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

BULLETIN 2095 April 4, 1973

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STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - ESSEX COUNTY PACKAGE STORES ASSOCIATION v. NEWARK, ET AL.

Essex County Package Stores Association, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, and First Motor Inn Corp., t/a Gateway Downtown Motor Inn, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Brass & Brass, Esqs., by Leonard Brass, Esq., Attorneys for Appellant
William H. Walls, Esq., by Beth M. Jaffe, Esq., Attorney for Respondent Municipal Board
Stein & Rosen, Esqs., by Allan A. Pines, Esq., Attorneys for Respondent First Motor Inn Corp.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

On September 11, 1972 the Municipal Board of Alcoholic Beverage Control of the City of Newark (Board) approved the application of respondent First Motor Inn Corp., t/a Gateway Downtown Motor Inn (hereinafter Gateway) for a place-to-place transfer of its plenary retail consumption license from certain premises located in the motel premises operated by Gateway at Raymone Plaza West and Raymond Boulevard, Newark, to additional premises at the said address.

The Board, after a full hearing on the application, and consideration of argument in support thereof, the objections of the appellant and the recommended approval of the said transfer by the local police, building and fire departments, adopted the following resolution:

> "BE IT RESOLVED, that the following place to place transfer be and the same is hereby granted by reason of the fact that it has met the statutory requirements for transfer and the approval of this Board. (This is for premises for which certain alterations and/or changes and corrections will be made.) The effective date to be subject to the

completion of the premises at the new location and subsequent to the inspection of the issuing authority.

C-8 Held by: First Motor Inn Inc.
t/a Gateway Downtowner Motor Inn

From: Raymond Plaza West & Raymond Blvd.

To : Raymond Plaza West & Raymond Blvd.
& additional premises.

ADOPTED: September 11, 1972"

Robert E. Brown, secretary of the Board, set forth the reasons upon which the Board based its action as follows:

"In this situation, the Board, having carefully considered the objections as raised by Mr. Leonard Brass, who in his statement represented the Package Store Association, Essex County. The Board, in their deliberations, was of the unanimous opinion that the transfer referred to, should be approved. And accordingly, the poll of the Board indicates a three to nothing approval.

The Board in their approval took into serious consideration a communication of April 26, 1972. 'We have reviewed the plans of your licensed premises and find that they conform to the requirements of the Broad Package Privilege Law (R.S. 33:1-12.23 et seq.) and State Regulation No. 32. We have accordingly stamped the copy of the plan with ex parte approval subject to the determination by the Director in the event the matter is ever presented to him on appeal.... The approved print is not final until such inspection has been made by this Division. You are also reminded that the bar must be a working bar, reasonably stocked with alcoholic and malt beverages, glassware, ice, and the usual bar accessories. Bar stools must be one for every three feet and positioned at the bar. Very truly yours, Robert E. Bower, Director.'

The above letter was a copy dated, 'April 20, 1972' with reference to First Motor Inn Corp. directed to 'Robert Brown, Secretary, Alcoholic Beverage Control Board, City Hall, 920 Broad Street, Newark, New Jersey.'

The Board further considering all the facts as well as the State Director's letter, advised the licensee that in order to conform with the city ordinances it will be necessary for the licensee to affect a place to place transfer. This, of course, is done and that is the reason the matter was considered by the Board at the meeting of September 11, 1972.

The police in their investigation recommended approval of this transfer. The Board in their deliberation took this matter into consideration. The matter has also been approved by the Building and Fire Departments.

In this connection, the Board, therefore, unanimously voted to approve the transfer as indicated. And a poll revealed a three to nothing poll of the Board."

This appeal ensued.

Appellant alleges that the action of the Board was erroneous for the following reasons:

(a) It was illegal and "in direct violation of the Law of the State of New Jersey pertaining to N.J.S.A. 33:1-12.23 and its supplementation by Regulation No. 32";

(b) It was "contrary to the case law rendered by the Appellate Court of the State of New Jersey relating to the Statute and Rule, aforesaid"; and

(c) It was "beyond the scope of any discretionary power" because it was in direct violation of the Statute and Rule.

The answer filed by the Board denies the substantive allegations of the petition of appeal, and defends that the grounds upon which the Board made its decision were "based on the statutory requirements for transfer and the testimony before the Board from which it, in its sound discretion, concluded that the transfer should be approved."

An answer also was filed by Gateway which similarly denied the substantive allegations of the petition and asserted, as an affirmative defense, that the Board acted in full compliance with all applicable statutes and regulations, and that its action constitutes "the exercise of sound discretion by the Board based on the record" before it.

The hearing on appeal de novo herein was based on the transcript of the proceedings before the Board, supplemented by additional testimony adduced at the hearing herein in accordance with Rules 6 and 8 of State Regulation No. 15.

The record reflects the following: Gateway operates a motel at the above described premises and is the holder of a plenary retail consumption license, which was originally granted to it on or about January 8, 1969 by the Board and renewed each year thereafter under the provisions of N.J.S.A. 33:1-12.20 (the hotel-motel act). The license authorizes that certain designated areas within the said motel delineated in the submitted plans may be used under the license privilege.

In October 1970, the Broker Restaurant and Cocktail Lounge was opened under this license. This restaurant and cocktail lounge contains a seating capacity for about 300 persons, and includes a cocktail lounge with a seating capacity of about 60 persons. In the cocktail lounge area is a bar containing about 14 to 16 bar stools.

Opposite the Broker Restaurant and Cocktail Lounge, and separated by a promenade, another barroom was constructed and is operated as a regular bar, catering to commuters and the general public and designated "Room for One More". This is a stand-up bar and contains no bar stools. The "Room for One More" facility was within the area already licensed for the sale of alcoholic beverages.

On or about August 3, 1972, Gateway filed an application for a place-to-place transfer of the said license. The purpose of the said transfer was to permit the "Room for One More" facility to be reconstructed and its space expanded to include a larger bar, stools, table and chairs. This involved the addition of a vacant area contiguous to it in the motel premises, which was not, theretofore, licensed. Annexed to the application is a plan showing the proposed expansion of the barroom space which provides for an area to be devoted to the sale of package goods.

Theretofore, it appears that package goods in the Broker Restaurant facility were sold almost exclusively to hotel guests. On one occasion a witness for the appellant did purchase a bottle of alcoholic beverages although he was not a guest of the motel. This appeared to be an unusual transaction, and the bottle was delivered to him without a bag container (which the bartender apparently did not have), and was obtained from a small closet where the package goods were kept for sale to motel guests.

Following a hearing before the Board as set forth hereinabove, the Gateway application was granted on September 11, 1972, subject to the alterations, changes and corrections to be made at the licensed premises in accordance with the plans submitted. The plans for the expansion of the "Room for One More" had been first submitted to the Director of this Division, and after his examination, he approved the same ex parte, as set forth, hereinabove subject, of course, to his ultimate determination on this appeal, after finding that the plans conform with the statutory requirements and relevant regulation of this Division. The plans as filed and admitted into evidence indicated that there will be an entrance leading from the promenade or galerie into an expanded area of 1095 square feet which will have, at the entrance, a cashier's desk. Included in the expanded area will be a gondola for package display and shelving for package goods.

To the rear in the left of the "L" area, the plans contemplate that another bar will be erected containing eight stools. The package goods area will, of course, be contained within the four walls of the proposed enlarged premises.

Two witnesses testified, on behalf of the appellant that they were unable to purchase package goods at the "Room for One More". However, one of the witnesses did purchase a fifth of a gallon of scotch from the bartender at the Broker Restaurant for which he paid the sum of $14.50 but the bartender was unable to provide him with a bag for the purchase.

Dan Alper, the Managing Director of the Gateway, testified on behalf of the respondent, identified the sketch which was admitted into evidence and described the proposed expansion.

Jerry Waldon, the General Manager of Gateway, testified that it is not the present policy of the motel to sell package goods to the general public in either the Broker Restuarant or the "Room for One More" and that neither bar has operated a package goods store. He stated that the package goods at the Broker Restaurant were stored in a room adjacent to the Broker Restaurant and were intended solely for sales through room-service to the guests of the motel. It was intended that the "Room for One More" would include a package goods store which would not only be of greater service to the guests of the motel who desired to purchase package goods directly (not through room-service) but would serve the general public as well.

It was Gateway's intention to designate the "Room for One More" as the principal bar of the motel, since the bar located in the Broker Restaurant was in reality a service bar and was used essentially as an adjunct to the operation of the restaurant. He noted that, particularly during lunch time, substantially all of the area surrounding the bar and cocktail lounge was used for dining facilities and the bar was used as a service bar as a convenience to the dining guests.

I

Appellant contends that the action of the Board in granting Gateway a place-to-place transfer was in direct violation of N.J.S.A. 33:1-12.23 and State Regulation No. 32, Rules 3 and 4. It further alleges that such action was in violation of the case law of the Appellate Courts of this State and of the "New Guide Lines" for package goods sales as promulgated by the Director of this Division. N.J.S.A. 33:1-12.23 in pertinent part provides as follows:

> "The holder of a plenary retail consumption license...may sell and display for sale alcoholic beverages in original containers for consumption off the licensed premises only in the public barroom of the licensed premises, such barroom being a room containing a public bar, counter or similar piece of equipment designed for and used to facilitate the sale and dispensing of alcoholic beverages by the glass or other open receptacle for consumption on the licensed premises...."

Rule 3 of State Regulation No. 32 repeats the language of the aforementioned statute.

Rule 4 of State Regulation No. 32 provides as follows:

> "No holder of a plenary retail consumption license or seasonal retail consumption license, without the 'Broad Package Privilege' as set forth in Rules 1, 2 and 3 hereof, who maintains at the same time more than one barroom on the licensed premises shall sell or display for sale any alcoholic beverage in the original container for off-premises consumption except from and in the principal bona fide public barroom on the licensed premises." (underscore added)

Gateway, of course, does not have the Broad Package Privilege and, therefore, under N.J.S.A. 33:1-12.23 Gateway "may sell and display for sale alcoholic beverages in original containers for consumption off the licensed premises only in the principal public barroom on the licensed premises."

The attorney for appellant contends that Rule 4 of State Regulation No. 32 restricts the sale of package goods to the principal bona fide public barroom. He does not deny that the "Room for One More" is a bona fide public barroom, but insists that the Broker Restaurant is, in fact, the principal barroom because it contains a bar with fourteen to sixteen bar stools, has a cocktail lounge, which has a seating capacity of sixty persons and has a restaurant which can serve about three hundred persons.

The storeroom which is attached to the restaurant contains the package goods which are available for sale to guests of the motel and to the public. On the other hand, he notes that the "Room for One More" as presently operated contained no stools, cocktail area, chairs and tables and is just a stand-up bar. He further notes that, while the Broker bar remains open until 12:00 or 1:00 a.m. the "Room for One More" presently closes its operation at 6:30 p.m. Finally, he maintains that the operation of the Broker bar will continue as heretofore and that the "obvious intent is to attempt a circumvention of the [statute] and State Regulation No. 32.

My reading of the aforesaid statute convinces me that it gives an absolute right to a licensee to sell alcoholic beverages in original containers for off-premises consumption, provided that such sales take place in the public barroom of the licensed premises. There is no indication that the "Room for One More" as presently constituted does not exist as a bona fide public barroom. As the plan indicates when this facility is enlarged it will contain a total area of 1095 square feet, will include the existing bar plus an additional bar with room for a minimum of eight stools. Therefore, the central issue is whether Gateway has the right and authority to designate these enlarged facilities as its principal bar. It should be noted that while N.J.S.A. 33:1-12.23 mentions the "public barroom", Rule 4 of State Regulation No. 32 defined it more specifically as the "principal bona fide public barroom."

The attorney for appellant points out that Rule 4 of State Regulation No. 32 recognizes that a licensee may maintain more than one barroom at the same time. The rule provides merely that sales for off-premises consumption would take place in and from the principal barroom of the licensed premises.

Walden, the General Manager, has testified that, in the traditional sense, "Room for One More" is the principal public barroom because it caters to the public who want to buy drinks of alcoholic beverages without having to have meals furnished to them. As a practical matter the public would not and in fact, did not go into the Broker to buy package goods because the package goods were merely for sale to the hotel guests.

It is a matter of common experience that persons desiring to buy package goods would not go into a busy restaurant to buy them. It is quite apparent that the bar in the Broker restaurant, used to service over 360 patrons, can practically be considered only as a service or adjunct bar. That Gateway considered this to be the case is evidenced by the fact that the bartender did not even have a bag or facilities to wrap such purchase by appellant's witness.

The purpose of establishing a package goods department in "Room for One More" was to inform the public that such goods were available and could be conveniently purchased.

From my examination of the plans, I note that the proposed enlarged facility will include, plus the additional bar, a minimum of eight stools. When it is enlarged it seems clear that the Gateway would have a right to designate it as a principal bar since it would be operated independently as a barroom.

The proposed changes as set forth in the plans submitted at the hearing clearly indicate that the enlarged facility will be a substantial public bar, satisfying not only the statutory requirements, but also the Guide Lines issued by the Director of this Division. In the said Guide Lines the Director advises:

> "When there are two or more public barrooms on a licensed premise, and in the event of a conversion of one of the barrooms to a primarily off-premises outlet, the designation of same barroom must be made by the licensee and approved by the Director." (Emphasis supplied)

Here the designation was definitely made by Gateway and was consistent with the intended use of that facility. Moreover, in considering whether a barroom is the principal bona fide barroom,

not only quantitative but qualitative criteria must be evaluated. The record indicates that the "Room for One More" facility will be greatly expanded to a total area of 1095 square feet. Thus, this is not merely a make-shift bar arrangement, but constitutes a substantial area.

Further, Gateway proposes to keep this facility open until 10:00 p.m. So that the fact that the Broker is open until 12:00 p.m. is not really significant.

And finally, qualitatively, what is relevant is the fact that the Broker is not set up to sell package goods, but maintains its bar therein essentially as a service bar to accommodate the needs of its large patronage. Also, the word "principal" as stated in the relevant rule cannot be defined in a vacuum, but must be read in the context of its practical application for the use intended. These are the practical determinants which mandated the designation of the "Room for One More" as the principal bona fide barroom.

In Mayor & Council, Bor. of Totowa v. Chicken Barn, Inc., 41 N.J. Super. 459 (App. Div. 1956), the licensee sought a place-to-place transfer from an existing bar located in a restaurant with an existing package goods store to an enlarged restaurant bar and package goods facility. The issuing authority denied the said application and the Director reversed and allowed the transfer. On appeal, the Appellate Division affirmed the action of the Director and held that where no walls were to be erected to separate bar from package goods displayed, and proposed changes merely enlarged area wherein package goods were displayed in the bar, there was no violation of statute dealing with the sale and display of intoxicating liquors for off-premises consumption, and it did not constitute a violation of the regulation of this Division.

With respect to the sale of alcoholic beverages from an additional public barroom, said the court at p.464:

> "The statute and rule do not prohibit enlargement of an existing public barroom. To hold otherwise would prevent a licensee from enlarging or renovating his premises. The Director determined, and we agree, that since no walls were to be erected to separate the bar from the package goods display, the proposed changes merely enlarge the area wherein package goods are displayed, and thus there was no violation of either the statute or regulations."

Since I find that Gateway had the right to designate "Room for One More", when enlarged in accordance with the application and plans submitted, it follows that such enlargement to include the package goods facility within its four walls was not violative of the statute and the subject regulation.

As noted hereinabove, it is quite apparent that package goods sold at the Broker restaurant were intended merely for the convenience of the guests of the motel who were able to purchase these package goods through room service. The clear intent of enlarging the facility of "Room for One More" was not only to add a greater convenience to the motel guests who might desire package goods in a manner other than through room service, but also to provide the general public with an outlet for the purchase of such goods. Cf. Springdale Park, Inc. v. Tp. Comm. of Andover, 97 Super. 270 (App. Div. 1967). In that case the court re-affirmed the principle that the sale of alcoholic beverages for off-premises consumption in a motel is not statutorily limited to the needs of the motel and to guests. It quotes the Director as follows:

> "I find nothing in the statute or the adjudicated cases to so limit such license issued to a motel. Once a plenary retail consumption license is issued to a motel it carries the same rights and privileges as any other plenary retail consumption license, and the restaurant facility which it operates can be as large or small as is economically feasible...."

Therefore, I find no merit in appellant's contention that the proposed enlarged facility of the "Room for One More" bar to be designated as the principal bona fide public barroom is in contravention of the aforesaid statutes, Division regulations or Guide Lines promulgated by the Director.

II

The appellant contends that Gateway would be in violation of R.S. 33:1-12(1) because there are other mercantile establishments operating in the motel premises which have entrances on the galerie or promenade. It contends that since this is open to the public that it would be in violation of the aforesaid statute, which provides that:

> "...such license shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which a grocery, delicatessen, drug store or other mercantile business (except the keeping of a hotel etc.,)is carried on."

This clearly does not apply to motel premises. See Springdale Park, Inc. v. Tp. Comm. of Andover, supra; Essex County Retail Liquor Stores Assn. et al. v. Newark and Pere, Inc., 64 N.J. Super. 314.

This contention lacks merit and is rejected.

III

Finally, appellant contends that since there is a violation of the statute and regulations the Board does not have any discretion in this matter. Inasmuch as I have determined that the relevant statute and regulations have not been violated, I am of the conviction that the Board has acted in the reasonable exercise of its lawful discretion in granting the application for transfer.

In matters involving transfers of licenses the burden of establishing that the action of the Board in granting the transfer was erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 Cert. denied 18 N.J. 204 (1955). Once it so acts its action may be reversed on appeal only in the event that it constitutes a clear abuse or unreasonable or arbitrary exercise of such discretion. Essex County Retail Liquor Stores Ass'n v. Newark, 77 N.J. Super 70 (App. Div. 1962); Hudson-Bergen County Retail Liquors Dealers Assn. v. North Bergen et al., Bulletin 997, Item 2; Blanck v. Magnolia, 38 N.J. 484 (1962).

In Ward v. Scott, 16 N.J. 16 (1954), a Superior Court decision of an appeal from a zoning ordinance quoted in Fanwood v. Rocco, 59 N.J. Super. 306, the following general principle was stated:

> "Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications...And their determinations should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: 'Universal distrust creates universal incompetence.' Graham v. United States, 231 U.S. 474, 480, 34 S. Ct. 148, 151, 58 L. Ed. 319, 324 (1913)."

The Board in the exercise of its lawful discretion obviously determined that the proposed enlarged facility to include a package goods store would not only benefit the guests of Gateway but also the City of Newark. The Gateway project located opposite the Pennsylvania Station in Newark is an important project and was developed with a view to bringing into the City of Newark a facility which would help advance the interests of the residents of this municipality. The Board felt that the proposed enlargement of the "Room for One More" to include a package goods store would be consistent with and in accord with the desire to make the Gateway project a constructive addition to the City. It was obviously felt that the enlargement of these premises would service the public as well as guests of the complex and would be in the public interest. The public interest is the polestar in these proceedings. See Lubliner v. Paterson, 33 N.J. 428 at p.441.

In Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, at p.302-303 (1970) the court stated:

> "Responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place...is primarily committed to municipal authorities. N.J.S.A. 33:1-19, 24... In allocating spheres of operation between the State Division and municipal authorities, the Legislature wisely recognized that ordinarily local officials are thoroughly familiar with the community's characteristics ...the nature of the particular area....
>
> "Obviously when the lawmakers delegated to local boards the duty 'to enforce primarily' the provisions of the act it invested them with a high responsibility, a wide discretion and intended their principal guide to be the public interest. Lubliner v. Paterson, 33 N.J. 428, 446 (1960).
>
> "The conclusion is inescapable that if the legislative purpose is to be effectuated, the Director and the courts must place much reliance upon local action (and) its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion."

To the same effect, see Fanwood v. Rocco, 33 N.J. 404 at p.414.

The function of the Director in these matters is to determine whether reasonable cause exists for the issuing authority's opinion and, if so, to affirm its action. Helms v. Newark et al., Bulletin 1398, Item 3.

The ultimately dispositive rule in these matters was succinctly stated in Lyons Farms Tavern, Inc. v. Newark et als., supra (55 N.J. at p.303):

> "...Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue in these cases: Did the decision of the local board represent a reasonable exercise of discretion on the basis of evidence presented? If it did that ends the matter of review both by the Director and by the courts."

I conclude that the Board acted in the circumspect and proper exercise of its lawful discretion, fully consistent with the applicable law, regulations and guide lines established by this Division in reaching its determination. I find that the other matters alleged in the petition of appeal to be lacking in merit.

I, therefore, find that the appellant has failed to sustain the burden of establishing that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15. It is, accordingly, recommended that an order be entered affirming the action of the Board and dismissing the appeal.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report and argument in support thereof were filed by the attorney for the appellant. No answering argument was filed by the respondents.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's report, and the exceptions to the Hearer's report which I find have either been fully considered in the Hearer's report or are lacking in merit, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 21st day of February, 1973

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Robert E. Bower,
Director

2. APPELLATE DECISIONS - BRIGHTON HOLDING COMPANY, INC. v. NEWARK.

Brighton Holding Company, Inc., t/a Soul Community Liquors & Delicatessen,

Appellant,

v.

Municipal Board of Alcoholic Beverage Control of the City of Newark,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Braff, Litvak, Ertag, Wortmann & Harris, Esqs., by Brian C. Harris, Esq., Attorneys for Appellant
William H. Walls, Esq., by Beth M. Jaffe, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant, holder of a plenary retail distribution license for premises 523 Springfield Avenue, Newark, appeals from the action of respondent Board which on March 27, 1972, found appellant guilty of (1) a sale and delivery and permitting the removal of an alcoholic beverage on a Sunday (December 27, 1970), in violation of Rule 1 of State Regulation No. 38, and (2) on the same day it permitted its entire licensed premises to remain open, in violation of a local ordinance. The Board suspended appellant's license for fifteen days effective April 17, 1972.

Upon filing this appeal an order was entered by the Director on April 18, 1972, staying the Board's action pending determination of this appeal.

In its petition of appeal appellant alleges that the Board's action was erroneous in that it was against the weight of the evidence and was the result of prejudice and mistake.

The Board in its answer denied that its action was erroneous and asserts that it was based on factual testimony.

The transcript of testimony of the proceedings held before the Board on March 20, 1972 was admitted into evidence, supplemented by oral testimony, pursuant to Rules 6 and 8 of State Regulation No. 15.

A review of the transcript of the hearing before the Board reflects the following: Detective Vincent Coburn of the Newark Police Department testified that on Sunday, December 27, 1970, he and Detective Bernie Hardy were assigned to the area in which the licensed premises were located. At approximately 10:30 a.m. he observed a male (identified as James Brown) enter the licensed premises (described by him as "a liquor store and delicatessen") and purchase groceries at a counter at the front of the store serviced by a female. Proceeding to the rear of the store, Brown purchased what appeared to be a bottle of vodka which was placed in a bag by Forrest Fleming. Upon departing from the premises, Brown was apprehended and placed in their patrol car. Shortly thereafter he observed a male (identified as James Manly) walk in the premises and purchase a bottle of scotch whisky. Upon

departing from the premises, Manly was also confronted and placed in the car. The detectives entered the premises and informed Fleming that he was under arrest for illegal sale of alcoholic beverages. Both Brown and Manly denied purchasing the liquor in the licensed premises. The bottles confiscated from each were received in evidence.

On cross examination Detective Coburn testified that he parked the car diagonally across the street and approximately seventy-five to one hundred feet distant from the licensed premises. The liquor is located at the rear of the store. He could observe the rear of the store with binoculars. He found a bottle of liquor in the bag of groceries that Brown was carrying out of the premises. He did not recall whether Brown was carrying a bag upon entering the premises. Manly was carrying the bottle inside his waist. The officer asserted that he observed both sales through binoculars.

Detective Bernie Hardy corroborated the testimony offered by Detective Coburn.

On cross examination Hardy testified that he was seated in the driver's seat; that Coburn used binoculars and that he himself could see the interior of the store except that "maybe to the extreme left."

James Manly testified that he at no time entered the licensed premises on December 27. He was on his way to visit a friend and he was carrying the bottle inside his shirt. He had purchased the bottle the day previous from some other liquor establishment. He always carries liquor inside his shirt.

In behalf of appellant James Brown testified that on the morning of December 27 he purchased two bags of groceries in a store across the street from appellant's delicatessen and liquor store and then proceeded to the delicatessen and liquor store in order to purchase a certain make of cigar sold by appellant. He had the bottle of liquor in his possession at the time that he had entered appellant's establishment. Upon being questioned concerning the place where he had obtained the liquor, the witness asserted "off the street ... from two friends I know." And,

> "Two friends I know. I told them I didn't have any money and they said I could get it real cheap, and he said, 'You want it?' I said, 'No.' He said, 'Come on, it's cheap.' So I gave him I think $2 I gave him for it. For a fifth of liquor, $2 I'll buy it any day."

He asserted that in purchasing the groceries he was waited on by Mrs. Hicks (later identified as Citernia Fleming). He was confronted, questioned and arrested by the police officers about a block-and-a-half from appellant's establishment. He denied that he had purchased the liquor in appellant's store. Upon being transported in the patrol car, he observed Manly, accompanied by a female, about to enter appellant's store. The female entered appellant's store and, as Manly was walking up the street, he too was held for questioning by the police officers.

Brown denied purchasing the bottle of liquor in appellant's establishment.

On cross examination Brown testified that he purchased the liquor from "two boys" on Springfield Avenue, whose names he did not know although he could recognize them if he were confronted with them.

The witness then testified that he purchased the cigars from Forrest Fleming. He carried the bags of groceries into appellant's store. No liquor was placed in either bag by Fleming.

Helen Hicks, later identified as Citernia Fleming, testified that she is a part-time employee at appellant's store. On December 27 she arrived at the store between 10:30 and 10:35 a.m. As she was entering the store, Brown was leaving. She hadn't as yet removed her coat when she was taken under custody by the police. She at no time waited on Brown. She did not see Manly enter the store that day.

On cross examination the witness testified that she has no financial connection with the business of appellant. Upon being questioned whether she is a good friend of Fleming, she responded, "No, not really." She helps out whenever she can, "sometimes on Sundays I go and do the books or to get the bills together, because I do that sometimes for his accountant, so other times whenever they are shorthanded." She receives no remuneration for her assistance.

Forrest Fleming testified that he is employed as the manager of the business conducted by the corporate appellant. On December 27 he opened the store at approximately 8 a.m. From that time to 10:30 a.m. he did not see Manly in the store. Brown entered the store carrying two bags of groceries he had purchased elsewhere. He purchased a certain make of cigars and departed. Mrs. Hicks did not wait on him. She was entering the store while Brown was leaving. Approximately twenty-five minutes later he (Fleming) was placed under arrest. During that period of time Manly did not enter the store. He was not acquainted with Manly. He did not sell an alcoholic beverage to either Brown or Manly on the morning of December 27.

On cross examination Fleming testified that he and Mrs. Hicks are "very close friends" and that he and she "are in love." She is not compensated for the work she performs in the store.

At the hearing held at the Division offices on September 7, 1972, Forrest Fleming testified that the liquor department display is to the right of the entrance to the store, and the delicatessen department is to the left. At the rear of the store there is located the liquor counter with its separate cash register. A partition approximately four-and-a-half feet high separates the liquor display from the delicatessen department.

The witness reiterated the testimony offered by him at the hearing held before the Board relative to his sale of cigars to Brown and that at no time did Manly enter the store on the morning of December 27. A female, whom he later ascertained was Manly's wife, did patronize the delicatessen department on that morning and was served by Mrs. Hicks (Fleming).

On cross examination Fleming testified that an individual could proceed from the delicatessen department to the liquor department and vice versa without going outside the premises. Groceries are also sold in the premises. Hicks and Fleming have since married.

Citernia Fleming testified she is the same person who was known as Mrs. Helen Hicks in the proceedings before the Board held on March 20, 1972.

On Sunday, December 27, 1970, she entered the licensed premises at approximately 10:15 a.m. as Brown was leaving the store. She did not wait on him. Thereafter she waited on a female whom she later learned at the police station was Manly's wife. She was not acquainted with Manly nor had she seen him in the licensed premises that morning. She worked at the store in order to help Fleming whom she subsequently married.

At the request of the attorney for appellant, the hearing was continued to a later date in order to afford appellant an opportunity to produce Detective Vincent Coburn as a witness. At the continued hearing Detective Coburn testified that on the subject day he and Detective Hardy were using an unmarked police car. The car was parked diagonally across the street from the licensed premises. He peered into the store using binoculars and he could see the counters on either side of the store and into the rear thereof. He did not recall whether he was seated in the driver's seat or on the passenger side. At times his view could have been obstructed by traffic.

Concerning Brown's movements, he testified that he "entered the store and purchased some groceries from a female at the counter on the left as you enter. After he purchased the groceries he went to the rear, where he purchased a bottle of vodka." He did not recall whether Brown was carrying anything upon entering the store. He recalled testifying in the municipal court concerning this matter on January 7, 1971; however, he did not recall testifying that Brown was carrying two bags upon entering the store. The alcoholic beverage was purchased from Fleming who was behind the counter in the rear.

After Brown was detained in the police vehicle, he observed Manly "walk into the store and purchase a bottle of scotch, which he placed inside his pants and walked out, and he was stopped by myself and Detective Hardy" and, further, "went directly to the rear counter where he met Mr. Fleming, and it appeared he exchanged money for a bottle of scotch, which he placed inside his pants, like between his waist line and down, you know, down below there." He did not recall whether he walked in alone or was accompanied by a female.

Preliminarily, it should be observed that we are dealing with a purely disciplinary action. 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 only by a fair preponderance of the credible evidence. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956). There is a sharp conflict in the testimony of the witnesses produced by both appellant and the Board. Testimony, to be believed, must not only proceed from the mouth of credible witnesses but must be credible in itself. No testimony need be believed but, rather, so much or so little may be believed as the trier finds reliable. 7 Wigmore Evidence, sec. 2100 (1940); Greenleaf Evidence, sec. 201 (16th Ed. 1899).

I am imperatively persuaded that Detective Coburn's version with respect to the alleged purchases by Brown and Manly had a substantial ring of truth and was not contrived or improperly motivated in order to inculpate an innocent licensee. I have taken particular note of the fact that this witness was extensively cross-examined by the competent attorney for appellant and his unequivocal identification of both Brown and Manly, his detailing of the transactions in which they engaged in the licensed premises and the finding of alcoholic beverages in the

possession of Brown and Manly are convincing and credible. On the other hand, it is my view that the testimony of Brown and Manly was fabricated in an attempt to favor and assist a licensee who had unlawfully delivered them alcoholic beverages.

It also appears to me that Fleming's version was prompted by self-interest.

As pointed out before, there is no measure of weight of evidence other than the feeling of probability which it engenders. Wigmore Evidence, 3d Ed., sec. 2948. Further, it should be pointed out that the ultimate test in these proceedings is one of reasonableness on the part of the Board. In other words, could the Board, as reasonable men, acting reasonably, have come to its determination based upon the credible evidence presented? They have had an opportunity to observe all of the witnesses, and clearly and unanimously believed the testimony of the police officers.

The Director's function on an appeal of this kind is not to substitute his personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal views. Broadley v. Clinton & Klingler, Bulletin 1245, Item 1; Tash v. Princeton, Bulletin 1585, Item 3. Simply stated, this means that the Director should not reverse unless he finds as a fact that there was a clear abuse of discretion, or unwarranted finding of fact or mistake of law by the Board. Montiero v. Newark, Bulletin 2073, Item 2, and cases cited therein.

I have carefully evaluated both the transcript of the hearing below and the testimony presented before me at the plenary de novo hearing.

I therefore find that, under all of the circumstances, there has been the necessary quantum of proof, namely, by a preponderance of the believable evidence of appellant's guilt. I conclude that appellant has failed to carry the burden of establishing that the Board's action was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15.

I accordingly recommend that an order be entered affirming the Board's action, dismissing the appeal, and fixing the effective dates for the suspension imposed by the Board, stayed pending the entry of the 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 entire record herein, including the transcript of the testimony, the exhibits 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 26th day of February 1973,

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 my order, dated April 16, 1972, staying the Board's action pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Distribution License D-73, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Brighton Holding Company, Inc., t/a Soul Community Liquors & Deli., for premises 523 Springfield Avenue, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Thursday, March 8, 1973, and terminating at 2:00 a.m. Friday, March 23, 1973.

ROBERT E. BOWER
DIRECTOR

3. APPELLATE DECISIONS - NELSON v. NEW BRUNSWICK.

Gilbert L. Nelson, Appellant, v. City Council of the City of New Brunswick, and James M. Scott, Jr., Respondents.	On Appeal CONCLUSIONS and ORDER

Gilbert L. Nelson, Esq., Appellant Pro se
J. Norris Harding, Esq., Attorney for Respondent City Council
Benjamin Weiner, Esq., Attorney for Respondent Scott

BY THE DIRECTOR:

This is an appeal from action of respondent City Council of the City of New Brunswick which on December 20, 1972 adopted a resolution approving an application for a place-to-place transfer of a plenary retail consumption license held by respondent James M. Scott, Jr. to another location.

When the matter came on for hearing, appellant did not appear but notified the Division by telephone that he was withdrawing the appeal, whereupon counsel for respondents moved for dismissal of the appeal. I shall grant the motion and dismiss the appeal.

Accordingly, it is, on this 15th day of March 1973,

ORDERED that the appeal herein be and the same is hereby dismissed.

Robert E. Bower,
Director.