

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

BULLETIN 1814

September 19, 1968

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STATE OF NEW JERSEY
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1. NEW LEGISLATION - MUNICIPALITIES AUTHORIZED TO ACQUIRE AND RETIRE RETAIL CONSUMPTION LICENSES IN EXCESS OF STATE NUMERICAL LIMITATION LAW AND TO BORROW MONEY AND INCREASE LICENSE FEES TO FINANCE SUCH ACQUISITION.

On September 4, 1968, the Governor signed into law Assembly No. 540, which thereupon became Chapter 277 of the Laws of 1968, effective immediately. The new law reads as follows:

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The governing body of any municipality in which the number of existing alcoholic beverage retail consumption licenses exceeds one for each 2,000 of its population according to the latest Federal census, may by ordinance determine it is in the public interest to reduce the number of such licenses, authorize the acquisition and retirement by the municipality of licenses in excess of such limitation by contracts with licensees and appropriate funds therefor.
2. No such contract shall authorize payment to the licensee for transfer of the license to the municipality of a sum in excess of \$10,000.00 and no such contract shall result in the reduction in the number of retail consumption licenses to fewer than one for each 2,000 of the municipality's population, and no license so acquired by the municipality shall be reissued to any applicant.
3. Any ordinance authorizing the acquisition of licenses pursuant to this act may provide for an increase in the annual license fees for all retail consumption licenses in the municipality in an amount of not more than \$200.00 over and above the maximum fees fixed in accordance with section 33:1-12 of the Revised Statutes, which increase may be continued in force for each license year until the total revenue derived from such additional license fees in all years shall equal the total amount expended by the municipality to acquire and retire licenses pursuant to contracts authorized by ordinance adopted under this act. If in the final year in which the additional license fee authorized by this section is in effect, the total additional revenue derived in all years from such increases shall exceed the amount expended for acquisition of licenses and retirement of indebtedness incurred pursuant to section 4 of this act, such excess may be used for general municipal purposes.
4. Any municipality adopting an ordinance pursuant to this act may, by bond ordinance, incur indebtedness, borrow money and authorize and issue its negotiable obligations to finance the acquisition and retirement of licenses. Revenue derived from any additional annual license fee authorized by section 3 of this act shall be applied to the payment and retirement of any indebtedness incurred pursuant to this section.
5. No contract for acquisition of a license, authorized by an ordinance adopted pursuant to this act, may be entered into after January 1, 1974.
6. Nothing in this act shall affect the authority of a municipality to acquire and retire licenses pursuant to P.L. 1966, chapter 317.
7. This act shall take effect immediately."

Dated: September 17, 1968

JOSEPH M. KEEGAN
DIRECTOR

2. NEW LEGISLATION - REDUCTION IN QUANTITY OF ALCOHOLIC BEVERAGES IMPORTABLE INTO STATE FOR PERSONAL CONSUMPTION IN VEHICLES OF OTHER THAN TRANSPORTATION LICENSEES - AMENDMENT TO R.S. 33:1-2.

On September 9, 1968, the Governor signed into law Assembly No. 570, which thereupon became Chapter 298 of the Laws of 1968, effective October 9, 1968. The new law, in so far as it amends R.S. 33:1-2 of the Alcoholic Beverage Law, (deleted matter in brackets, new matter underscored) reads as follows:

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 33:1-2 of the Revised Statutes is amended to read as follows:

33:1-2. It shall be unlawful to manufacture, sell, possess with intent to sell, transport, warehouse, rectify, blend, treat, fortify, mix, process, bottle or distribute alcoholic beverages in this State, except pursuant to and within the terms of a license, or as otherwise expressly authorized, under this chapter; but any drink actually intended for immediate personal consumption may be mixed by any person; and alcoholic beverages intended in good faith to be used solely for personal consumption may be transported in any vehicle from a point within this State to the extent of, not exceeding 1/2 barrel, or 2 cases containing not in excess of 24 quarts in all, of beer, ale or porter, and 5 gallons of wine and 12 quarts of other alcoholic beverages within any consecutive period of 24 hours, and, by the owner thereof, in a vehicle other than that of the holder of a transportation license, from a point outside this State to the extent of, not exceeding 1/4 barrel or one case containing not in excess of 12 quarts in all, of beer, ale or porter, and one gallon of wine and [one gallon] 2 quarts of other alcoholic beverages within any consecutive period of 24 hours; provided, however, that except pursuant to and within the terms of a license or permit issued by the director, no person shall transport into this State or receive from without this State into this State, alcoholic beverages where the said alcoholic beverages are transported or received from a State which prohibits the transportation into that State of alcoholic beverages purchased or otherwise obtained in the State of New Jersey. If any person or persons desire to transport alcoholic beverages intended only for personal consumption in quantities in excess of those above-mentioned, an application may be made to the commissioner who may, upon being satisfied of the good faith of the applicant, and upon payment of a fee of \$5.00 issue a special permit limited by such conditions as the commissioner may impose, authorizing such transportation of alcoholic beverages in quantities in excess of those above-mentioned.

2. * * *

3. This act shall take effect 30 days after enactment."

JOSEPH M. KEEGAN
DIRECTOR

Dated: September 17, 1968

went over there and took our drinks and started conversation with them and bought them drinks."

Prior to this time they had not been acquainted with the two females, later identified as Maryann Tamburini and Joan Ward. A general conversation ensued. Edward left to go to the men's room. At this time an unidentified male came over to Maryann, conversed with her and pointed his fist at William. William said, "Don't wave your fist at me." William finished his drink, leaning against the wall. The distance between the stools at the bar and the wall was "about three feet, four feet." While William was still leaning against the wall, the unidentified male "got up and walked away."

Thereafter Peter Luisi (a brother-in-law of the licensee) came over, whispered to Maryann and walked around the bar to the area of the juke box where a group of males was standing. Peter Luisi came back with "seven or eight, maybe nine" males and surrounded William who was still leaning against the wall. Peter Luisi said something to the effect, "Get the hell out of here." William responded, "I am going to finish my drink... What is the reason for my getting put out? I wasn't giving you any trouble here... This is a public bar. I'm not bothering anybody." At this point, Edward returned and Peter Luisi declared, "You are flagged. Both of you are flagged." Edward put his glass on the bar and asked for a glass of beer. Peter Luisi said, "No. You are flagged, too." William said he wasn't going to leave. Peter Luisi said, "I'll call the police." William responded, "Call the police then." Police officers did enter the licensed premises within twenty minutes thereafter. In the meantime, the two females departed from that bar and proceeded to the back bar approximately thirty or forty feet distant. No other words were exchanged between Peter Luisi and either one of the Tituses until the police arrived. Peter Luisi left the group, walked out of the front door, returned shortly thereafter and said that he had called the police. William responded, "Good." Two local police officers entered, walked up to William's position and asked, "What is the trouble going on here?" William replied that he wanted an explanation as to why he and his cousin were being ejected. The police asked Peter Luisi as to why he wanted them out. Peter Luisi responded "I just want them out. They are trouble in here." Until this time, William had consumed two drinks. At the urging of the police he started walking towards the front door. One officer was walking with him to the right and to the front of him and the other officer was to his left. Edward was still positioned against the wall approximately ten or twelve feet distant. When he inquired of his cousin, the officers said, "Don't worry about your cousin. We are here now. They won't touch him." He then saw "a little club or blackjack twelve inches or eight inches in size" being passed along in the group of seven, eight or nine males he had seen in the area. He called out to the officers, "They are going to hurt my cousin." The officers responded, "No, no, we'll watch him." Upon the witness being questioned as to what he observed his cousin doing when he turned around, he responded, "Up against the wall with his head down like this. He was hitting him again. I guess again. His head was down. He must have been hit a first time before his head went down." Later he said that Peter Luisi struck his cousin with an instrument. He did not know what happened to the instrument. Edward fell forward away from the wall. His head did not

strike anything. The officers helped pick Edward off the floor and took him outside, spattered with blood.

On cross-examination the witness admitted that although he was "flagged" he did not want to leave because it was his impression that he was in a public place and he had a right to be served. He was angry because he was requested to leave and insisted upon being served. Despite being requested to leave by the police, he was still reluctant about leaving.

He testified that Peter Luisi struck him in the stomach, causing him to fall to the floor. The officer was there at the time of the occurrence. Later, when questioned as to where the police were at the time, he replied, "I don't know whether they were there or not. I'm not too sure."

Edward J. Titus confirmed the factual account given by his cousin to and including the recital of how they left their position at the bar and walked over to where the Misses Tamburini and Ward were seated and struck up a conversation with them. He didn't recall with which of the two females he conversed. Neither of the females requested the Tituses to leave them alone or to not to bother them. He did not molest either of the girls.

After an initial conversation, he left to go to the men's room. He was gone "at least five minutes, maybe ten minutes." Upon his return he observed his cousin William standing with his back to the wall surrounded by a "bunch of guys... at least a half dozen."

Peter Luisi came over and informed William that he was flagged. William said, "I'm not leaving. Tell me what I did." Peter Luisi said, "I want you out of here." William responded, "If you want me out call the police to come down and take me out." Peter Luisi walked away. Things calmed down. Edward proceeded through the group to the bar, found and consumed his drink. Peter Luisi returned and said, "The cops were coming." Edward pointed his finger at Peter Luisi and said, "I am his cousin. I am with him. The man is flagged?" Luisi responded, "Yes. You are flagged, too. Get out!" Edward heard a scuffle and then saw his cousin getting up from the floor. Immediately thereafter, he observed the police officers walking in. After the police officers, Peter Luisi and William conferred, the police officers led William to the front door. Peter Luisi followed and Edward left his position at the bar and followed alongside of Luisi. He heard Peter Luisi say, "We should have busted his head in for this." Edward grabbed Peter Luisi by the coat and said, "Leave him the hell alone." He was then struck on top of the back of head once. He was struck again "more on the left side." He thought he was struck by a "billy club." He did not know who struck him. The second blow caused him to fall to the floor on his hands and knees. He then felt himself "being grabbed and sort of pushed out the door, being taken out." At the time he was struck, he was approximately ten or fifteen feet from the door. Outside the tavern, when informed by his cousin that Luisi had struck him, he broke away from the police and grabbed hold of Peter Luisi again. He loosened his grip when the police intervened.

On cross-examination the witness admitted that he and his cousin attempted to "pick up" the two females. The females had given them no encouragement.

Elmer L. Henry, Jr., employed as a patrolman by the City of Orange, testified that while riding with patrolman Alfonso Juliano, he was dispatched to the vicinity of the licensed premises to investigate a complaint concerning an intoxicated person and "--- in the process of him turning around to back up Main Street we were stopped by Peter Luisi, one of the owners of the Derby Tavern, and he said he was having some trouble with two young men in the place and would we come in and give him some assistance. That is when we went inside."

Peter Luisi pointed out two males (identified as William Titus and Edward Titus) and said "he wanted these men out." Upon being questioned as to what happened when he approached the two Tituses, the witness replied, "Well, I asked them what was the trouble. They told me -- both of them told me they had been flagged, and they wanted to know the reason why. By 'flagged' they meant they would not serve them any more drinks. I told them 'the people don't want to serve you no more. There is enough taverns around here. You can go somewhere else and drink if they don't want to take your money'. In the process, we finally convinced them to come out peacefully." The Tituses did not appear to have been drinking to excess.

In leaving the tavern, William Titus led the procession. He was followed by Officer Juliano, Officer Henry and Edward Titus. At this point the questioning of the officer revealed the following:

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"Q. As you were walking out did anything happen?

A. Well, we were about -- I was about three feet from the door, and he turned around and started coming back, and he said, 'Officer, they are hitting my cousin.' When I turned around Edward Titus was on the ground, and he was bleeding profusely from a head wound.

Q. When you turned around did you see what had happened to Edward Titus? You said you saw him lying on the floor; is that right?

A. Yes.

Q. Did you see what caused that bleeding?

A. No, I did not.

Q. As you were walking out where was Peter Luisi?
If you know.

A. He was bringing up in the rear.

Q. Would he be behind Edward Titus?

A. Yes, sir.

Q. Do you know at that point whether there were any other employees of the Derby in back with Peter Luisi?

A. No, I don't know them that well down there."

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Q. At the time you turned around and saw Edward Titus on the floor what, if anything, did you do?

A. I picked him up and told Officer Juliano to escort the other Titus out, and I picked this fellow up and put my arms around him and took them both out to the radio car.

Q. Did you make any inquiry as to what had happened to him at that time?

A. No. We rushed him right to the hospital then."

On cross-examination, the officer reiterated that Peter Luisi flagged him and informed him that he wanted to eject

two males. When he entered, he observed one of the Tituses standing and the other seated. He did not see either one of them getting up from the floor. He denied hearing Luisi say, "We should have busted his head." He denied seeing Edward Titus grabbing Peter Luisi by the lapel of the coat and saying, "Leave him the hell alone."

Continuing, the officer denied that during the time that the group was outside the tavern, Edward Titus broke away from the officers and grabbed hold of Peter Luisi until the officers intervened.

Patrolman Alfonso Juliano substantially corroborated the testimony offered by Officer Henry.

On behalf of the appellant, Peter F. Luisi, who was employed to manage the licensed premises by the licensee (his sister-in-law), testified that he was on duty on the night in question. He was acquainted with Maryann Tamburini and Joan Ward who were seated at the bar.

While he was standing near the front of the premises approximately fifteen or twenty feet away from where the females were seated, Miss Tamburini approached him and explained that despite their protestations, William and Edward Titus had "bothered" them. He approached the Tituses, identified himself as the manager, stated he "had a couple of complaints" and said, "You had enough to drink, and I would like you to leave." In response, he received an obscene reply. Luisi turned to the bartender and said, "These two fellows are flagged. They are not to be served any more. They are leaving." Directing his attention to the Tituses, he said, "If you refuse to leave I will call the police." The reply was, "Go ahead." Luisi proceeded to the telephone booth, called police headquarters, again approached the Tituses, requested them to leave and informed them that he had called the police. When he returned to the area where the Tituses were positioned, he was accompanied by his brother Donald Luisi, and by Harry Beresny who was stationed at the front entrance. He denied that there were seven, eight or nine men with clenched fists surrounding the Tituses. Due to space limitation, that would not be possible. At Peter Luisi's request both females departed from the area. It was his opinion that the Tituses had enough to drink and shouldn't drink any more. Edward Titus never left the area to go to the men's room. The police arrived approximately ten minutes after he made his telephone call. In the meantime, the Tituses refused to leave, they said that they would rather wait for the police. Peter Luisi proceeded to the front door and at that time he saw two policemen arriving. After the policemen entered the tavern, he repeated his request to the Tituses that they should leave. William Titus said, "We are not leaving. We didn't do anything wrong, and we are going to stay here. If you put one hand on me I'll own this place."

For a time, the Tituses refused to heed the urging of one of the police officers to leave. At one point William Titus shoved into Peter Luisi, yelled, "He hit me! He hit me!" and laid on his back on the floor. Peter and Donald Luisi picked up William Titus and "grabbed legs and shoulders and carted him towards the front entrance." They were followed by the police officers and by Edward Titus. William Titus and the police officers had made their exit through the front door.

As the door was closing behind Edward Titus, he flung it open, rushed in, struck at Donald Luisi and then rushed at Peter Luisi pushing him against the foyer partition near the door and pinned him against the wall with both hands around his neck. Donald pulled Edward Titus away causing Edward Titus to strike his head against the door, fall down and then strike his head on the radiator along the wall near the door. Peter and Donald Luisi picked Titus up from the floor and escorted him out the door. While outside, Edward Titus broke away from the police officers and lunged at Peter Luisi pinning him against the door. The police officers interceded and brought him to the police car.

Finally, he testified that he saw no object approximately nine inches long, being passed along among seven, eight or nine persons. He did not see Edward Titus being struck on the head by a club. He had no knowledge of a billy club being kept on the premises.

Maryann Tamburini gave the following account: She and Joan Ward were seated at the bar when the Tituses (whom she had never met previously) came over and started talking to them. When asked to describe the condition they were in, the witness replied, "They were slurring their words and using -- I don't know, they just hung all over us, and I don't like the idea anybody acting that way with me." She approached Peter Luisi, who was standing near the telephone booth and requested of him, "Will you please ask these fellows to leave us alone?" Peter Luisi then approached the Tituses and requested them to leave. A discussion ensued. The Tituses refused to leave. Peter Luisi requested the females to leave that part of the bar. Thereafter, she saw the police officers enter the licensed premises. She was too far away to observe anything else. Neither of them accepted a drink from the Tituses.

John V. Sherlock testified that he entered the licensed premises on the night in question with his lady friend at 10:30 P.M. He and his lady friend sat near the door "maybe the 3rd or 4th seat from the end of the bar." The place was crowded. He heard loud talking "from just about the middle of the bar." He observed Peter Luisi enter the door with two police officers. More shouting ensued. William Titus was loud and obscene in the presence of the police officers. Suddenly, he lost sight of William Titus. The officers and two or three other persons obstructed his view. He then observed Donald and Peter Luisi half carrying, half dragging him out. They put him down and the officers took him out. Edward Titus walked out when suddenly the door flung open and he charged in, pushed Donald Luisi out of the way and grabbed Peter Luisi and "had him up against the partition." Donald Luisi pulled Edward back causing him to strike the edge of the partially open door and fall to the left near the front window. The police re-entered and took him out. He did not see Peter Luisi strike Edward with an object. He "saw no object as they mentioned."

On cross-examination, the witness testified that between "Peter Luisi and the two Titus boys, there were possibly two other people standing at the bar."

F. Donald Luisi, husband of the licensee, a co-manager at the licensed premises, testified that he was on duty on the night in question. He first noted the presence of the Tituses when his brother Peter informed him that he "had a problem on the other side of the bar" and was going to call the police. He took a position about six feet distant from the Tituses who at that time were behind the two females. Peter Luisi headed towards the telephone booth and upon his return informed the Tituses that he had called the police and questioned them concerning leaving the premises. They indicated that they wouldn't leave. Peter Luisi returned a second time with two police officers and again requested the Tituses to leave. Upon receiving a negative reply, the officers requested them to depart. William said, "I don't have to leave. You don't have any right to order me out," and fell to the floor. Donald and Peter Luisi dragged William to the front door followed by the police officers and by Edward. William Titus stood up and was assisted out the front door by the officers followed by Edward. Before the door closed fully it "popped up", Edward rushed in, pushed Donald Luisi and then put his hands around Peter Luisi's neck. Donald Luisi "yanked" at Edward Titus causing him to strike against the door and fall down to the floor. He doesn't know whether or not his head struck the radiator. Donald and Peter Luisi started to pick him up. The police officers re-entered the tavern and led him out of the door. No one connected with the establishment struck him over the head with an object. No item resembling a billy club was kept in the premises.

On cross-examination, the witness declared that William Titus was not struck prior to falling down.

I have detailed the testimony extensively because of the apparently conflicting versions presented by the Titus cousins on the one hand, by the group of witnesses who appeared in behalf of the licensee on the other hand and finally the testimony presented by the two local police officers.

The sole question to be determined, after considering the factual complex presented is: Did the licensee allow, permit or suffer brawls, acts of violence and disturbances upon the licensed premises in violation of Rule 5 of State Regulation No. 20?

In considering the instant case, I am of the opinion that the testimony of William and Edward Titus to the effect that they had been assaulted in the licensed premises was totally unsubstantiated and unreliable. I perceive that the licensee's employee acted reasonably and expeditiously in requesting the Tituses to leave the tavern and failing to accomplish that purpose he brought in local police officers to evict the unwanted patrons.

In Re Plaza Hotel-O'Leary, Bulletin 188, Item 9, the Commissioner ruled that a licensee has an absolute right to refuse to sell or serve liquor to anybody provided only that such refusal is not made on account of race, creed or color. He cited Re Dorflinger, Bulletin 136, Item 12, as follows:

"The reason for this is that tavern keepers, like all liquor licensees, have great responsibilities under the law...."

and further cited Re Rollka, Bulletin 142, Item 4:

"The licensee is Master of his tavern. He who is responsible for the conduct of it has the right to decide for himself what behavior he shall permit."

Wasserman and Goldberg v. Newark, Bulletin 1590, Item 1, is authority for the principle that in disciplinary proceedings a preponderance of the evidence is necessary to support and justify a finding of guilt and doubtful questions of fact must be resolved in appellant's favor. Club Zanzibar Corp. v. Paterson, Bulletin 1408, Item 1.

After carefully considering the testimony adduced at the present hearing, I find an absence of substantial legal evidence to support a finding of appellant's guilt.

In view of the fact that the factual findings in this case were not supported by substantial legal evidence, I conclude that respondent failed to sustain the burden of establishing the finding of guilt by a preponderance of the evidence and I therefore, recommend that the action of respondent be reversed and the charge be dismissed.

Conclusions and Order

No exceptions were taken to the Hearer's report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 6th day of August 1968,

ORDERED that the action of the respondent be and the same is hereby reversed and the charge be and the same is hereby dismissed.

JOSEPH M. KEEGAN
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)
)
 L. Kubisky, Inc.)
 t/a Club Polynesian)
 49-53 W. Broadway)
 Paterson, N. J.,)
 Holder of Plenary Retail Consumption License C-250, issued by the Board of Alcoholic Beverage Control for the City of Paterson.)
)

CONCLUSIONS AND ORDER

William J. Rosenberg, Esq., Attorney for Licensee
 Walter H. Cleaver, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On Friday, February 16, 1968, 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 twenty-one (21) years, viz., Oralee ---, age 19 and Evelyn ---, age 20, 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."

The Division presented testimony of the minors Oralee --- and Evelyn ---, in addition to the testimony of ABC Agent J, in support of the said charge.

Oralee testified that she was born on September 24, 1948, and was nineteen years of age on February 16, 1968. Accompanied by Evelyn she entered the licensed premises (described as a neighborhood tavern having a rear room for music and dancing) on February 16, 1968, at 10 p.m. While both females were seated at the bar, an unidentified male asked them whether or not they wanted a drink. Oralee responded "no". The male said, "You can take it and drink it later." The male ordered champale (admittedly an alcoholic beverage) for Oralee and her companion. The bartender placed a bottle of champale and a glass in front of Oralee. She did not remember whether or not the bartender poured the champale into the glass. She did not pour the champale into the glass. The bartender did not question her as to her age. She did not consume any of the champale. On cross examination the witness further stated that she had patronized the licensed premises almost weekly for a year prior to February 1968 to listen to the music. She never consumed any alcoholic beverages or any other beverages while in the premises. On the occasion of her first visit, at the

request of Louis Kubisky (secretary of the corporate licensee and who served as manager of the licensed premises) for proof of her age she showed him a birth certificate (not hers) which indicated that she was twenty-one years of age. At Kubisky's request she signed a paper. She was not aware of the contents of the paper that she signed. She did not recall whether or not the champale was placed in front of her or in front of the male who had ordered the drink. Approximately five minutes thereafter she was questioned by the ABC agents.

Evelyn testified that she was twenty years of age. On February 16, 1968, at "10 o'clock or 10:30", she accompanied the previous witness in patronizing the licensed premises. She had visited the licensed premises "many times" previous to the night in question.

After testifying that an unidentified male asked them "if we would like to have a drink", to which she responded "no", her testimony proceeded thusly:

- "Q What was his reply to that?
A He said he was going to order and maybe we would like to drink it later.
Q What did he order for you?
A Champale.
Q Were you served a glass?
A A glass, yes.
Q And a bottle?
A Yes.
Q Did the bartender pour the drink from the bottle into the glass?
A I don't remember whether the bartender poured it."

She identified the bartender as Booker Cauthen.

Prior to being served, she was not questioned as to her age. However, she was questioned as to her age on a prior visit and she displayed a birth certificate (not hers) to Kubisky indicating that she was twenty-one years of age. Additionally, she signed a "small piece of paper stating I was twenty-one." She did not consume any of the beverage.

ABC agent J testified that, accompanied by agent B, he entered the licensed premises on Friday, February 16, 1968, at approximately 9:30 p.m., pursuant to specific assignment to investigate a complaint that minors were being sold alcoholic beverages. They "took seats at the bar in the front of the premises." He identified Booker T. Cauthen as one of the two bartenders on duty.

At approximately 9:50 p.m. he observed Oralee and Evelyn entering the licensed premises and sit at the bar. They appeared to be under twenty-one years of age. They did not order drinks. At approximately 10:20 p.m. he observed a male (identified as William Wilson) enter the premises and converse with Cauthen. The bartender then placed a shot glass in front of Wilson, a champagne glass and a bottle of champale in front of the minors Oralee and Evelyn. He then poured a portion of champale in each glass and a shot of whiskey for Wilson. Wilson paid for the drinks. The females were observed consuming their drinks. Approximately five

minutes thereafter, agents J and B identified themselves to the minors and to Kubisky.

On cross examination the agent admitted that the females did not drink between 9:50 to 10:20 p.m., had nothing in front of them during that period of time, and he did not hear what Wilson had ordered from the bartender. The females commenced to consume the drinks immediately after service thereof.

It was stipulated that agent B's testimony would be the same as the testimony offered by J, both on direct and on cross examination.

In defense of the charge Booker T. Cauthen, who was employed as a bartender by the licensee corporation, testified that he was on duty on the date alleged in the charge and that he recalled Oralee and Evelyn entered the licensed premises at 9:30 p.m. or shortly thereafter and sat at the bar. He asked the females as to whether they wanted a "coke" on two occasions. They responded, "no". An unidentified male (who positioned himself to the left of the females) ordered "Miller High Life, two Champale, VO and soda, I think it was." He placed these drinks in front of the male. Later he testified as follows:

- "Q Where were those two women in relation to the man who ordered the drinks?
 A When I served him I think he went to the bathroom. I was looking for him to come back. He was standing between them. That is where I placed the drinks.
 Q Just answer my question. Where did you serve these drinks?
 A In front of him.
 * * * *
 Q After you placed those drinks in front of the man do you know what the man did with those drinks?
 A No."

When informed by agent J that he had served two minors (referring to Oralee and Evelyn), he informed the agent that "we had signed statements they were about 23." J did not ask for copies of the statements. He had been acquainted with the two females approximately six or seven months prior to February 16. At that time he was of the impression that they were nineteen or twenty years of age. He therefore called Kubisky and Kubisky refused them admittance because they lacked proof of age. Two weeks later they returned and produced proof of age. Kubisky said, "make them sign the small form we have." The females signed a statement that they were twenty-one years of age. The statement was witnessed by the bartender, and a person "supposed to be a brother" witnessed it. He doesn't recall the names used by the females. The females also produced birth certificates (bearing the same names that they had used in signing the statements) which indicated that they were over twenty-one years of age. Finally the witness testified as follows:

"Q During that interval of time from about six months ago when they first came in to February 16, 1968 did you ever serve those girls any alcoholic beverages?

A No, I didn't serve them. They usually drank Coke or just sat there."

On cross examination the witness testified that he was present on the night that the females signed the statements. At that time they had birth certificates with them. The statements read, "I am twenty-one years old." He looked at the birth certificates; however, he didn't remember the names. He admitted that the females appeared to be minors when he first saw them, and they still appeared to be minors on the day of the hearing, that is, on April 29, 1968.

Upon confrontation by the agents, he informed the agents that the females signed statements that they were twenty-three years of age. He did not recall the names the females used in signing the statements, nor did he recall the names on the birth certificates.

Louis Kubisky, Jr. testified that he first saw Oralee and Evelyn at the licensed premises approximately "a year, a year and a half" prior to February 16, 1968. On that occasion he refused them admission because they failed to present proof of age. When they returned approximately "a week, two weeks, three weeks" later, they each presented a birth certificate. He then requested each female to sign a form attesting to their age. Both signed forms. They were then served and admitted to the rear room used for dancing. He did not recall the names on either the birth certificates or the names signed on the forms. The females continued to patronize the establishment.

The questioning then revealed the following:

"Q The first time you saw them and asked for proof of age, in your opinion, how old were [Oralee] and [Evelyn] ?

A I would say they might be old enough and yet they did not look old enough.

Q There was a doubt in your mind?

A Like I say, you can be so old and look so young."

Inasmuch as the tavern was closed for two weeks during the early part of the year 1968 and he "cleaned the joint out; got rid of all the junk and garbage laying around", he does not have the proof-of-age forms pertaining to Oralee and Evelyn.

Preliminarily, it should be noted that we are presently dealing with a disciplinary action, and such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a fair preponderance of the credible evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

I find as a fact that the licensee, through its employee Cauthen, did actually serve and deliver an alcoholic

beverage to the two minors Oralee and Evelyn, in contravention of Rule 1 of State Regulation No. 20 which reads as follows:

"No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of twenty-one (21) years"

The fact that the minors did not pay for the drinks or that they were not ordered directly by them does not relieve the licensee of its responsibility since it has been held, under the broad sweep of the Alcoholic Beverage Law and the principle of rigid control underlying its administration, that service, even indirectly, to a minor by service by the minor's companion is a violation of the statute. Vide, Re The Bunny Hutch, Bulletin 1722, Item 2, and cases cited therein.

The licensee contends that it is not guilty because it had several months prior to the date of the alleged violation procured written representations of the females' ages indicating that they had attained their majority in compliance with the statute. However, Cauthen testified that the females appeared to him to have been minors not only at the time they allegedly signed the representations but also on the date of the hearing. Kubisky testified that he had some doubt concerning the age and appearance of the females.

Furthermore, I find that the females definitely appeared to me to be minors.

The defense of the licensee based upon its obtaining a written representation must be rejected. Although it has been the uniform practice of the Director to recognize the legislative intent expressed in the enactment and to permit the statutory proviso to constitute a defense to a like charge in the disciplinary proceedings conducted in the Division, nevertheless the enactment must be considered in its entirety. R.S. 33:1-77 provides as follows:

"Anyone who sells any alcoholic beverage to a minor shall be guilty of a misdemeanor; provided, however, that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the minor falsely represented in writing that he or she was twenty-one (21) years of age or over, and (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be twenty-one (21) years of age or over, and (c) that the sale was made in good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually twenty-one (21) years of age or over." (Underscoring added)

A different construction under the circumstances would render the law sterile and meaningless and would serve to completely frustrate the salutary intendment of the legislation.

Hence I conclude that the Division has established

the truth of the charge by a fair preponderance of the evidence, and I recommend that the licensee be found guilty of said charge.

The licensee has a previous record of suspension of license by the local issuing authority for five days effective February 1, 1965, on hostess and nuisance charges.

It is therefore recommended that the license be suspended for fifteen days, to which should be added five days by reason of the suspension of license for dissimilar violation occurring within the past five years (cf. The Nut Club, Inc., Bulletin 1759, Item 9) or a total of twenty days.

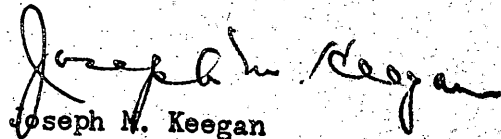
Conclusions and Order

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 and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 6th day of August 1968,

ORDERED that Plenary Retail Consumption License C-250, issued by the Board of Alcoholic Beverage Control for the City of Paterson to L. Kubisky, Inc., t/a Club Polynesian, for premises 49-53 W. Broadway, Paterson, be and the same is hereby suspended for twenty (20) days, commencing at 3 a.m. Tuesday, August 13, 1968, and terminating at 3 a.m. Monday, September 2, 1968.


Joseph M. Keegan
Director