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

MAY 29, 1974

BULLETIN 2148

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

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MAY 29, 1974

1. COURT DECISIONS - ESSEX COUNTY PACKAGE STORES ASSOCIATION v. NEWARK ET ALS. - DIRECTOR REVERSED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2028-72

ESSEX COUNTY PACKAGE STORES ASSOCIATION,

Appellant-Appellant

v.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, NEW JERSEY: FIRST MOTOR INN CORPORATION t/a Gateway Downtown Motor Inn, and ROBERT E. BOWER, Director of Division of Alcoholic Beverage Control of the State of New Jersey,

Respondents-Respondents.

Argued December 10, 1973; Submitted for Determination March 25, 1974 - Decided April 17, 1974.

Before Judges Collester, Lynch and Michels.

On appeal from the Division of Alcoholic Beverage Control, Department of Law and Public Safety, State of New Jersey.

Mr. Leonard Brass argued the cause for appellant.

Mr. John Pidgeon argued the cause for respondent Municipal Board of Alcoholic Beverage Control of the City of Newark, New Jersey (Mr. William H. Walls, Corporation Counsel, attorney; Mr. Salvatore Perillo, on the brief).

Mr. Frederick Z. Feldman argued the cause for respondent First Motor Inn Corporation, t/a Gateway Downtowner Motor Inn (Messrs. Stein & Rosen, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey (Mr. George F. Kugler, Jr., former Attorney General of New Jersey, and Mr. David S. Piltzer, Deputy Attorney General, of counsel), submitted a statement in lieu of brief on behalf of respondent Division of Alcoholic Beverage Control.

PER CURIAM.

(Appeal from the Director's decision in Re Essex County Package Stores Association v. Newark, et al. - Director reversed, Bulletin 2095, Item 1. Opinion not approved

2. COURT DECISIONS - OCEAN CLUB CORPORATION v. JERSEY CITY - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-293-73

OCEAN CLUB CORPORATION,

Appellant,

v.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY, and DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF NEW JERSEY.

Respondents.

Submitted April 1, 1974 - Decided April 25, 1974.

Before Judges Conford, Handler and Meanor.

On appeal from Division of Alcoholic Beverage Control.

Mr. Leon Sachs, attorney for appellant.

Mr. Raymond Chasan, Corporation Counsel, attorney for respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City (Mr. Bernard Abrams, Assistant Corporation Counsel, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent Division of Alcoholic Beverage Control of the State of New Jersey (Mr. David S. Piltzer, Deputy Attorney General, of counsel).

PER CURIAM

(Appeal from the Director's decision in Re Ocean Club Corporation v. Jersey City, Bulletin 2122, Item 2. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

3. APPELLATE DECISIONS - ERNEST GRASSO CORP. v. NEWARK.

Ernest Grasso Corp., t/a Ernie's Glass Bar, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Fielo and Fielo, Esqs., by Michael K. Fielo, Esq., Attorneys for Appellant
Donald King, Esq., by John Pidgeon, 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 the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Board) which, on August 27, 1973, suspended appellant's Plenary Retail Consumption License C-142, for fifteen days effective September 17, 1973, upon finding that appellant permitted its licensed premises to remain open with patrons present and blinds drawn after legal closing hours, in violation of the applicable local ordinance.

The effective date of the suspension was stayed by order of the Director of September 17, 1973, pending the determination of this appeal.

The petition of appeal contends that the determination of the Board was contrary to the weight of the evidence presented before the Board. The Board denied this contention, asserting that the proofs before it amply supported its determination.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. Additionally, a transcript of testimony taken at the hearing before the Board was admitted into evidence pursuant to Rule 8 of the said regulation.

The transcript of testimony before the Board reflects the following: a Newark policeman observed a man enter appellant's premises about 2:30 on the morning of March 24, 1973. The policeman followed, found the door locked, knocked and was admitted. He further observed about seven persons seated at the bar, two of whom had drinks in front of them. The officer explained that his presence in the area had been due to disturbances that had taken place a short time earlier.

At the de novo hearing, Ernest Grasso, owner of the stock of appellant corporation, testified that, prior to closing hour, a minor altercation arose among some of his patrons whom he ordered out. The acrimony was sufficiently bitter so that he, his barmaid, her brother and three others were frightened. Grasso locked the door, the barmaid called the police and the persons inside remained until the altercation on the exterior was quelled. There they remained until one of the patrons who had departed earlier, returned for his coat and was followed into the premises by the policeman.

He explained that he is a heart patient using a pacemaker; the threats made against him by the patrons, whom he had ordered out, generated sufficient fear that he resolved not to leave the premises until the outside noises were stilled.

The barmaid, Elsie Bacus, testified that she had called the police as there was fighting outside the premises. The police apparently responded three times for she saw the reflection of the revolving red lights indicating police cars outside. After each of the police visits there were moments of quiet, but she did not make any observation through the window.

She admitted that as her brother was visiting her at the premises and, as he had been discharged from the Veteran's Hospital that very day, she wanted to allow sufficient time for all of the disorderly persons outside the premises to leave before she and her brother departed from the premises. She acknowledged, however, that, at the arrival inside of the police, there "might have been one or two glasses on the bar."

The barmaid's brother, Donald McCook, testified in general corroboration of the testimony of his sister. The present barmaid, Patricia Gaudreau, testified that she was present at the premises on the evening in question, and recounted that the patrons who were asked to leave by Grasso were rowdy kids who continued their fracas outside.

Accepting all of the testimony as uncontroverted, the ordinance has been clearly violated. Patrons were present in the premises after closing hours; the blinds or shades were unopened

as required; and although there was no proof of the sale of alcoholic beverages, the presence of patrons at the bar more than one-half hour beyond closing time presents a direct violation.

It has been long established that a closing hour requirement also carries with it a prohibition against the presence of patrons or guests in the licensed establishment after the prohibited hour. Re Four Hundred Social Club, Inc., Bulletin 242, Item 8; Re Casarico, Bulletin 268, Item 1; Cf. Oliver Twist Pub and Lounge v. North Bergen, Bulletin 1869, Item 3.

In oral argument before this Division as well as before the Board, appellant vigorously contended that all of the persons within the establishment were present, not as patrons, but as persons legitimately there during permitted hours, who were fearful of bodily harm upon departure.

The uncontroverted testimony elicited from appellant's witnesses confirmed that, despite the admitted arrival of the police cars outside the premises, they made neither move to leave or any observations relating to their possible safe departure. Conversely, the barmaid and Grasso both admitted that neither they nor anyone present either opened the door to observe or even uncovered the windows to take notice of the exterior situation. No effort whatever was made to seize upon the police presence as a means of safe egress, hence the presence of patrons comfortably seated at the bar (one patron was admittedly sleeping-it-off at a table) biding their time until the alleged threatening situation outside subsided, gives rise to no other conclusion than that there was a direct violation of the ordinance.

A further argument, advanced by appellant, that the penalty was excessive was without merit. A suspension of fifteen days for like offense is consistent with Division precedents. See Re Brady's, Bulletin 2096, Item 2M; Brighton Holding Co. Inc. v. Newark, Bulletin 2095, Item 2; Gach v. Irvington, Bulletin 2058, Item 1; Sanderson v. Woodstown, Bulletin 2037, Item 1.

Therefore, I conclude that appellant has failed to meet the burden of establishing that the action of the Board was erroneous, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that an order be entered affirming the Board's action, dismissing the appeal, vacating the Director's 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 and stayed by said order.

Conclusions and Order

Written 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 Hearer's report, and the exceptions taken with respect thereto which I consider to either be lacking in merit, or to have been satisfactorily answered in the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Subsequent to the filing of the exceptions to the Hearer's report as noted above, the appellant made application for the imposition of a fine in lieu of suspension, in accordance with the provisions of Chapter 9 of the Laws of 1971, in the event that the action of the Board is affirmed. However, prior to my consideration of the said application, the appellant withdrew its application. Therefore, the suspension may now be reimposed.

Accordingly, it is, on this 5th day of April 1974,

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 the Director's order of September 17, 1973, staying respondent'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-142, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Ernest Grasso Corp., t/a Ernie's Glass Bar, for premises 315-319 Sanford Avenue, Newark, be and the same is hereby suspended for fifteen (15) days, commencing 2:00 a.m. on Thursday, April 18, 1974 and terminating 2:00 a.m. on Friday, May 3, 1974.

Joseph H. Lerner
Acting Director

4. APPELLATE DECISIONS - RAMOS v. JERSEY CITY.

Carmen Ramos, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Michael Halpern, Esq., Attorney for Appellant
Raymond A. Hayser, Esq., by Bernard Abrams, 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 the Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which on October 1, 1973 suspended appellant's plenary retail consumption license for premises 190-192 York Street, Jersey City, for thirty days, effective December 3, 1973, after finding appellant guilty of a charge which alleged that she sold alcoholic beverages to three minors on May 4, 1973, in violation of Rule 1 of State Regulation No. 20.

Additionally, the Board imposed a suspension of five days in consequence of the appellant having pleaded guilty to a second charge alleging that she had, on the same day caused the hinderance and delay of an investigation, to all of which was added a suspension of five days by reason of appellant's prior dissimilar record, making a total suspension of forty days.

The said suspension was stayed by order of the Director on November 26, 1973, pending the determination of this appeal.

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

Appellant contends that the action of the Board was contrary to the weight of evidence presented because no proof of a sale to a minor had been established. The Board, in its answer, denied this contention.

The Board introduced the testimony of Fred Patarteys, a police officer of Jersey City. He stated that on May 4, 1973, he and his partner, Police Officer Angel Tabares were on patrol in an unmarked vehicle on York Street and observed two male youths concealing something in their shirts while walking in the middle of the street opposite No. 235 York Street. Accosting the youths, he observed that each concealed a bottle of wine.

Upon determining their identities and dates of birth, the officer secured the bottles of wine, dismissed the youths and proceeded to appellant's tavern from which it was learned the wine had been purchased. There they interrogated the bartender, Miguel Rodriguez, who denied any sale to minors.

Officer Patrick Rochford testified that he caused a subpoena to be served on one minor, Daniel-- but was unable to serve the remaining minor, Hector-- who, he learned, had returned to Puerto Rico.

Daniel, one of the two minors involved, testified that he was born on August 5, 1956, and that on the date in question, he and his friend Hector, had been playing basketball. On the way home from the game, Hector entered appellant's tavern and emerged with two bottles of wine. Daniel was given one and Hector kept the other. Passing police officers in a vehicle, stopped them and discovered the wine. The boys were invited into the police car and were driven around the block, whereupon they identified appellant's premises as the place where the bottles of wine were purchased. Thereupon, upon surrendering the wine to the police officers, the boys were permitted to return to their homes.

At the conclusion of the testimony offered on behalf of the respondent, the appellant moved for a dismissal of the charge on the ground that no proof had been offered sustaining the charge that alcoholic beverages had been sold to a minor.

Prior to the determination of the motion, appellant offered testimony of the bartender, Miguel Rodriguez, of the licensee Carmen Ramos and of three patrons, Herniz, Atilano and Matos. The substance of the said testimony was to the effect that no minor had entered the premises, nor had any sale whatever been made to any minor.

We are dealing here with a purely disciplinary measure and its alleged infraction. Such measure 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 preponderance of the believable evidence. Butler Oaks Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). In order for appellant to prevail in the instant matter it must appear from the

record upon which the parties rely that the evidence did not preponderate in support of the determination of the Board.

The charge must be established by affirmatively satisfactory evidence. A finding of guilt may not be based upon mere suspicion, no matter how reasonably inferable such suspicion may be. Re Doyle, Bulletin 469, Item 2; Vangelas v. Paterson, Bulletin 1969, Item 1.

Doubtful questions of fact must be resolved in appellant's favor. Club Zanzibar Corp. v. Paterson, Bulletin 1408, Item 1. To be in doubt is to be resolved. Such doubts must be resolved in favor of appellant. Lysaght v. Denville, Bulletin 1490, Item 1.

The age of minor Hector was given as fifteen through the testimony of the police officer who related a conversation that he had had with this minor. No corroborating proof whatever was offered. Additionally, the minor could not be produced and as he and he alone was alleged to have made the purchase. Daniel had remained on the sidewalk some distance away from the appellant's premises. Therefore, there was obviously no corroborative proof of the purchase.

Upon the record at this de novo hearing, I find that there is lacking the necessary preponderance of the credible evidence to establish the proof of the charge. Hence, appellant has met the burden required by Rule 6 of State Regulation No. 15 of showing that the action of the respondent was erroneous and should be reversed.

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

It is, therefore, recommended that an order be entered reversing the Board's action with respect to the first charge and affirmed with reference to the second charge. It is further recommended that the order of suspension imposed by the Board be modified to a suspension of ten days and that the said order fix the effective dates of the said suspension which was stayed pending entry of a further order herein.

Conclusions and Order

Written exceptions to the Hearer's report were filed on behalf of appellant, pursuant to Rule 14 of State Regulation No. 15. These exceptions were directed solely to the Hearer's recommendation that the suspension imposed by the respondent Board with reference to the second charge (on which charge the respondent Board suspended

appellant's license for five days after entering a guilty plea thereto) be modified to a suspension of ten days.

In response thereto, respondent's attorney, by letter, informed this Division that it was the Board's intention to assess a suspension of five days only on the said charge to which appellant had pleaded guilty and further, it was its intention to assess an additional suspension of five days for a dissimilar charge after it had found appellant guilty of the first charge, the contested charge (to which charge the Hearer recommended that the action of respondent be reversed and the charge be dismissed).

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report, the exceptions and the response thereto, which I deem to be a concurrence with the exceptions filed herein, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein, except that the Hearer's recommended penalty of ten days with respect to the second charge shall be modified in accordance with the statement set forth hereinabove, to a suspension of license for five days.

Accordingly, it is, on this 16th day of April 1974,

ORDERED that the action of the respondent in finding appellant guilty of the first charge preferred herein and suspending his license be and the same is hereby reversed, and the aforesaid charge be and the same is hereby dismissed; and it is further

ORDERED that the Director's order dated November 26, 1973, staying respondent's action pending determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-218, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Carmen Ramos, for premises 190-192 York Street, Jersey City, be and the same is hereby suspended for five (5) days, commencing 2:00 a.m. Wednesday, April 24, 1974, and terminating 2:00 a.m. Monday, April 29, 1974.

Joseph H. Lerner
Acting Director

5. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - LICENSE SUSPENDED FOR 35 DAYS.

In the Matter of Disciplinary Proceedings against

Jo-Gem, Inc. (A Corporation)
t/a The Antlers
North Delsea Drive
Franklin Township
PO Franklinville, N.J.,

Holder of Plenary Retail Consumption License C-2, issued by the Township Committee of the Township of Franklin.

CONCLUSIONS and ORDER

Lipman, Antonelli, Batt & Dunlap, Esqs., by Frederick A. Jacob, Esq., Attorneys for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on August 29, 1973, it sold alcoholic beverages to two minors, both age 17, in violation of Rule 1 of State Regulation No. 20.

The Division's case was presented through the testimony of three ABC agents who visited the licensed premises pursuant to a specific assignment. The testimony of ABC Agent Pa, which was fully corroborated by Agents Pe and W, may be briefly summarized as follows: On August 29, 1973, at about nine o'clock in the evening, the agents entered the licensed premises and thereafter observed three youthful looking females order and receive glasses of alcoholic beverages. Shortly following the service to the three females, the agents observed the sale of a glass of beer to an apparent minor male. Identifying himself, Agent Pe obtained the identification of and date of birth of the youthful looking patrons, from which he ascertained that one female, Katherine-- and one male, George--, were both seventeen years of age. The agents denied seeing either minor being asked to execute or making any written representation prior to being served, nor did they have reason to believe the bartender relied on such information before making the service.

Testifying on behalf of the licensee, its principal corporate officer, Joseph R. Meloni, Jr., asserted that, about two

weeks prior to the date in the charge, the minor George, attempted to purchase alcoholic beverages. Before service was made, he asked for identification and proof of age.

> "So he [George] showed me a card with the school picture on it that said he was 18, and he also showed me the permit or something, a piece of paper to drive, and I said, I looked at the card I said 'George, do me a favor. Just sign the paper stating that you're 18'. That's all I said...."

As to Katherine, the witness stated that she, too, had been in the establishment at an earlier date, showed a driver's license indicating that she was eighteen. However, he admitted he did not obtain any writing to that effect from her.

On the night in question, when both minors ordered beer, the bartender looked over to Meloni in inquiry concerning service to which Meloni responded "Nick, they're all right." Hence service was made to both.

The sale of alcoholic beverages to the two minors is not in dispute. The area of controversy surrounds the adequacy of the licensee's defense. The licensee contends that, since it had required production of proof of age of both minors prior to service and had obtained the written representation by the minor George, it had substantially complied with the statute and regulation respecting sale to minors. Hence it presented a complete defense and the charges should be dismissed.

The statute pertaining to sales to minors (N.J.S.A. 33:1-77) categorizes the defenses available to a licensee on such sales as follows:

> "(a) that the minor falsely represented in <u>writing</u> that he or she was twenty-one (21) years of age or over [now reduced to age eighteen (18)];
>
> (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be over the age...;
>
> (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 of age...." (underscore added)

The above statute has been held to require that <u>all</u> of the conditions within it must be met in order to provide a complete defense. <u>Sportsman 300 v. Bd. of Com'rs of Town of Nutley</u>, 42 N.J. Super. 488 (App. Div. 1956).

As to Katherine, it has been admitted that no written representation from her was obtained, hence the defense to the charge as pertains to the ssle to her is without foundation.

The charge relating to George, is defended by the contention that the above statute has been fully complied with. George testified on behalf of the Division that he was born February 12, 1956 and was seventeen years old at the time of the sale. He admitted, on cross examination, that he had been in the licensed premises prior to the date in the charge and had signed a paper, introduced into evidence, which disclosed the month of birth as February 1955. He admitted that he had produced a temporary driver's permit which disclosed such birthdate. Additionally, he produced a card with a picture of his high school imprinted thereon, which also showed his age to be eighteen. This latter form was not produced at this hearing.

From all of the testimony, it is uncontroverted and I so find, that the bartender did not obtain any written representation from either minor, nor did either minor exhibit any documentation to him at the time of sale. The statement by Meloni that he indicated to the bartender "They're all right" when, in fact, insofar as Katherine is concerned she could not be legally served, is clearly not exculpatory.

The agents did not hear any remark by the bartender or Meloni relating to the service to George. The bartender, therefore, could not nor was it contended, that he had made the sale to George with the foreknowledge that a written representation as to his age was being relied upon. Hence the statutory requirements were not satisfied. As the appearance of George was apparent as requiring verification to Meloni, it follows that the appearance of this minor should have been questioned by the bartender. As there was no hesitancy by the bartender, it is obvious that he could not have relied upon such alleged prior writing.

The findings in these cases must be based upon competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 7 Wigmore, Evidence, Sec. 2100 (1940). Testimony 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).

I am convinced and find that the Division has established the charge by a fair preponderance of the believable evidence. I therefore recommend that the licensee be found guilty of the said charge.

Absent prior record, it is further recommended that the license be suspended for thirty-five days.

Conclusions and Order

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

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

Accordingly, it is, on this 4th day of April 1974,

ORDERED that Plenary Retail Consumption License C-2, issued by the Township Committee of the Township of Franklin to Jo-Jem, Inc., (A Corporation) T/a The Antlers for premises North Delsea Drive, Franklin Township, be and the same is hereby suspended for thirty-five (35) days, commencing at 4:00 a.m. on Wednesday, April 17, 1974 and terminating at 4:00 a.m. on Wednesday, May 22, 1974.

Joseph H. Lerner
Acting Director