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

BULLETIN 2248

March 17, 1977

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ITEM

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

BULLETIN 2248 March 17, 1977

1. COURT DECISIONS - 482 JACKSON AVENUE CORPORATION v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISON
A-296-75

482 JACKSON AVENUE CORPORATION,

Appellant,

v.

DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Respondent.

Submitted January 3, 1977 - Decided January 25, 1977.

Before Judges Carton, Kole and Larner,

On appeal from Division of Alcoholic Beverage Control.

Messrs. Krivit, Miller & Galdieri, attorney for appellant (Mr. Spencer N. Miller, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent (Mr. David S. Piltzer, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

(Appeal from the Director's decision in Re 482 Jackson Avenue Corporation v. Division of Alcoholic Beverage Control, Bulletin 2211, Item 3. Director Affirmed. Opinion not approved for publication by the Court Committee on Opinions).

2. APPELLATE DECISIONS - MIDDLE EARTH, INC. v. CLIFTON.

Middle Earth, Inc., t/a Middle Earth,	]	
Appellant,	]	On Appeal
v.	]	CONCLUSIONS AND ORDER
Municipal Board of Alcoholic Beverage Control of the City of Clifton,	]	
Respondent.	]	

Robert E. Hamer, Esq., Attorney for Appellant
Arthur J. Sullivan, Jr., Esq., by Francis J. Calise, 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 Municipal Board of Alcoholic Beverage Control of the City of Clifton (Board) which, on December 10, 1975, suspended appellant's Plenary Retail Consumption License C-43, for premises 205 Ackerman Avenue, Clifton, for forty-five days, effective January 2, 1976, upon finding it guilty of a charge which alleged that, between September 6, 1975 and October 18, 1975, it allowed, permitted and suffered brawls, disturbances and unnecessary noise thereby suffering the licensed premises to become a nuisance; in violation of Rule 5 of State Regulation No. 20.

In its petition of appeal, appellant contends that the action of the Board was erroneous in that: (1) the Board refused to furnish appellant with names and statements of witnesses, thereby violating its constitutional right of due process; (2) the finding of guilt was based upon incompetent and insufficient evidence, and was "influenced by prejudice"; (3) that the conduct of the hearing was violative of basic principles of justice and fair play in that the prosecutor was also permitted to make legal rulings with respect to the admissibility of evidence; (4) the Resolution adopted by the Board was prepared prior to the hearing, thereby indicating that the Board had prejudged the matter; and (5) although specifically requested to do so, the Board's decision was not accompanied by a findings of fact upon which it was based.

The Board, in its answer, denied the substantive allegations contained in the petition of appeal.

At the de novo hearing on appeal herein, the parties agreed to rely upon the transcript of the proceedings held before the Board. This was supplemented by the joint submission of several exhibits, and by oral argument. Rules 6 and 8 of State Regulation No. 15.

I.

Prior to making a determination of the central issues, I shall discuss the several peripheral issues raised by appellant.

Appellant argues that its constitutional rights were abridged because it was not furnished with names and addresses of witnesses, copies of their statements and copies of police reports unless appellant purchased the reports from the Police Department, all in violation of the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq. The short answer to this contention is that proceedings brought by local issuing authorities to suspend or revoke a liquor license are governed by N.J.S.A. 33:1-31 and do not fall within the purview of the Administrative Procedure Act which applies solely to State Agencies. A local issuing authority is not a State agency.

In any event, the Board countered that, upon receiving such request from appellant, which is comparable to discovery proceedings, appellant was informed that discovery was available to him at the legal department in the Municipal Building between certain hours, and that the cost of reproducing any document would have to be borne by appellant.

Although there are no statutory or regulatory guidelines relating to discovery proceedings in the conduct of disciplinary proceedings instituted by local issuing authorities against a liquor licensee, it is my judgment that the Board acted fairly, properly and was not insensitive to the rights of a licensee; it may well be used as a practical guide to all local issuing authorities in similar proceedings. I am persuaded that the costs of reproduction should be borne by a licensee, and not by the municipality.

I reject appellant's argument to the effect that the hearing conducted by the Board was violative of the basic principles of justice for the reason that the prosecutor was permitted to make legal rulings on the evidence.

A disciplinary action is civil in nature, and not criminal, and is akin to an administrative proceeding. There is nothing in either the Alcoholic Beverage Law, N.J.S.A. 33:1-1, et seq., or the

Administrative Code which prohibits the legal officer presenting the evidence to a local Board from also advising the Board in the manner indicated herein. In any event, I find, upon reading the transcript herein, that the basic principles of justice were not violated. I have noted that, on several occasions, appellant's objections were sustained.

It was conceded that a resolution was prepared by the Board prior to the final disposition of the charge herein, as alleged by appellant. However, it is also apparent, as claimed by the Board, that the resolution provided for both "guilty" and "not guilty" findings to be filled in upon the Board's arrival at a determination. There was not a scintilla of evidence produced indicating that the Board had predetermined its decision herein. I, therefore, reject this contention.

Although the resolution adopted by the Board did not contain a findings of fact as alleged by appellant which would be preferred practice in all instances, it is apparent, from an examination of the joint exhibit in evidence pertaining thereto, that respondent did, subsequently, submit its findings of fact upon which it based its determination.

II.

I shall now consider the factual complex involved in arriving at a determination of the subject appeal.

The Board's attorney candidly conceded that items two through nine of the specification of charges (received in evidence as a joint exhibit) furnished to the appellant, involving alleged incidents between September 19, 1975 and October 18, 1975 were not sustained by the evidence. In view thereof we are concerned solely with the allegation that on September 6, 1975, licensee "caused or allowed to happen, an assault upon one Paul Pryor in and about the premises of your tavern; said assault resulting in injuries to Pryor and further police investigation." Therefore, I shall limit my consideration of the voluminous testimony with respect to the aforementioned charge.

The testimony highlights the fact that an inebriated person, Paul Pryor, attempted to gain entry into appellant's tavern on September 6, 1975.

Patrolman Christopher Kelly of the local police department testified that, on the night of September 6 he was dispatched to appellant's premises in order to investigate a fight. Upon arrival, he found Pryor bleeding from the mouth and observed "abrasions on his right side". At that time, Pryor was on the sidewalk directly in front of the door to the tavern. Pryor was agitated and "appeared to be drinking".

Officer Kelly's report of the incident contained a statement taken from Michael Grindall who, with Edward Petcelli, are the principals of the corporate appellant, which reads, as follows:

> "Pryor, who was inebriated had no proof, but insisted upon entering the bar. After a period of time, Pryor became belligerent and attacked Grindall."

Grindall further reported Pryor made it to the doorway where he punched Grindall. Pryor was taken to the hospital for treatment.

Grindall, who was on duty on the night of the alleged occurrence described the incident as follows:

> "Paul Pryor had come to the bar and he was trying to get into the door, and the proofer was having some trouble, because he wouldn't show any identification, because he had no identification. He was drunk, he was getting loud. We walked him outside once, he came back in he started pushing. We got him outside again, he came in again and then he started pushing and shoving and we got him outside and then he started to take a swing at Ed. He was pushing him, and Ed hit him and then later on we closed it up. Ed went back inside and the same thing happened all over again, he was pushing me, spitting blood at me, and that's when the police came."

He asserted that Pryor did not step inside the tavern that night. Later, the witness testified:

> "He might have at the most got his foot in the door. We have something posted at the door and that's--you know, we don't allow them passed the door. You know, depends what you want to call in the premises."

Grindall asserted that he struck Pryor in self-defense.

On cross examination, Edward Petcelli testified that both he and Grindall struck Pryor in self-defense. He explained:

> "Mr. Pryor tried to enter without any proof, and was inebriated at the time, and he was forcing his way into the bar and hitting us."

Petcelli further testified that he required stitches on his hand after striking Pryor in self-defense.

It is firmly settled that the Director's function on appeal is not to reverse the determination of the municipal issuing

authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way: Could the members of the Council as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Council. Cf. Hudson Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Newark, 55 N.J. 292, 303 (1970).

The critical inquiry is whether the licensee or its employees, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, has exercised that degree of care consistent with such obligation in keeping the premises free from disturbances, noise and acts of violence.

It is apparent that the critical issue presented for determination is factual.

In evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only, Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control, (App. Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

It is abundantly clear herein, that this is not the classic case of a sudden and unforeseen flare-up between two patrons which generally imposes no liability upon a licensee. In the matter sub judice, both principals of the corporate appellant asserted that Pryor was inebriated, unruly and combative. He was turned away from the licensed premises on more than one occasion. It was conceded that both principals inflicted physical punishment upon Pryor, albeit, they declared it was in self-defense.

The common sense rule should have been applied in this situation. They were well aware that Pryor was troublesome and, under the circumstances, they should have requested assistance from the police. Instead, they chose to allow the situation to

deteriorate into an escalted interpersonal altercation wherein Pryor sustained injuries resulting in blood being shed and subsequent hospital treatment required.

It is no answer for appellant to argue that the occurrence took place outside of the licensed premises, and, therefore, it is not legally responsible therefor.

Licensees are responsible for conditions both in and outside of the premises which are caused by patrons thereof. Seidel v. Upper Freehold, Bulletin 1246, Item 1; D'Ambola v. North Caldwell, Bulletin 1922, Item 1. The reason for the imposition of such a strict rule is that the liquor business is an exceptional one, and courts have always dealt with it exceptionally. See X-L Liquors v. Taylor, 17 N.J. 444 (1955); Mazza v. Cavicchia, 15 N.J. 498 (1954).

The Division's role in reviewing the findings below is to determine whether the findings made could have been reached reasonably on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity to judge their credibility.

I am satisfied, and find, from my study of the record in its totality, including the exhibits and the argument of counsel, that appellant has failed to establish that the action of the Board was erroneous, was an abuse of its discretion, and should be reversed. Rule 6 of State Regulation No. 20.

It is, accordingly, recommended that an order be entered affirming the Board's action, dismissing the appeal, vacating the order staying the suspension pending the determination of this appeal, and fixing the effective dates for the suspension of license heretofore imposed by the Board.

Conclusions and Order

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

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

Accordingly, it is, on this 2nd day of December 1976,

ORDERED that the action of the Board in finding appellant guilty of the charge herein be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated December 31, 1975, staying Board's action pending the determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-43, issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton to Middle Earth, Inc., t/a Middle Earth, for premises 205 Ackerman Avenue, Clifton, be and the same is hereby suspended for forty-five (45) days, commencing at 3:00 a.m. on Tuesday, December 14, 1976 and terminating at 3:00 a.m. on Friday, January 28, 1977.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - MIDDLE EARTH, INC. v. CLIFTON - AMENDED ORDER.

Middle Earth, Inc., t/a Middle Earth, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Clifton, Respondent.	On Appeal AMENDED ORDER

Robert E. Hamer, Esq., Attorney for Appellant
Arthur J. Sullivan, Jr., Esq., By Francis J. Calise, Esq., Attorneys for Respondent

BY THE DIRECTOR:

Conclusions and Order were entered herein on December 2, 1976 affirming the action of the respondent, Municipal Board of Alcoholic Beverage Control of the City of Clifton, dismissing the appeal, vacating the Director's Order dated December 31, 1975 staying the Board's action pending the determination of this appeal, and reimposing a suspension of forty-five days commencing on Tuesday, December 14, 1976.

It appears, however, that the action appealed from involved a suspension of ten days, rather than forty-five days. Thus, the forty-five days suspension set forth in the Conclusions and Order is inadvertent.

I shall, therefore, enter an Amended Order to reimpose a suspension of license consistent with that originally imposed by the respondent.

Accordingly, it is, on this 6th day of December 1976,

ORDERED that my Conclusions and Order dated December 2, 1976 be and the same is hereby amended in pertinent part as follows:

ORDERED that Plenary Retail Consumption License C-43, issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton to Middle Earth, Inc. t/a Middle Earth, for premises 205 Ackerman Avenue, Clifton, be and the same is hereby suspended for ten (10) days, commencing at 3:00 a.m. on Tuesday, December 14, 1976 and terminating at 3:00 a.m. on Friday, December 24, 1976.

JOSEPH H. LERNER
DIRECTOR

4. APPELLATE DECISIONS - TWO NICKS ET AL. v. JERSEY CITY ET AL.

Two Nicks, t/a Neptune Seafood Restuarant, Pantazis Excell Restaurant and Carl Ferrigno t/a Blue Point Tavern, Appellants, v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Robinson's Chop House, Inc., t/a Robinson's Restaurant, Respondents.	On Appeal CONCLUSIONS and ORDER

Louis Serterides, Esq., Attorney for Appellants
Dennis L. McGill, Esq., by Bernard Abrams, Esq., Attorneys for Respondent-Board
Schumann, Hession, Kennelly & Dorment, Esq., by Francis X. Kennelly, Esq., Attorneys for Respondent, Robinson's Chop House

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent, Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which adopted a resolution approving a place-to-place transfer of Plenary Retail Consumption License, C-10, issued to respondent Robinson's Chop House t/a Robinson's Restaurant (hereinafter Robinson's) from 2902 Kennedy Boulevard to 426-430 Summit Avenue, Jersey City. The petition of appeal filed herein further addresses itself to the grant of renewal of the Robinson license for the current licensing year.

That portion of the petition of appeal that alludes to the grant of renewal of the Robinson license must of necessity be disregarded as the action of the Board renewing the license occurred on March 16, 1976, more than thirty days from the renewal grant. Rule 3 of State Regulation No. 15. Thus the appeal will be considered only as a challenge to the Board's approval of the place-to-place transfer.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15 at which, the parties were permitted to introduce evidence and cross-examine witnesses. As most of the relevant facts were uncontroverted or stipulated, only the testimony of Carl Ferrigno, one of the appellants, was offered; and that was introduced apparently solely for the purpose of clarifying the reasons for appellant's objections, as well as to add an oral description of the area to which the license transfer is proposed.

Ferrigno, a licensee whose premises is less than three hundred feet from the subject proposed location, had serious doubts that Robinson's, which had secured transfer to the subject premises, could conceivably open a "restaurant" in the limited size building available. It was his belief that only another "barroom", of which there were already too many in the area, could be set up in the tiny building on the premises.

Apart from the usual objection by a competitor-licensee to a grant of a place-to-place transfer to a nearby location, appellants struck upon an apparent dichotomy of logic in the Board's approach to the subject approval. Three years earlier the Board denied an application for transfer to the subject premises (Jenkins et al v. Jersey City, Bulletin 2134, Item 3). Appellants contend that, in view of the Board's action a mere three years ago, there is no justification for a present approval.

From the oral description and sketches offered, it is apparent that the building in which Robinson's Restaurant is to be housed is the same building to which Jenkins had sought transfer three years ago. At that time the rejection of Jenkin's application revolved about the addition of the Jenkins license to another part of the City in which there was already a saturation of licenses, coupled with certain ecomonic restraints that Jenkins apparently could not overcome. It is to be noted, in that connection, that one of the grounds urged by Jenkins for reversal of the Board's judgement was the previous approval in the year prior to the transfer of Two Nicks Corp., the present appellant, (Cf. Two Nicks Corp. v. Jersey City, Bulletin 2099 Item 1).

The underlying principle involved herein, as in all matters involving the discretion of the issuing authority in the consideration of applications for transfers of plenary retail licenses is that such action is generally affirmed on appeal to the Director if reasonable and properly motivated. In short, the Director's function on appeal is not to substitute his personal judgement from that of the municipal issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his own personal view. Fanwood v. Rocco, 59 N.J. Super. 306 (App.Div.1960); Lyons Farms Tavern v. Newark, 55 N.J. 292 (1970).

In the instant matter, the Board articulated its decision to approve the transfer in a lengthly and well detailed exposition of its reasoning. By its resolution, it obviously came to grips with the conflicting values of the approval, and determined that those values expressed overcame the burdens.

Hence, unless the Board abused the discretion conferred upon it by the statute (N.J.S.A. 33:1-1 et sec) the Director will affirm. I find no abuse of such discretion and recommend affirmance. Blanck v. Magnolia, 38 N.J. 484 (1962).

II

Appellants further challenged the action of the Board in the area of public safety, in that there exists a large (1,000 gal.) fuel tank underground near one corner of the building. They further assert that a safety problem exists because of the proximity on the grounds containing the licensed premises, of a car wash. Other aspects to this multi-faceted parcel of property were also described as constituting a safety problem.

These same fears expressed before the Board were resolved by it in its resolution wherein it indicated that "Requirements have been met as to the aforesaid documents and Jersey City Municipal Code, Section 4-4 (b) necessary to effectuate the Transfer." In short, Code examination and enforcement is a concomitant part of the licensing process. This requirement has apparently been met.

III

Appellants raised the proximity of ten other licensed premises within an approximate five hundred foot radius as ample proof, that by the concentration of licensed premises there, the transfer should be denied. As the Board has recognized in Jenkins v. Jersey City, supra, a transfer from other parts of the city to that area would, indeed, add to the obviously over-saturation. However, in the instant matter, the respondent, Robinson's was long established in the area, and its presence there antedated the very presence of appellant, Two Nicks Corp. Hence the contention by appellants that the grant of transfer, within the area, to respondent Robinson's would increase the number of existing licenses there lacks merit. This is as particularily as applied to Robinson's a venerable restaurant which has operated at Journal Square for the past half-century.

In consequence of all of which, I find that the appellants have not sustained their burden of establishing that the action of the Board was erroneous and should be reversed, as required pursuant to Rule 6 of State Regulation No. 15.

Accordingly, it is recommended, as hereinabove stated, that the action of the Board be affirmed, and the appeal filed 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 carefully considered the entire matter herein, including the transcript of the testimony and the Hearer's Report I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 2nd day of December 1976

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Jersey City in approving the place-to-place transfer of Plenary Retail Consumption License of respondent, Robinson's Chop House t/a Robinson's Restaurant from 2902 Kennedy Boulevard to 526-430 Summit Avenue, Jersey City be and the same is hereby affirmed, and the appeal filed herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS) - LICENSE SUSPENDED FOR 90 DAYS.

In the Matter of Disciplinary Proceedings against:	
468 Market Street, Inc., t/a Casino Royale 468 Market Street Paterson, N. J.	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-239, issued by the Board of Alcoholic Beverage Control for the City of Paterson.	

David S. Piltzer, Esq. Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads "not guilty" to the following charges, dated February 26, 1976:

1. On October 21, November 1, and November 8, 1975 and January 9, 1976, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets in a lottery, commonly known as the "numbers game"; in violation of Rule 7 of State Regulation No. 20.

2. On October 21, November 1, and November 8, 1975 and January 9, 1976, you allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the "numbers game", to be sold and offered for sale in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20.

Following the entry of the plea, the licensee and the Attorney General's Office engaged in correspondence over a period of several months resulting in the licensee being granted several adjournments in order that he may obtain counsel to defend the license. On September 1, 1976, the Deputy Attorney General wrote:

"Gentlemen:

I am scheduled to present disciplinary proceedings against you at the Division of Alcoholic Beverage Control 25 Commerce Drive, Cranford, New Jersey, on Tuesday, September 7, 1976, at 9:30 A.M. It is noted in the file of this case that no attorney has entered an appearance on your behalf. Instead, you have entered a "not guilty" plea to the charges by way of your manager, Dorothy Tuck.

Please be advised that since you are a corporation only an Attorney at Law of this State may represent you at the hearing above scheduled. This means that neither your manager nor any of your officers or other employees may represent you at such hearing. Unless an Attorney appears on your behalf at the hearing, the case will proceed without your participation.

You are further advised that because of the number of postponements of past hearing dates at your request, this hearing has been set down peremptorily for September 7th. This means that no further postponements of the hearing will be granted.

If you or your Attorney have any questions concerning this matter, I may be reached at 201-648-2624."

The licensee appeared on the hearing date without a lawyer despite all reasonable opportunities having been afforded it to obtain counsel. The hearing was held ex parte in the presence of Vincent Vella, a major stockholder and manager of the corporate licensee.

In behalf of the Division ABC agent Mc gave the following account: On October 21, 1975, he entered the subject premises at 2:00 P.M. and ordered a drink. He observed two male patrons engaged in a conversation about number 158. One of them stated that he wanted to play it for $2.00 straight. One of the males identified as Johnny, removed a slip of white paper from his left sock and made a notation and took $2.00 from the patron.

The bartender, later identified as William Tuck, stated he too wished to play 158 for $1.00 straight. Johnny took $1.00 from Tuck, who thereafter removed a slip of paper from the cash register and said to Johnny "you can play 468, 818, 518 too, all for $1.00 each". Johnny made notations as Tuck read the numbers from his slip of paper.

Agent Mc then said, "give me 151 for $2.00 straight." Johnny made a notation and took the proffered two dollars. Tuck then assured agent Mc that he need not worry; if his number hit, Johnny would be there at noon the next day to pay him. Thereupon Johnny left; Agent Mc left soon after.

On October 28th, at about 3:00 P.M., Agent Mc returned to the tavern, and asked the bartender, Tuck, if he could place a numbers bet. Tuck replied he was delayed in opening that day, and he was sure it was too late to place a bet because Johnny did not visit the tavern this late in the day.

On November 1, 1975, Tuck informed Agent Mc that Johnny had already been there but would return. Tuck offered to take the bet and give it to Johnny. He was given the $2.00 for the bet on number 151, straight; and Tuck placed it in a pitcher behind the bar.

On November 8th, Tuck complained to Agent Mc that "....his number does not come out a winner and things were really rough." The witness replied that he was still going to play the same number (151) "no matter how long it takes." Tuck advised him to switch to another number. Tuck then opened the cash register, removed a small box from within which he extracted a slip of paper stating ".... these were the numbers I played yesterday none of which was a winner. The agent told Tuck to enter his $2.00 straight bet on number 151 and a 25 cent combination. Tuck reached to the back bar and obtained a piece of white paper and pen and made a notation of the bet stating he'd give it to Johnny, and collected the money. ABC Agent J, who had entered the bar with Mc witnessed the entire transaction and thereupon left. Agent Mc remained and saw Johnny enter the premises, whereupon Tuck removed the paper containing Agent Mc's bet and passed it to Johnny along with the money.

On January 9, 1976, Agents J & S, accompanied by Sgt. Salvatore Cossari of the Paterson Police Department went to the subject premises. Agent J and Sgt. Cossari remained outside at a point of observation. ABC Agent S entered with two previously marked $1.00 bills. He inquired of Tuck "Can I get my number in?" Tuck said "It was too late but maybe I could get it in next door." Agent S gave him $2.00 and stated he wished to play "444 and 823 straight" for $1.00 each. Tuck wrote the numbers down on a match book cover, and departed the premises. Agent J and Police Sgt. Cossari who were outside observed Tuck leave the bar and enter the grocery store, next door where he remained for a short time, and then returned to the bar. Upon reentering the bar Tuck informed Agent S that it was allright, he had placed the bets. Agent S thereupon left and advised Agent J and Police Sgt. Cossari, who were still outside, of what had transpired. All three entered the bar, identified themselves and informed Tuck of the violation.

A thorough search of the premises did not reveal either the match book cover or the marked two $1.00 bills. Tuck stated he gave the bet slip, and the two $1.00 bills to the grocer next door. A search of those premises revealed the two $1.00 bills but not the match book cover upon which the bets were noted. However, several other numbers slips were found in a potato chip bag.

The testimony of Agent J and of Sgt. Cossari was corrobarative of the testimony of Agent S with respect to the extent of their participation in the subject charges.

It is immaterial that no physical evidence of gambling was found in licensed premises. Re Schultz Realty Co., Bulletin 1780, Item 2.

Although the testimony of the agents is supported by no physical evidence of any kind other than the two marked one dollar bills, it is noted that it makes no difference whether the bets are committed to paper or memory; hence, it is not necessary to prove a tangible record was made. See, State v. Di Stasio, 49 N.J. 247, 253 (1967).

It is basic that in disciplinary proceedings, a licensee is fully accountable for any violations committed or permitted by his agents, servants or employees, Rule 33 of State Regulation No. 20. In Re Schneider,, 15 N.J. Super 449 (App.Div. 1951).

In adjudicating matters of this kind, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N. J. 373. (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div.1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control, not officially reported, reprinted in Bulletin 1491, Item 1.

After carefully considering all of the evidence adduced herein, and the legal principles applicable thereto, I conclude that the Division has proved its case by a fair preponderance of the credible evidence. I, therefore, recommend that the licensee be adjudged guilty of said charges.

The licensee has no prior adjudicated record of suspension of license. Hence, I further recommend that the license be suspended for 90 days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the attorney for Appellant pursuant to Rule 6 of State Regulation No. 15.

I have analyzed and assayed the said exceptions, and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit.

Thus, having carefully considered the entire record herein including the transcript of the testimony, the exhibits, the argument of counsel, the Hearer's report, and the exceptions filed thereto, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is on this 2nd day of December 1976

ORDERED that Plenary Retail Consumption License C-239, issued by the Board of Alcoholic Beverage Control for the City of Paterson, to 468 Market Street Inc., t/a Casino Royale, for premises 468 Market Street, Paterson, be and the same is hereby suspended for ninety (90) days, commencing at 3:00 A.M. Wednesday, December 15, 1976 and terminating at 3:00 A.M. Tuesday, March 15, 1977.

Joseph H. Lerner

JOSEPH H. LERNER
DIRECTOR