

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

BULLETIN 1816

September 30, 1968

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In its petition of appeal Parkway alleges that the action of the Committee was erroneous for reasons which may be briefly summarized as follows: (a) the Committee's action was not in the best interests of the community and "will retard the growth of the area"; (b) such license is necessary for the operation of this "nationally franchised motel"; (c) the amended ordinance precluding the issuance of such license after Parkway applied for the same "showed bad faith and deprived [Parkway] of property without due process of law"; (d) the denial was "motivated by a conflict of interests between [Parkway] and members of the Township Committee."

The answer admits the jurisdictional allegations of the petition and denies the substantive allegations thereof. It further sets up five "reasons for denial" which may be considered as separate defenses. The fourth reason for denial, as set forth in the answer, is in my judgment a complete defense to this action warranting a dismissal of this appeal. It sets forth the following: The Committee, at a regular meeting held on February 12, 1968, adopted an ordinance, as follows:

"AN ORDINANCE TO AMEND AN ORDINANCE ENTITLED
'AN ORDINANCE TO AMEND AN ORDINANCE ENTITLED
'AN ORDINANCE CONCERNING ALCOHOLIC BEVERAGES
AMENDING ORDINANCE 16"'"

"BE IT ORDAINED, by the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UPPER, CAPE MAY COUNTY, NEW JERSEY, that:

"SECTION 1. Section 1 of Ordinance 18 as amended by Ordinance 24 which took effect as of February 10, 1947, is hereby amended to read as follows:

"SECTION 1. The number of retail plenary consumption licenses outstanding in the Township of Upper at the same time shall not exceed four, provided, however, that this shall not prevent the renewal of plenary retail consumption licenses outstanding at the time of the adoption of this limitation or the transfer of such license and renewal of the license so transferred. No new plenary retail consumption licenses shall be issued until the number outstanding shall be reduced by surrender, revocation or non-renewal to less than four."

"SECTION 2. This ordinance shall take effect upon final passage according to law."

The record on this plenary de novo appeal hearing shows that the Township of Upper, which has a population of approximately 3,500 persons, already has seven plenary retail consumption licenses outstanding and one plenary retail distribution license. The above ordinance was introduced at the January 2, 1968 meeting and was finally adopted on February 12, 1968. This ordinance amended Ordinance 24 which was then in effect and which restricted the number of "C" licenses in the community to four in number put permitted the grant of additional licenses to hotels and motels containing in excess of fifty sleeping rooms. Ordinance 89 (the amendatory ordinance)

continues the four "C" license restriction but deletes the hotel-motel exception from Ordinance 24. This ordinance was duly adopted after public meeting at which all persons were given an opportunity to be heard.

The law in this State is well established by a long line of adjudicated cases to the effect that the status of the municipal ordinance at the time of the court's decision, and not at the time of the filing of the application, controls. Thus, Ordinance 89, which is now in effect (as of the date of this hearing on appeal) is binding and determinative in this action. Roselle v. Wright, 37 N.J. Super. 507; Hohl v. Township of Readington, 37 N.J. 271, 279 (1962); Bellings v. Denville Tp., 96 N.J. Super. 351, 355; DeVries v. Passaic et al., Bulletin 1457, Item 4; Aiello v. West Milford et al., Bulletin 1741, Item 2.

As the court said in Socony-Vacuum Oil Co., Inc. v. Mt. Holly Twp., 135 N.J.L. 112 (Sup. Ct. 1947), at pp. 117-118:

"Moreover, in my opinion, there can no longer be any question as of the time when the status of the applicable law controls. It is neither the status of the law prevailing at the time of the application for the permit nor the status of the law prevailing at the time of the application or allowance of the rule to show cause. It is the status of the law prevailing at the time of the decision by the court that is controlling. Cf. Westinghouse Electric Corp. v. United Electrical, &c., America (Court of Errors and Appeals, 1946), 139 N.J. Eq. 97, 105, 106; 49 Atl. Rep. (2d) 896.

"And just as a change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation, as here, to a permit for the doing of a future act. Otherwise the administrative body, here the building inspector whose acts are subject to appeal to or review by this court, would issue a permit contrary to the existing legislation. Cf. Ziffrin v. United States, 318 U.S. 73, 78."

In this connection there is a presumption that a municipality, in enacting or amending a zoning ordinance, acted reasonably, and that the resulting ordinance is a valid one. Ward v. Montgomery Tp., 28 N.J. 529, 539 (1959); Bellings v. Denville Tp., supra. Nor has there been any evidence to support an allegation that the Committee has been improperly motivated or influenced. Thus we have an ordinance now in effect at the time of this hearing on appeal which prohibits the Committee from issuing the subject license. Such issuance would clearly be in violation of the said ordinance and would in effect render that ordinance of no force and effect. Obviously this Division does not have the authority to render an ordinance invalid or ineffective. If a person wished to challenge the validity of said ordinance, he would not be entitled to bring such issue before the Director, but would have to seek a judicial ruling by plenary suit in a court of competent jurisdiction. Blanck v. Magnolia, 73 N.J. Super. 306 (App. Div. 1962), reversed on other grounds 38 N.J. 484.

As the court stated in Fanwood v. Rocco, 59 N.J. Super. 306, at p. 318:

"... the Director has no right to compel a municipality to issue a license, even if the municipality has none at all, or to issue a new one when the municipality has several but in good faith wants no more." Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1935).

And further (p. 320):

"The primary purpose of the act is to promote temperance (R.S. 33:1-3) and 'to be remedial of abuses inherent in liquor traffic and shall be liberally construed' to effect those purposes. R.S. 33:1-73; Hudson Bergen County Retail Liquor Stores Ass'n, Inc. v. Board of Com'rs. of City of Hoboken, (135 N.J.L. 502 (E. & A. 1947)). Because these are the purposes there is a sharp and fundamental distinction between the power of the Director when a license is denied by the municipality and when one is granted, because refusing a license cannot lead to intemperance or to any of the other evils the act is intended to prevent."

However, in the present status of the law, under the present ordinance, there can be no lawful grant of Parkway's application for a license.

In addition to the above, my reading of the entire record persuades me that the Committee acted reasonably and circumspectly in denying the appellant's application for this license. Its action was consistent with the prior action in a similar application made and reported in Tara Bay Club v. Upper, Bulletin 1627, Item 1.

For the reasons aforesaid, it is recommended that an order be entered affirming the action of the respondent Committee and dismissing the appeal.

Conclusions and Order

Exception to the Hearer's report, limited to a challenge to the validity of the amended ordinance which took effect on February 12, 1968, was filed by appellant, pursuant to Rule 14 of State Regulation No. 15.

In the exception, appellant's attorney requested that the conclusions and order of the Director be withheld pending a determination of the validity of the said ordinance by the Superior Court. On July 29, 1968, Superior Court Judge Cafiero upheld the validity of the said ordinance and dismissed the action, in Parkway Exit #25 Motel, Inc. v. Upper Township, Superior Court, Law Division, Cape May County, Docket No. L-15688-67 P.W.

The Hearer found under the facts of this case not only that the ordinance precluded the grant of the application but also that respondent's denial of appellant's application was a reasonable exercise of its discretion and was consistent

with prior decisions of respondent regarding the issuance of new alcoholic beverage licenses to motels in its municipality.

After carefully considering the entire record herein, including the transcript of testimony, the Hearer's report and the exception, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of August, 1968,

ORDERED that the action of respondent be and the same is hereby affirmed and that the appeal be and the same is hereby dismissed.

JOSEPH M. KEEGAN
DIRECTOR

2. APPELLATE DECISIONS - BUCKSHAW v. NEWARK.

Shirley Buckshaw, t/a Buck's Tavern,)	
)	
Appellant,)	On Appeal
v.)	
)	CONCLUSIONS AND ORDER
Municipal Board of Alcoholic Beverage Control of the City of Newark,)	
)	
Respondent.)	

Hodes & Hodes, Esqs., by Irving L. Hodes, Esq., Attorneys for Appellant.

Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney 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 whereby, by a vote of 2 to 0, it suspended appellant's plenary retail consumption license for fifteen days effective March 18, 1968. The suspension was imposed after respondent heard testimony in disciplinary proceedings, as a result of which it found appellant guilty of a charge alleging that on June 23, 1967, she allowed, permitted and suffered in and upon her licensed premises a brawl, act of violence, disturbance and unnecessary noise, in violation of Rule 5 of State Regulation No. 20. Appellant's licensed premises are located at 31 Orchard Street, Newark.

Upon the filing of the appeal, an order was entered by the Director dated March 6, 1968, staying respondent's order of suspension until entry of a further order herein.

Appellant in her petition of appeal alleges that respondent's action was erroneous in that it was contrary to the weight of the evidence and there was no showing of fact upon which the finding could be supported. Furthermore, the Judgment was unwarranted, unlawful, unreasonable and capricious.

Respondent in its answer denies appellant's allegations and contends that "the grounds upon which the issuing authority made its decision were based upon the factual testimony before the Board from which it, in its sound discretion, concluded that the penalty imposed substantiated such action."

The parties hereto agreed to present the case upon the stenographic transcript of the proceedings held before respondent, pursuant to Rule 8 of State Regulation No. 15.

At the hearing below, respondent produced Bennie Butler and Officer Angelo Suppa to substantiate the charge preferred against appellant. Daniel Burwell, Michael Buckshaw and Shirley Buckshaw appeared on behalf of appellant.

Bennie Butler testified that he was in the licensed premises on June 23, 1967 and, while drinking with a friend, for no apparent reason Daniel Burwell, appellant's bartender, punched him in the mouth. He was knocked from the stool upon which he was seated and lost a tooth in the melee. His mouth became swollen and he was bleeding from the impact of the blow. Butler further testified that he left the premises and lodged a complaint with the police against the bartender for the assault upon him; that he returned to appellant's premises with a police officer and identified Daniel Burwell as the man who had struck him.

Officer Angelo Suppa testified that on June 23 he investigated the alleged assault upon Butler, questioned Michael Buckshaw and Burwell at the licensed premises with reference to the assault, and apprehended Burwell as the person who had injured Butler as alleged by him. Pursuant to the complaint, Burwell appeared in the municipal court, pleaded guilty to an assault and battery charge, and was placed on probation for one year. Previous to the court appearance, Burwell gave a signed statement to the police admitting that he had struck Butler while he was employed on the licensed premises.

Michael Buckshaw, husband of appellant, testified that he was on duty on the day in question but heard no commotion or disturbance with reference to the alleged incident; that he was serving patrons in the rear of the bar and Butler was seated near the front of the bar which was being taken care of by Burwell at the time. Buckshaw further testified that everything was quiet and then he saw Burwell on the patrons' side of the bar speaking to Butler. In response to a question as to whether or not he had any conversation with Butler, Buckshaw stated, "I told him to go home" and that "he picked himself up and walked out." Thereafter, two police officers entered the licensed premises and Burwell left with them.

Daniel Burwell testified that he was on duty at the time in question and that Butler asked him on three or four occasions for matches and also requested that he (Burwell) serve him a drink. When refused service, Butler said he was going to

obtain the drink himself and was leaning over the bar when Burwell walked to the patrons' side of the bar and placed his hand on Butler's shoulder. When questioned as to whether he had pushed Butler in order to make him sit down, Burwell stated, "I imagine so. He sat down." About five minutes thereafter, according to Burwell, Butler left the tavern and some time later returned with police officers.

When questioned why he pleaded guilty to the charge of assault and battery in the municipal court, he explained that since he had made contact with Butler by placing his hand on his shoulder, he believed he was guilty of such an offense. Burwell denied, however, that he had struck Butler with his fist.

Appellant, Shirley Buckshaw, testified that she knew nothing concerning the incident except what her husband had told her.

I have set forth the testimony of the various witnesses which I believe pertinent to the matter now under consideration. This presents a factual question as to what actually transpired on the occasion in question. I am not impressed with the testimony of either Burwell or Buckshaw as to the occurrences which took place in the licensed premises. Nor do I believe Burwell's explanation for his guilty plea in the municipal court that since he had made physical contact with Butler, it was his opinion that he was guilty of assault and battery. On the other hand, there is the testimony of Officer Suppa that he investigated this matter and that Burwell gave a signed statement to the effect that he struck Butler while working at the licensed premises on the day in question. The testimony of Butler appears to be the true version as to what happened on June 23 at the licensed premises and that he had been struck by Burwell.

I find as a fact that appellant permitted an act of violence on the licensed premises as charged. I might also add that a licensee is responsible for all violations committed or permitted on licensed premises by an employee. Rule 33 of State Regulation No. 20.

After careful consideration of the record herein, it is recommended that an order be entered affirming the action of respondent, dismissing the appeal and fixing the effective date of suspension which was stayed by the Director pending entry of an order herein.

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 record, including the transcript of the testimony and the Hearer's report, I adopt the conclusions and recommendations of the Hearer as my conclusions herein.

Accordingly, it is, on this 7th day of August, 1968,

ORDERED that the action of respondent be and the same is hereby affirmed and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-339, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Shirley Buckshaw, t/a Buck's Tavern, for premises 31 Orchard Street, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Wednesday, August 14, 1968, and terminating at 2:00 a.m. Thursday, August 29, 1968.

JOSEPH M. KEEGAN
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS BETS) -
LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against
Eunice Saporito
281-283 Scotland Road
Orange, N. J.,
Holder of Plenary Retail Consumption License C-54, issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange.

CONCLUSIONS
AND
ORDER

Citrino, Carella, Balsam & Crochelt, Esqs., by Charles C. Carella, Esq., Attorneys for Licensee
Edward F. Ambrose, 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 charges:

- "1. On September 16, 19, 22, 23, 30, October 5 and 6, 1967, 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 September 16, 19, 22, 23, 30, October 5 and 6, 1967, 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, and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

I shall confine this report to the occurrences which took place in the barroom (the licensed premises) only. I am disregarding any activity which took place in any area other than the barroom.

Agent S (who possessed ample experience in conducting gambling investigations including numbers betting) gave the following account: Pursuant to specific assignment to investigate alleged gambling activities, he visited the licensed premises which he described as having the appearance of "a regular restaurant, package store and tavern combined" on several occasions.

Accompanied by ABC Agents M, R and G, he entered the licensed premises on September 16, 1967 at approximately 12:50 p.m. The agents positioned themselves at the bar. A male identified as Gilbert Graeber (usually called "Bob") was tending bar. Bob not only served other patrons but also made change for the purchases as required. After testifying that the agents discussed numbers bets with Bob, and that R in particular asked about numbers bets, the questioning revealed the following:

"Q What did he [R] ask him?

A He asked about numbers bets and Bob replied, 'Sure,' and he went to the back bar and he picked up a piece of paper, a piece of white paper, and a pencil and he handed it to R---.

Q Did you hear what, if anything, he said to R---?

A Yes. He told him to write down what he wanted.

Q Did you see what R--- did?

A R--- began making notations with the other agent and they got together in a huddle to make the numbers bets and at this time I left them and went into the rear portion of the premises and I conversed with Alphonso."

I am not reporting the conversation that S had with Alphonso (known as Alphonso Romano and also known as "Funzi") because it did not occur in the licensed premises. The agents left the barroom at 1:35 p.m., shortly after S returned thereto.

The four ABC agents revisited the licensed premises on September 19, 1967, at approximately 12:15 p.m., and positioned themselves at the bar. The patronage consisted of approximately fifteen males and nine females. Graeber (Bob) was tending bar unassisted from the time the agents entered to the time that the agents departed from the premises at 1 p.m. Graeber made no mistakes in serving the agents and made change as required.

After the agents conversed with Graeber concerning previously mentioned numbers bets, G requested Graeber to furnish him with pencil and paper in order to record additional bets. Graeber produced paper and pencil, whereupon G recorded his bet on 916 for twenty-five cents and twenty-five cents or a total of fifty cents. G then recorded a bet on 325 for fifty cents and fifty cents or a total of one dollar for Agent S. He then recorded a bet on 864 for fifty cents and fifty cents or a total of one dollar for M, and a bet on 539 for twenty-five cents and twenty-five cents or a total of fifty cents for R. The total amount bet was three dollars. Graeber was watching on the opposite side of the bar. At this point the testimony proceeded thusly:

"Q Did you see what G--- did?

A Well, he wrote the numbers bets down and took the three dollars and he says to Bob, 'I have three dollars for numbers,' and Bob replied, 'Wait till the boss turns his head.' He was referring to Sam Romano up front.

Q But he said that and then what?

A Well, Bob, Mr. Graeber, kept looking down at the front portion of the bar to see if Sam was looking at him or checking, apparently, and when he saw that Sam wasn't looking in that direction he took the slip and the money from G--- and he placed them into his right pants pocket.

Q Did Mr. Graeber appear to know what he was doing?

A He certainly did, sir.

Q Did you say anything as you were going out?

A Yes. We told Bob to make sure he got the bets in and he said, 'Don't worry, they will be in. If you guys hit and you are not here tomorrow, I will hold the money for you.'"

On September 22, 1967, S revisited the licensed premises at 11:35 a.m., again accompanied by M, R and G. Andrew Saporito (husband of the licensee) and Bob were tending bar. The agents positioned themselves at the bar. After Sam Romano called Graeber to the package goods section, G made notations on the bar of numbers bets for himself and for R. G, followed by R, proceeded to the package goods area. S and M remained seated at the bar. S observed G hand Bob a slip and money and depart from the premises with R. He heard no conversation.

On September 23, 1967, the aforesaid agents visited the licensed premises twice. The agents entered the licensed premises together at 12:20 p.m. and sat at the rear portion of the bar near the dining room. Graeber was tending bar. Saporito walked about in a supervisory manner and, if Graeber was busy, he would assist him. Graeber served the agents several drinks, took payment therefor and made change as required. Upon being questioned as to whether there was any occurrence between the agents and Graeber, S responded, "Yes. There was conversation and Mr. Graeber said, he said, 'From now on you should put your bets in an envelope,' because Sam had asked him what G--- had given him on the previous visit when we had left the premises." Continuing, Graeber said that he "didn't want anyone to know his business." The agents departed from the premises at 12:45 p.m.

On the same day, prior to re-entry at approximately 2:05 p.m. and while the agents were in a motor vehicle, M recorded several numbers on a slip of paper and placed the slip and the sum of \$2.50 in an empty cigarette package. Upon entry the agents placed themselves at the same position at the bar as heretofore. Again, Graeber was tending bar. Then, S testified as follows:

"Q Tell us what happened after that.

A Well, M--- placed the pack on the bar, the pack of cigarettes, Salem, bearing the numbers slip and the money and he said, 'The money is in there, too.'

Q To whom did he say that?

A To Mr. Graeber. He handed the pack across the bar. Mr. Graeber looked up and down and he picked up the pack and he said, 'What's in here?' And M--- replied, 'Two dollars fifty cents and a slip.' So he put the cigarette pack bearing the money and the slip into his shirt pocket and he nodded his head up and down affirmatively."

The agents left the premises at approximately 4 p.m.

On September 30, 1967, at 1:05 p.m., the four ABC agents returned to the licensed premises and seated themselves at the same position at the rear of the bar. Graeber served the agents "five, six times." Saporito served them "about two."

M recorded on a small white slip of paper "number 864, fifty and fifty; he wrote 104 for fifty and fifty; and 318 for fifty and fifty, a total of three dollars in bets." At the time of the recordation Graeber was behind the bar directly in front of the agents. M wrapped up the money in the slip and placed the items in an empty cigarette pack which he had on his person.

Upon being questioned as to what he heard or saw, the agent replied, "Agent M--- said, 'Bob, the bets are inside,' and Bob took the cigarette pack and placed it in the left rear pants pocket, in the rear of his white pants."

The agents departed at approximately 3:50 p.m.

On October 6, 1967, S returned to the vicinity of the licensed premises accompanied by M and a county detective at approximately 2:55 p.m. S and M entered the licensed premises upon arrival and took a position at the bar. Graeber was tending bar. The patronage consisted of "two or three males." M handed Bob a pack and said, "The bets and money are in the cigarette pack." Bob replied, "Okay, it's in," and placed the cigarette pack with the marked money into his rear pocket. M then said, "Bob, make sure the bets go in on time" and Bob replied, "Don't worry. I am going down the street as soon as I get out of here."

The agents then proceeded to the pizza area and had a discussion with Funzi which I shall not elaborate upon because I find and report that that area did not constitute a part of the licensed premises.

Graeber was seen leaving the premises "shortly after three o'clock." Prior to that time he had been tending bar.

The agent's testimony on cross examination was essentially corroborative of the testimony adduced on direct examination.

Referring to the date of September 19, 1967, of the approximately twenty-four patrons two or three were positioned at the bar, the others were seated at tables. Bob was behind the bar most of the time. He heard patrons and Bob converse "regarding drinks." He heard a waitress order cokes. Bob served the cokes. When offered a drink by the agents, Bob responded, "he would like a drink but he had to wait until he

was off-duty because his orders are not to drink while he was working, from Mr. Saporito and Mr. Romano."

Referring to Bob's general appearance, the agent stated that Bob appeared to be approximately fifty-five years of age; at times he was cleanly shaven and other times he had a light beard. At times his eyes would be bloodshot. When questioned as to whether there was anything significant about Bob's appearance, the agent responded, "Well, in my opinion, from my observations he appeared to me to be a man who was working, that wanted to work. He was a man that maybe could have been an alcoholic, maybe, in the past. He looked to me to be a man that was slightly nervous, twitched a little bit when he talked. He was a man that looked like he had been a 'rummy' and was trying to get on the right road and, in fact, he looked to me that he might have even been a member of the AA." Later the witness added, "But he looked to me like a man who at one time was a drinker. He looked to me like he had been rehabilitated. He was very coherent. He was respectable in his actions -- he didn't try to cheat or clip. We left money for that reason, to test him. He was respectable to Mr. Saporito, very respectable and fearful both of Mr. Saporito and Mr. Romano. He was very conscious of what he did. He knew by taking bets he was wrong, because he said he didn't want to be seen."

G testified that, accompanied by ABC Agents S, M and R, he entered the licensed premises on September 16, 1967 at 12:50 p.m. At one point during the investigation S left the group and proceeded to the pizzeria section of the premises. During the period of time that S was gone, R asked the bartender Bob to take their numbers bets for that day. R wrote on a slip the number 363 for himself, the number 554 for M and the number 318 for G, each for one dollar. After recording the numbers, R handed the slip to Bob and said, "That's a total of three dollars, right?" Bob took the money, put it in his pocket and said that he would get the bet in.

It was stipulated that G's testimony would be the same as the testimony offered by Agent S as to all of the occurrences testified to by S except for the date of October 6, 1967, on which date G did not accompany S into the licensed premises.

Additionally, G testified that he accompanied M into the licensed premises on October 5, 1967, at approximately 2:30 p.m. and that they positioned themselves at the rear portion of the bar. Graeber and Saporito were tending bar. Prior to entering the barroom he had observed M writing two numbers bets (one for each agent) on a slip of paper, each for one dollar. M had placed the slip and money in a cigarette pack. M said to Bob, "Here, Bob, here are our number bets for today." Bob accepted the cigarette pack, placed it in his trousers pocket and said, "Okay, you got it."

It was stipulated that the testimony of Agent R, who participated in the investigation on September 16, 19, 22, 23 and 30, 1967, and the testimony of Agent M who participated in the investigation on September 19, 22, 23, 30, October 5 and 6, 1967, would be cumulative.

In defense of the charges the licensee produced Dr. Endre Nadas (a licensed physician of the State of New Jersey who specialized in psychiatry). He examined Gilbert Graeber (Bob) on January 2, 1968 and March 13, 1968. His clinical examination revealed that Graeber exhibited signs "of liver disease, lung infection and involvement of his peripheral nerves, peripheral neuropathy, that is, a tendency to paralysis of his limbs, and signs of chronic brain syndrome associated with intoxication, ethanol, that is, ethanol alcohol, and this is in addition to what may be congenital absence of intellect, that is, defective intellect, and this is in addition to a probable reading difficulty that he had when he was a child so he couldn't obtain any education whatsoever. He is illiterate, incapable of reading and writing." The doctor administered a brief intelligence test, not based on education, but based on native intelligence, and he gave Graeber an imbecile rating. It was his opinion that Graeber could not distinguish between right and wrong, that he would be unable to comprehend the nature of a gambling transaction and that his mental impairment was permanent. In so far as he was able to determine, Graeber was unable to read and write.

On cross examination the doctor reiterated that, in his opinion, Graeber was not capable of understanding the significance of a numbers bet "with respect to its legality or illegality and its consequences" nor did he believe that Graeber "knew at that time that he was taking a numbers bet."

Andrew Saporito (husband of the licensee) testified that he helps take care of his wife's business. He was not aware of any form of gambling being carried on at the licensed premises. Graeber is not employed by his wife at the licensed premises nor is he a bartender there. He assists Saporito in maintaining his "own properties, such as parking lots, picking up rubbish, taking my dogs for a walk, doing a little painting on the outside." He then offered the following testimony:

"Q Now, with reference to his mental condition, how would you, having seen him, and so forth, how would you classify him?

A Well, he is like a little boy. I have to shave him. I have to keep him clean. I have to tell him when to eat. If I am not there to tell him to eat something, he will go without food. When I met him he was partly dead and I took care of him. I felt sorry for him. He is an unfortunate."

On cross examination, when the witness was asked, "Do you give him pocket money", he replied, "Just his needs, such as cigarettes." He has known Graeber for approximately a year-and-a-half.

Sam Romano and he tend bar in the daytime. He tends bar every day until 3 p.m. If he should go on an errand, Sam is left in charge. He recalled seeing the agents on the days referred to by them. On none of these days did Graeber tend bar. He had never seen Graeber tend bar. Finally, Saporito's testimony disclosed the following:

"Q Does Mr. Graeber have a practice of leaving the tavern every day at three o'clock?

A Not a practice. It's only if I tell him, 'Well, you want to go for a walk?' Or he has some friends that he visits. He has Marty, the cleaner, who he will go there and chat. Then he has the beauty parlor and they might give him twenty-five cents to take the garbage out.

Q Is that all done after three o'clock?

A Anytime. Sometimes somebody will call me up and say, 'Will you spare Gil sometime for five minutes?'"

The licensee (Eunice Saporito) testified that she is in the licensed premises "usually from six to ten and during the day when needed." She was not aware of any gambling activity in the licensed premises. Gilbert Graeber is not an employee.

On cross examination the witness denied that Graeber performs any kind of services in the licensed premises.

Samuel L. Romano (who manages the business conducted by the licensee) testified that Graeber's name does not appear on the payroll records, nor does he perform any services at the licensed premises. He had no knowledge of any gambling activity being carried on in the licensed premises on the dates mentioned in the charges. Graeber was not a bartender on any of these days. Graeber cannot count or make change.

On cross examination the witness testified that Graeber was never in the licensed premises on the dates and at the times that the ABC agents claimed that they were in the licensed premises.

Mildred Perruso (whose son Michael is the food concessionaire in the dining room to the rear of the barroom) testified that Graeber is not employed by the licensee.

It is apparent that the dispositive issue presented for determination is mainly factual.

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), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It 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); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I closely observed the demeanor of the witnesses as they testified and made a careful analysis and evaluation of their testimony.

I perceive the evidence is overwhelming that gambling activities (numbers playing) were allowed, permitted and suffered in the licensed premises as charged.

I find the testimony offered by the Division agents, describing the numbers betting activity engaged in between them and Gilbert Graeber on the various dates mentioned in the charges, persuasive and a true portrayal of the gambling activities described.

I find as a corollary that Graeber did actually perform services as a bartender (as testified to by the agents) and was, therefore, employed by the licensee. The fact that Graeber may not have been compensated for performing these services and was not on the payroll of the licensee is irrelevant to the issue of employment. Vide, Re Jacobs, Bulletin 935, Item 3, and Re Neim, Bulletin 1772, Item 2.

Additionally, after considering all of the evidence adduced herein I find that Graeber was able to comprehend the nature of a gambling transaction. It is my view that the agents' testimony was not a concoction, maliciously contrived to inculcate an innocent licensee.

I cannot be unmindful of Saporito's testimony on cross examination wherein he stated that Graeber visits with friends, that he chats with "Marty, the cleaner", that he is entrusted to remove garbage at a beauty parlor. This does not bespeak of the actions of an imbecile. It is significant that, although the licensee produced a number of witnesses in her behalf, she failed to produce Graeber.

Finally, I observe that it is a well established and fundamental principle that a licensee is responsible for the misconduct of persons employed and fully responsible for their activities during their employment on licensed premises. In re Olympic, Inc., 49 N.J. Super. 299; In re Schneider, 12 N.J. Super. 449, (App. Div. 1951); Rule 33 of State Regulation No. 20. Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951); F. & A. Distrib. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961).

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

The licensee has a prior adjudicated record of suspension of license by the Director for five days effective July 9, 1962, for sale below filed price. Re Saporito, Bulletin 1468, Items 10, 11. The prior record of suspension of license for dissimilar violation disregarded because occurring more than five years ago; it is further recommended that the license

be suspended for sixty days. Re Lenron, Inc., Bulletin 1789, Item 5.

Conclusions and Order

Written exceptions to the Hearer's report and argument thereto were filed by the licensee's attorneys, pursuant to Rule 6 of State Regulation No. 16.

I find that the matters contained in the exceptions have either been considered in detail by the Hearer in his report or are without merit.

Consequently, having considered the entire record herein, including the transcript of the testimony, the Hearer's report and the exceptions and arguments with reference thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 19th day of August, 1968,

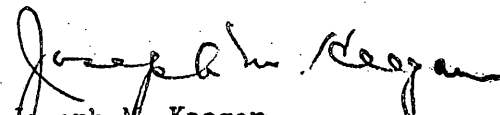
ORDERED that Plenary Retail Consumption License C-54, issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange to Eunice Saporito for premises 281-283 Scotland Road, Orange, be and the same is hereby suspended for sixty (60) days, commencing at 2:00 a.m. Monday, August 26, 1968, and terminating at 2:00 a.m. Friday, October 25, 1968.

JOSEPH M. KEEGAN
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Jacobson Beverages, Inc.
35-37½ Euclid Avenue
Manasquan, New Jersey

Application filed September 24, 1968 for place-to-place transfer of State Beverage Distributor's License SBD-38 from 628 Higgins Avenue, Brielle, New Jersey.


Joseph M. Keegan
Director