive, Underberg proposed to buy a case of Scotch whiskey. In Agent F's presence, he made a phone call, identified himself to the person of the other end and stated that he needed a case of Dewar's White Label Scotch Whiskey. After

completing the call he directed his porter to go to Gem and pick up a case of Dewar's, and give him \$120.00 cash. Agent F remained in Underberg's windowless office awaiting the porter's return. The porter returned in ten or fifteen minutes with a case of Dewar's White Label Scotch Whiskey and gave Underberg his change, plus a hand written receipt on a memo pad slip which reads:

| | | |
|----------|---|-------------|
| "Dewar's | Q | 97.31 |
| | | <u>3.00</u> |
| | | 100.31 |
| Tax | | <u>5.00</u> |
| | | 105.31 |

PAID."

There is nothing on the slip to identify to whom or by whom it was sold. Agent F departed the premises without taking possession of the case of Scotch Whiskey.

On cross examination, Underberg admitted that ill-will existed between Lippman and himself since Lippman threatened legal action in order to collect a \$100.00 debt. Lippman has not called upon Underberg to sell him whiskey since that time. He was asked the following questions:

"Q: Why did you wait a year and a half?
(to report the overture to sell illegally)

A: I was a bad citizen, and suddenly decided to turn good especially in view of the fact he's landing on my corner.

Q: So, now, we come to the second part in this case, Mr. Myron (principal stockholder of Gem Liquor Store Corp.), he's your major competition; isn't he?

A: Yes.

Q: Kind of nice if he closed down. Right?

A: Sure would."

ABC Agent F corroborated Underberg's testimony, adding that he did not request Underberg to make either purchase. He asserted that another ABC Agent had attempted, unsuccessfully, to purchase alcoholic beverages from Gem below the minimum retail price.

On cross examination, Agent F admitted not observing either purchase, but stated he assumed they were made at Gem, because he was told that by his informant, Underberg.

In order to sustain a finding of guilt under the charged offenses, it is essential that the sale of the alcoholic beverage, at less than the filed minimum price, be established. The evidence is totally lacking in this respect. It is obvious from the testimony of Agent F that he did not witness either purchase, nor was his undercover operative successful in making a similar purchase. Under the circumstances, I find the testimony of informer Underberg, unbelievable without corroboration from a more disinterested and reliable source.

Consequently, I conclude that the charges against Gem have not been established by a preponderance of the believable evidence, and that they be dismissed; and I so recommend.

II.

In Case S-10,841, Alvin Lippman pleaded "not guilty" to the following charges:

"1. On December 22 and 30, 1975, you knowingly aided and abetted Gem Liquor Store Corp., t/a Gem Liquor Store, 1737 Atlantic Avenue, Atlantic City, a retail licensee to sell alcoholic beverages to the Place Bar, Inc., t/a Place Bar & Liquors, another retail licensee not pursuant to and within the terms of the said Gem Liquor Store Corporation's plenary retail distribution license, contrary to N.J.S. 33:1-12(3) (a) and Rule 15 of State Regulation No. 20; in violation of N.J.S. 33:1-52.

2. On October 10 and 31, 1975 and November 21, 1975, you engaged in conduct which is prohibited by your employer, viz., that on the aforesaid dates you sold alcoholic beverages except for payment in cash on or before delivery to 2203 Atlantic Avenue Corp., t/a Lombardi's Lounge, 2203 Atlantic Avenue, Atlantic City, who at the time of delivery was listed on the Default List, contrary to Rule 4 (a) of State Regulation No. 39."

In as much as Gem Liquor Store Corporation had been adjudged "not guilty" of violation of N.J.S.A. 33:1-12 (3)(a) and Rule 15 of State Regulation No. 20, the charge against appellant Lippman of "knowingly aiding and abetting" Gem to violate said regulations must of necessity, fall; I therefore recommend that charge I be dismissed.

As an outgrowth of Underberg's accusations the Division carefully investigated Alvin Lippman's dealings with Gem, and other of his accounts. Charge No. 2 accuses him of selling alcoholic beverages, except for cash, on or before delivery, to 2203 Atlantic Avenue Corp., t/a Lombardi's Lounge at the time said account was listed on the Default List, contrary to Rule 4 (a) of State Regulation No. 39, on three separate occasions; October 10th, October 31st and November 21st, 1975.

Alcoholic Beverage Control Agent F's testimony that his examination of the records, (and documents entered into evidence) confirm the charge, that on October 10th, 1975 Lippman accepted an uncertified check in settlement of an invoice while the said licensee was on the Default List. Rule 4 (a) of State Regulation 39 states:

"No manufacturer or wholesaler shall sell or deliver any alcoholic beverages except for payment in cash on delivery to any retail licensee who is at the time of delivery listed on the Default List, and no retail licensee who is at the time listed on the Default List shall purchase or accept delivery of any alcoholic beverages except for payment in cash on delivery."

Rule 2 (c) of State Regulation 39 states that, although the term "Cash" includes a certified check, it does not include a check which is not certified. The appellant could offer no testimony that the check was in payment of another debt, as all documents relating to the Oct 10th sale refer to the invoice number of even date. I therefore, find as a fact, that Lippman is guilty of violating said state regulation with respect to the October 10th sale.

The sales of October 31st and November 21st were for cash but the Division alleges that the cash was not collected prior to delivery. This allegation is based upon the cash book of the Licensee in default (Lombardi) and upon the records of deposit made by Lippman to his employer's account.

After carefully considering the testimony adduced I find an absence of substantial credible evidence to support a finding of guilt relative to the October 31st and November 21st 1975 sales.

Accordingly, I recommend that the said solicitor, Alvin Lippman, be adjudged guilty of violating subject state regulation with regard to the October 10th sale, but not guilty with regard to the October 31st and November 21st, 1975 sales, and the charges relating to the later two dates be dismissed.

The usual penalty imposed by the Division in cases involving a solicitor's violation of Rule 4(a) of State Regulation No. 39 is a monetary fine of \$50.00, which I recommend.

CONCLUSIONS AND ORDER

No exceptions to the Hearer's Report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 20th day of April 1977,

ORDERED that the charges against Gem Liquor Store Corporation t/a Gem Liquor Store, 1737 Atlantic Avenue, Atlantic City, New Jersey, Plenary Retail Distribution License D-7, alleging violation of Rule 15 of State Regulation No. 20, and Rule 5 of State Regulation No. 30, have not been sustained, and the same be and are hereby dismissed; and it is further

ORDERED that the charges against Alvin Lippman, 301 North Fredericksburg Avenue, Ventor, New Jersey, holder of Unlimited Solicitor's Permit No. 548 issued by the Director of the Division of Alcoholic Beverage Control, alleging violation of Rule 15 of State Regulation No. 20, and Rule 4(a) of State Regulation No. 39, on October 31, 1975 and November 21, 1975, have not been sustained, and the same be and are hereby dismissed; and it is further

ORDERED that said solicitor, Alvin Lippman, be and is guilty of violation of Rule 4(a) of State Regulation No. 39, on October 10, 1975, and a monetary penalty of fifty (50) dollars be and the same is hereby imposed.

JOSEPH H. LERNER
DIRECTOR

5. STATE LICENSES - NEW APPLICATIONS FILED.

Yaffe Properties, Inc.

t/a The Soda Mart

13 Whitman Square Shopping Center

Black Horse Pike, Washington Twp.

PO Turnersville, New Jersey

Application filed September 1, 1977

for person-to-person and place-to-place

transfer of State Beverage Distributor's

License SBD-14 from Anthony J. Ciccio,

t/a New Milford Home Beverages, 26 E.

Madison Avenue, Dumont, New Jersey.

Frank B. Polito & Dorothy W. Polito

t/a Polito Vineyard

Medford Lakes Road, $\frac{1}{4}$ mile west of Route 206

Tabernacle Township, New Jersey

Application filed September 7, 1977

for limited winery license.



Joseph H. Lerner
Director