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

December 6, 1967

BULLETIN 1764

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ITEM

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1. APPELLATE DECISIONS - HANDON AND COWARD v. NEWARK AND KAY'S LIQUORS.

DAVID HANDON AND RUSSELL COWARD, Appellants,	)	
v.	)	ON APPEAL CONCLUSIONS AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, AND KAY'S LIQUORS (CORP.), Respondents.	)	

Zucker, Brach & Eichler, Esqs., by Lance A. Posner, Esq., Attorneys for Appellants
Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney for Respondent
James E. Abrams, Esq., Attorney for Respondent Kay's Liquors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Municipal Board of Alcoholic Beverage Control (hereinafter Board) whereby on the 15th day of February 1967 it unanimously granted the application of respondent Kay's Liquors (corp.) for a place-to-place transfer of its plenary retail distribution license for the period expiring June 30, 1967 from premises 118 Spruce Street to 423 Chancellor Avenue, Newark.

The petition of appeal alleges that the action of the Board was erroneous and should be reversed for reasons which may be briefly summarized as follows:

1. The appellants did not receive notice of the meeting held before the Board and therefore were "not afforded an opportunity to be heard with respect to [their] objections;"

2. There were certain procedural irregularities with respect to the service of notice to property owners residing within 200 feet of the proposed transfer site; and other procedural omissions in violation of the local ordinances;

3. That the action will "depreciate the value of their property; will impair the health and safety of the neighboring community and will be detrimental to the general welfare of the community."

The answer of respondent Kay's Liquors denies the allegations of the petition and sets forth two defenses:

1. That the appeal should be dismissed because the notice and petition of appeal were not filed within thirty days from the date of the action of the Board pursuant to Rule 3 of State Regulation No. 15; and

2. That the Board exercised its sound discretion in granting the application for the transfer of the said license.

At this plenary de novo hearing on appeal appellants were afforded full opportunity to present testimony in support of their objections. Thus, if there were any procedural irregularities, they have been rectified on this appeal. Rule 6 of State Regulation No. 15. Cf. Nordco, Inc. v. State, 43 N.J. Super 277, 288 (App.Div. 1957).

The transcript of the testimony taken at the hearing before the Board was submitted on this appeal in accordance with Rule 8 of State Regulation No. 15, and was supplemented by additional testimony on behalf of both the appellants and respondents.

I

The first separate defense of respondents is, in my judgment, a complete defense to this action and the appeal herein should be dismissed. The record herein, which includes the testimony of Robert E. Brown, Secretary of the Board, reflects the fact that the action of the Board in approving the transfer took place on February 15, 1967. This is admitted by appellants and is further acknowledged by the notice of appeal filed herein. However, the transfer was actually endorsed effective April 12, 1967, upon completion of the plans and specifications filed with the Board. The notice of appeal and petition of appeal were filed on April 21, 1967.

R.S. 33:1-26 relates, in part, to appeals from transfers of liquor licenses. The fifth paragraph thereof is controlling in this case. The applicable part of that paragraph reads:

"... If the other issuing authority shall grant a transfer any taxpayer or other aggrieved person opposing the grant of the transfer may, within 30 days after the grant of such transfer, appeal to the director from the action of the issuing authority."

Rule 3 of State Regulation No. 15 in its applicable part provides as follows:

"Appeals from the issuance of a license and from the granting of an application for the extension or transfer of a license must be taken within thirty (30) days from the date of the action appealed from; all other appeals must be taken within thirty (30) days after the service or mailing of notice by the municipal issuing authority of the action appealed from."

There is no requirement that notice be given to any objectors to the grant of a transfer. As the court pointed out in Hess Oil & Chem. Corp. v. Doremus Sport Club, 80 N.J.Super. 393, 396:

> "... The Legislature has chosen to require each individual objector to keep himself informed of a local board's decisional process rather than burden the local board with taking names and addresses, and later notifying the potentially large number of interested persons. There is no statutory requirement that a local board notify objectors of its decision to grant a place-to-place transfer."

The court further stated that:

> "... Enlargement of statutory time for appeal to a state administrative agency lies solely within the power of the Legislature, Borough of Park Ridge v. Salimone, 21 N.J. 28, 47 (1956), affirming 36 N.J. Super. 485 (App. Div. 1955), and not with the agency or the courts, Scrudato v. Mascot S. & L. Assn., 50 N.J. Super. 264, 270 (App.Div. 1958)."

Concluded the court in that case:

> "Since the appeal was untimely, the Division acted properly in refusing to hear it. Indeed, the Division had no jurisdiction to accept the appeal", citing cases.

See also Atlantic County Licensed Beverage Association et al. v. Hamilton Township et al., Bulletin 879, Item 5.

It is very clear in the matter sub judice that the actual endorsement of the transfer was a ministerial act which did affect the date of the action taken with respect thereto by the Board. I therefore conclude that the appeal herein was taken out of time, and that the Director is without jurisdiction to consider the same.

II

Notwithstanding the above finding, testimony was taken with respect to the substantive merits. Based on the following findings of fact, I am persuaded that the action of the Board was reasonable and a proper exercise of its discretion. Respondent Kay's Liquors was forced to discontinue the operation of its plenary retail distribution license at 118 Spruce Street because those premises were pre-empted by the City of Newark for an urban renewal development project.

Thus this was clearly a hardship situation. The site to which the transfer of this license was granted is located in a well-developed business section on one of the main thoroughfares in Newark. According to the Police Department report submitted by Captain Max Steinberg of the precinct in which that site is located, there is "no other 'D' license in the vicinity, the closest one being on Lyons Ave. and Schley St. being a substantial distance from the cite. However, there is a 'C' license located at 378 Chancellor Ave. which is over 600 ft. away from this proposed location...."

The Captain testified that he has known the principal officers of the corporate licensee for many years and recommends them as persons of high integrity and an unblemished record of operation.

The record, buttressed by the testimony of the Board's Secretary, shows that there has been full compliance on the part

of the respondents with all procedural requirements, applicable ordinances and State Regulations prior to the approval by the Board of the application for transfer.

David Handon voices the objection that the transfer of this license would depreciate his property. Although such objection is of relevance, he did not offer the slightest scintilla of evidence to support this contention. He also objected because "People go in whiskey stores, buy whiskey, stand around drinking it and things like that. That is a prime reason." This, of course, is a nebulous objection, contrary to the long experience of well-run package liquor stores. The co-appellant Russell Coward never bothered to appear or testify in these proceedings.

Maurice Berlinrut, president of the Weequahic Community Council (an organization in the neighborhood in which the license is now located) testified that he feels generally that a liquor store "will be harmful to the neighborhood and a detriment to the neighborhood." However, on cross examination he admitted that, so far as he knows, there has been no difficulty with package liquor stores and particularly with the one operated by respondent Kay's Liquors.

The number of licensed premises to be permitted in a particular area has been held to be a matter confided to the sound discretion of the local issuing authority. It is also apparent that the Board took into consideration the good character of the respondent Kay's Liquors, its unblemished record as a licensee, and the hardship circumstance. Tagliaferro et als. v. Newark et al., Bulletin 1710, Item 1. It also clearly recognized the well-established thesis that an owner of a license or privilege acquires, through its investment therein, an interest which is entitled to some measure of protection in connection with a transfer. R.S. 33:1-26. Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462.

The action of the municipal issuing authority will not be reversed by the Director unless there was evidence that "the act of the board was clearly against the logic and effect of the presented facts." Hudson Bergen, &c., Assn. v. Hoboken, 135 N.J.L. 502, 511. I conclude that the Board acted reasonably and in the sound exercise of its discretion in approving the said transfer.

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

Conclusions and Order

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

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

Accordingly, it is, on this 14th day of September 1967,

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

JOSEPH P. LORDI
DIRECTOR

2. APPELLATE DECISIONS - GEWERTZ v. DEPTFORD and P & J LOUNGE, INC.

Kenneth Gewertz and Frank Schmitt, Appellants, v. Township Committee of the Township of Deptford, and P & J Lounge, Inc., t/a "Wagon Wheel", Respondents.	)	ON APPEAL CONCLUSIONS AND ORDER

Martin A. Herman, Esq., Attorney for Appellants.
Fred A. Gravino, Esq., Attorney for Respondent Township Committee
Cahill and Wilinski, Esqs., by Robert Wilinski, Esq., Attorneys for Respondent P & J Lounge, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellants (both of whom are members of the respondent Township Committee) challenge the action of the Township Committee (hereinafter Committee) whereby it granted the application for a place-to-place transfer and renewal of plenary retail consumption license of the respondent P & J Lounge, Inc., t/a "Wagon Wheel", for premises located at Lot 47, Block 233, Plat 21, Easterly side of Delsea Drive, New Sharon.

The Committee's determination, as reflected in the minutes of the meeting held on April 10, 1967, was made after it was advised by the Township attorney that the procedure adopted at that meeting was lawful, and that the proposed resolution had been approved as to form by this Division. The following resolution was adopted:

> "WHEREAS, on June 27, 1966, by resolution duly adopted, plenary retail consumption license #C-8 was renewed to P & J Lounge, t/a Wagon Wheel, subject to evidence of building within ninety days and it now appearing that said building has been substantially completed in accordance with plans and specifications filed and it further appearing that in order to clear up any questions in the form or wording of the resolution heretofore adopted with reference to this license, the following resolution is hereby adopted:

"BE IT RESOLVED that plenary retail consumption license C-8 heretofore issued to P & J Lounge, t/a Wagon Wheel, for premises located Lot 46, Block 233, Plate 21, easterly side of Delsea Drive, New Sharon, New Jersey, is hereby transferred to P & J Lounge, t/a Wagon Wheel, for premises located Lot 47, Block 233, Plate 21, easterly side of Delsea Drive, New Sharon, New Jersey, effective June 30, 1966, nunc pro tunc, subject to the completion of premises in accordance with plans and specifications and this transfer shall be effective as of June 30, 1966, for the sole purpose of permitting the granting of application for 1966-1967 renewal.

"BE IT FURTHER RESOLVED that application for 1966-1967 plenary retail consumption license #C-8 is hereby granted, subject to the completion of premises in accordance with plans and specifications.

"BE IT FURTHER RESOLVED since the premises have now been completed in accordance with said plans and specifications, the Township Clerk is authorized and directed to issue 1966-1967 plenary retail consumption license #C-8 to P & J Lounge, t/a Wagon Wheel, for premises located Lot 47, Block 233, Plate 21, easterly side of Delsea Drive, New Sharon, New Jersey."

The aforesaid resolution was adopted by a vote of seven to two, with both appellants as members of the Committee voting in opposition. No other person appeared to object to the said resolution.

In their petition of appeal appellants allege that the action was erroneous for reasons which may be briefly summarized as follows: (a) the present transfer was not advertised, (b) the notice of renewal was erroneously advertised, (c) no hearing was held on the said proposed transfer despite written objection by the appellant Gewertz, and (d) failure to comply with the filed plans.

Answers filed by the respondents defend on grounds which may be summarized as follows: (a) the appellants have "no standing to bring this Appeal since they are members of the municipal body which approved the transfer and renewal;" (b) the renewal of the license approved by resolution adopted on June 27, 1966, was voted unanimously by the Committee (with both appellants participating) and without any objections by appellants or anyone else, thus the objection to a renewal at this time is out of time and contrary to the Rules and Regulations of this Division; (c) since the respondent P & J Lounge, Inc. has expended large sums of money in the building of its facility without any objection raised by appellants, they are estopped from making such objections at this time; (d) the resolution hereinabove cited was technical in nature, adopted nunc pro tunc, and is also valid in form; and (e) no one was misled or misinformed by the Committee's action and it was in the public interest.

This appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for the respective parties to present additional testimony and cross-examine witnesses.

I

The respondent licensee's first asserted defense on jurisdictional grounds, namely, that appellants, as members of the Committee, have no standing to bring this appeal, is in my view decisive and dispositive of this appeal.

Both appellants were members of the Committee on June 27, 1966 when it voted unanimously to grant renewal of the subject license; they also participated as such members in the consideration of the resolution adopted on April 10, 1967, and voted in opposition to its adoption. That resolution was adopted by majority vote.

Both appellants are taxpayers of this Township and, as such taxpayers, have a common interest with other taxpayers and residents in this matter when it was presented to the Committee. Such interest did not disqualify them from acting in their quasi-judicial capacity as members of Committee, especially since they did not have a direct property or pecuniary interest in the subject matter. 48 C.J.S. Judges, Sec. 48, p. 1053.

R.S. 33:1-26 provides, in so far as applicable herein, that "If the other issuing authority shall grant a transfer any taxpayer or other aggrieved person opposing the grant of the transfer may, within 30 days after the grant of such transfer, appeal to the director from the action of the issuing authority."

However, public policy considerations dictate that, having participated in such determination in a quasi-judicial capacity as members of the Committee, they are estopped from instituting an action as taxpayers or "aggrieved persons" in this tribunal to review that determination.

When appellants became members of the Committee they, in effect, agreed to waive their rights as "aggrieved" persons in so far as they related to matters being considered by that tribunal. The failure to do so would clearly involve a conflict of interest and impede the salutary and impartial administration of the Alcoholic Beverage Law by that body.

There is the well established doctrine that no person can be judge of his own cause, and a judge is disqualified from acting in a cause where he has an interest in the subject matter of the suit. See 48 C.J.S. Judges, Sec. 78, p. 1045. By assuming that function as members of the municipal issuing authority appellants are clearly estopped from becoming parties to an appeal that reviews the actions of that body, since such review is merely an extension and part of the action below. To hold otherwise would place appellants in the position of being parties to an action in which they also serve as judges. The effect of this would also be that appellants now admit that they did not act impartially and objectively, but were motivated by their own interests as taxpayers or aggrieved persons. Common fairness and logic resist that position.

Further, appellants are estopped from complaining, on appeal, from a determination in which they participated as members of the inferior tribunal. See general discussion, 5 C.J.S. Appeal and Error, Sec. 1501; also 73 C.J.S. Public Administrative Bodies and Procedure, Sec. 176, pp. 518-520.

Although counsel have been requested and have researched this postulate, no case has been presented which is dispositive of this specific inquiry. Nevertheless, on the basis of the general applicable principles of law, fairness and public policy considerations, I conclude that appellants have no legal standing in this tribunal to review the action of the Committee. Therefore the appeal must fail because of its jurisdictional infirmity.

II

Although I have concluded and recommended that the petition herein be dismissed for lack of jurisdiction, I have nevertheless examined and evaluated the entire record herein and find that on the merits the action of the Committee should be affirmed. I make the following findings of fact: P & J Lounge, Inc. was the holder of a plenary retail consumption license covering premises on Lots 46 and 47 at the aforesaid address for the period from July 1, 1965 to June 30, 1966. The building which was located on Lot 46 was severely damaged by fire on July 25, 1965, and it became clear before the end of that licensing period that the landlord had decided not to rebuild.

Horace B. Peters, president of P & J Lounge, Inc., inquired of this Division as to the procedure to be followed with respect to the licensing period commencing July 1, 1966. Although he was advised by letter from this Division with respect to the correct procedure in filing an application for a place-to-place transfer and renewal of his license precedent to his intention to construct a new building on Lot 47 (which was part of the licensed premises), he was apparently incorrectly advised by the Township solicitor that a renewal application was the only procedure required. The Township solicitor apparently also advised the Committee that this was the correct procedure because on June 27, 1966, it unanimously approved P & J Lounge's renewal application which was subject to its constructing a new building on Lot 47 within a specified period of time.

It further appears that, because of financial and other difficulties, the building did not actually commence until January 1967. P & J Lounge, Inc. filed plans and specifications and no objections were made to these plans by the Committee or its members and the construction of the building took place with the approval of the zoning officer, the building inspector and other Township officials.

When it was brought to the attention of the Committee that the procedure was deficient because no place-to-place transfer was filed, the resolution of April 10, 1967 was adopted after consultation with a Deputy Director of this Division.

No taxpayer or no "aggrieved" person, with the exception of the appellants (members of the Committee), entered any objections to the adoption of the said resolution. This resolution, as noted hereinabove, corrected the technical deficiency nunc pro tunc.

It is abundantly clear that the appellants cannot at this time object to the original renewal resolution of June 27, 1966, because the time for objection to same has long since expired. In the testimony of this appeal de novo Gewertz objected principally on the ground that Lot 47 was located in a residential area and thus violated the zoning code. He admitted tha he was unaware of the fact that this lot was in fact included as

part of the licensed premises for several years last past. Thus his argument that this transfer to Lot 47 would be the exercise of a non-conforming use is without merit, although irrelevant in these proceedings.

Gewertz also testified that there was an inadequate investigation of the application. Since he is a member of the Committee, it seems ludicrous for him to raise this objection. In order to maintain this objection he would have to admit that he was equally derelict with the other members of the Committee in this regard. In any event, there is no supportive evidence to sustain this contention.

I further find that the Committee acted out of a sense of fairness and justice in correcting the technical error by its resolution of April 10, 1967. Except for the appellants, no person objected nor, indeed, was the public interest deleteriously affected by the Committee's action.

The owner of a license acquired through his investment an interest which is entitled to some measure of protection with respect to the renewal or transfer of a liquor license. R.S. 33:1-26. Township Committee of Lakewood Twp. v. Brandt, 38 N.J. Super. 462. The P & J Lounge acted in good faith and relied in large measure upon the advice given to it by the then Township attorney. It has expended substantial sums in the construction of a new building, based upon plans approved by the building inspector, and it would be unconscionable under the facts and circumstances herein to reverse the action of the Committee. It should be added that allegations relating to violations of the zoning code may not be properly considered by this tribunal. Lubliner v. Paterson et als., 33 N.J. 428.

Finally, I am persuaded that the Committee was not improperly motivated, acted reasonably and in the proper exercise of its authority.

After considering all of the evidence herein and the memoranda submitted in summation by counsel for the respective parties, I conclude that the appellants failed to sustain the burden of establishing that the action of the Committee was erroneous. Rule 6 of State Regulation No. 15.

Therefore, for the aforesaid reasons I recommend that an order be entered affirming the action of the Committee herein and dismissing the appeal.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by the attorney for the appellants pursuant to Rule 14 of State Regulation No. 15, and written answers to the said exceptions were filed by the attorneys for respondent P & J Lounge, Inc.

I have carefully considered the exceptions taken to the Hearer's report and find that they have either been answered by the Hearer or are without merit.

After carefully considering the entire record, including the transcript of the testimony, the exhibits, the Hearer's report, the exceptions and the answers filed thereto, I concur in the conclusions of the Hearer and adopt his recommendation.

I find that the appellants have failed to sustain the burden (Rule 6 of State Regulation No. 15) of establishing that the action of respondent Township Committee of the Township of Deptford was erroneous and should be reversed.

Accordingly, it is, on this 31st day of October 1967,

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

JOSEPH P. LORDI
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE TO INTOXICATED PERSONS - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against

ALHE, INC.
t/a ERIN BAR
300-302 N. Broadway
Gloucester City, New Jersey

Holder of Plenary Retail Consumption License C-29 for the 1966-67 licensing period and Plenary Retail Consumption License C-24 for the 1967-68 licensing period, issued by the Mayor and Common Council of the City of Gloucester City.

CONCLUSIONS AND ORDER

John W. Dailey, Esq., Attorney 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 charge:

"On March 23, 1967, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to persons actually or apparently intoxicated and allowed, permitted and suffered the consumption of such beverages by such persons in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20."

ABC Agent C testified that, pursuant to specific assignment to investigate an allegation of sales to intoxicated persons, accompanied by Agent B, he visited the licensed premises (which he described as a neighborhood restaurant and bar) on March 23, 1967 at approximately 11 p.m. Joseph Greenan (the major stockholder and secretary-treasurer of the licensee corporation) was tending bar at which eleven male patrons and one female patron were gathered. A couple identified as Andy and Jean and a male identified as Albert Benton immediately attracted his attention in that their conversation "was loud, it was slurred.

All three parties spoke in loud tones, slurred speech, incoherent, their demeanor changed from friendliness to an angry nature in a short span of time."

Because he "felt they may have been under the influence of intoxicating beverages", he continued his observations of the three patrons.

In describing the female's movement from her position at the bar to the ladies' room at the rear of the premises (a distance of approximately forty feet), the agent testified, "She proceeded cautiously, and she staggered from side to side. She also mumbled constantly as she proceeded." Upon emerging from the ladies' room, she came approximately one-quarter of the distance back to a position near the telephone booths, staggering from side to side. She was met by Andy. The agent described Andy's movements as follows: "He slid off the bar stool and steadied himself by holding onto the bar and turned in the direction of the rear of the premises and staggered as he advanced to the rear of the premises, joining the female." He staggered from side to side and mumbled to himself. The pair "slouched into the phone booth momentarily, and came back leaning heavily on each other to the bar" where they took seats next to Benton. Andy ordered alcoholic beverages from Greenan for himself and for Jean, which they consumed. Greenan took money from the bar in front of Andy in payment for the drinks. The agent described Andy's movements upon returning from the rear of the premises as follows: "he did not sit down, he held onto the bar, leaned on the bar, and swayed from side to side, and his head nodded, and his eyes lowered, he had difficulty controlling his position."

Referring to Andy and Jean, the agent concluded his testimony as follows:

"Q At that point did you form any opinion as to the sobriety of either one or both of the people?
A Yes. I felt they were intoxicated.
Q Did you hear any conversation of Andy or Jean with the bartender?
A Shortly after completing their drinks Andy told Mr. Greenan he was going, they were leaving, and Mr. Greenan at this time said, 'Yes. I think you had enough. You are loaded.'
Q Did you see them leave?
A Yes. They were very near the entrance, both got -- she got off the stool, and they held onto each other, staggering from side to side, and left the premises at eleven-fifteen p.m."

Turning his attention to Benton, Agent C testified: "He was seated about two stools to my right, his hair down in his face, his head was hung heavy and low and bobbed up and down, and his clothing was disheveled, and face flushed." Continuing, he testified that Benton's speech was loud, slurred, incoherent and "most of the time he appeared to be talking to no one." Benton asked Greenan the time "about four times in less than ten minutes, and each time Mr. Greenan would repeat the time but tell him, 'I just told you.'" It was the agent's opinion that Benton was apparently intoxicated.

The agent observed Benton order, pay for and consume a shot glass of whiskey and a glass of beer. In drinking the beer, Benton's hand shook and the beer spilled over, and it

dribbled on his chin." Agent C described Benton's departure from the tavern as follows: "He /Greenan/ cautioned him to watch himself and be careful, take it easy. Mr. Benton picked up a package from the bar and stepped backward and lost his balance and fell against the wall, and again Mr. Greenan continued cautioning him to be careful, and it drew the attention of the remaining patrons, and some made comments which I didn't understand, others were laughing... He proceeded toward the front, and as he did he staggered from side to side, hitting bar stools and the wall, and then bumped into the cigarette machine, which is right alongside the entrance, and finally he managed to exit from the premises."

At 11:40 p.m. both agents identified themselves to Greenan. C informed Greenan that he had observed the three patrons and had also observed service of alcoholic beverages to them and it was his opinion that they appeared to be intoxicated. Greenan responded that "they come in regular, and that they had been drinking this evening, and that they are always like that." Referring to the couple, Greenan stated, "They are alcoholics .... It wasn't wrong since they are sick."

The agents were introduced to Greenan's wife Mrs. Dorothy Greenan (president of the licensee corporation) and informed her of their observations. The testimony of Agent C revealed the following:

> "Q Did she /Mrs. Greenan/ say whether or not she was cognizant of these three persons?
>
> A Yes. She said she had been in the bar and had seen the three people referred to, and she only knew them as Andy, Jean, and Al, and she said they came in quite regular, and that they were alcoholics. She said, 'They are always like that. That is the way they come in.'
>
> Q Did either Mr. Greenan or Mrs. Greenan make any remark with reference to this alleged violation of serving people?
>
> A Yes. They said they did not feel it was wrong since that is the way these people are, and that they run a very legitimate business and had no prior violations."

In essence, the cross examination of C proved to be mainly corroborative of the testimony elicited on direct examination.

It was stipulated that Agent B's testimony on direct examination would be the same as the testimony offered by Agent C. Cross examination proved to be mainly corroborative.

In defense of the charge, Joseph Greenan testified that he recalled the presence of Andy, Jean and Benton on the night in question. Benton usually frequented the tavern "about three or four nights a week" and Andy and Jean "maybe once, maybe twice a week" over a period of "six or eight months." In describing their actions the witness testified that at times they would be noisy and at times they would be quiet. Further, he testified, "These people act sometimes when they are sober like they may appear to a stranger to be drunk or to be intoxicated. They act this way lots of times when they come in."

When the witness was asked, "Have you ever decided in your mind any of these people were intoxicated in your place? Not this particular night but any time", he responded, "There were times when these people would get to where they were what I consider intoxicated, and I put them out and flagged them."

On March 23, 1967, Benton entered the tavern at approximately 8:00 or 8:30 p.m., played pool and drank at the rate of three glasses of beer per hour. At 10:30 p.m. he missed his bus and re-entered the tavern. Referring to the presence of Andy and Jean in the tavern, Greenan said that at the time Benton missed his bus, "they must have been there." After Benton returned, he sat between the agents and Andy and Jean and was served "2 or 3 shots." Andy and Jean left the tavern; Benton remained therein.

When queried "What happened when Mr. Benton left?" the witness responded, "Mr. Benton really surprised me. When he got up off the stool, like the agent said, he had a lot of difficulty getting off the stool. He wasn't normal when he left the bar stool to the front door, he wasn't. This surprised me. This is the first I realized there was any change in Mr. Benton from his normal self. When he got off the bar stool and went for the front door there was a big doubt in my mind as to his condition."

The testimony was in accord that shortly after Benton stepped outside the tavern he fell down a step and was removed from the scene by ambulance. Greenan testified that he conversed with Benton while Benton was lying on the pavement; that he could understand Benton and that Benton was not intoxicated.

Greenan did not observe Andy having any trouble drinking nor did he refer to Andy and Jean as being alcoholics. His wife may have referred to Andy and Jean as being alcoholics.

On cross examination the witness admitted that on the night in question Benton drank beer while shooting pool. However, during the period of an hour after he missed the bus, "he may have had 2 beers and 2 shots or 3 beers and 3 shots, no more."

Additional cross examination revealed the following:

"Q When you saw him get off the stool at eleven-twenty did you notice anything unusual about him?
A As he is normally.
Q By that do you mean he staggered?
A I mean he wasn't sure of himself. He wasn't stable. He had difficulty getting up, hard to make the door, and he was wobbly on his feet."

However, it was his opinion that Benton was not intoxicated, "just there was something wrong with the man." Asked whether Benton was a "heavy drinker", he responded, "He can drink real good. This man doesn't react to drink like a normal person."

Further, the witness testified that Benton, Andy and Jean were arguing and talking loudly; that Andy and Jean had enough to drink and that Andy and Jean always stagger whether they have had drinks or not. Both are heavy drinkers.

Albert Benton testified that on March 23, 1967 he entered the licensed premises at "8, 8:30" p.m. He played pool and drank beer until approximately 10:30 p.m. when he went for his bus. Upon missing the bus, he re-entered the tavern to wait for the next one, which was scheduled to arrive "an hour and ten minutes later", and

sat "fairly close" to the agents. Andy and Jean were in the tavern prior to his arrival. They did not drink an "unusual amount" that night; nor did they act "out of the ordinary." He "wouldn't say" they were drunk.

Benton admitted having "2 shots, maybe 3 shots, and 2 or 3 beers" after he missed his bus and "felt great", "felt normal."

On the day in question Benton had been taking medication prescribed for him by his doctor. On a previous occasion, mixing the medicine with whiskey caused an "adverse effect" upon him. According to his doctor, mixing the medicine and whiskey "could cause a person to be apparently intoxicated."

After he stepped down from the stool and lost his balance, Benton "realized that something was wrong", that he "shouldn't have taken the other shots because I was taking the pills."

The cross examination then proceeded thusly:

"Q You felt drunk?
A Yes.
Q You were drunk?
A I was intoxicated but not drunk."

And concluded as follows:

"Q Did you still feel drunk when you got home?
A Yes."

The attorney for the licensee argued mainly that the bartender Greenan, having observed the actions of the patrons over a much longer period of time than the agents, was in a better position to testify as to the patrons' state of sobriety. On the other hand, the attorney for the Division argued that the Division had established the truth of the charge by the requisite preponderance of the evidence. Thus it is apparent that the major point of inquiry presented herein is factual.

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

In appraising the factual picture presented in this proceeding, 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 have had an opportunity to observe the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony.

I am persuaded that the testimony of the agents, presented in a direct and detailed manner was factual and credible. Their detailed description of the deportment of Benton, Andy and Jean clearly established the observable manifestations of apparent or actual intoxication.

Greenan's testimony that he conversed with Benton while Benton was lying on the sidewalk and that he could understand Benton appears to be contradicted by Benton's testimony to the effect that he remembered "faintly" lying on the ground. Furthermore, I cannot disregard Benton's admission on cross examination that he was "intoxicated but not drunk" and his later admission that he still felt "drunk" when he arrived home. Additionally, the testimony was in accord that Benton consumed two or three shots of whiskey and two or three glasses of beer during the period of approximately one hour after he missed the bus.

A licensee is fully accountable for all violations committed or permitted by his servants, agents or employees. Rule 33 of State Regulation No. 20. Cf. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948).

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 reommend that the licensee be found guilty of the charge.

The licensee has no prior adjudicated record of suspension of license. I further recommend that the license be suspended for thirty days. Re Bruce Zane, Inc., Bulletin 1740, Item 2.

Conclusions and Order

Written exceptions to the Hearer's report and argument thereto were filed by the licensee's attorney, 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 exceptions filed, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions. I shall therefore impose the penalty recommended by the Hearer, namely, a license suspension of thirty days.

Accordingly, it is, on this 18th day of September, 1967,

ORDERED that Plenary Retail Consumption License C-24, issued by the Mayor and Common Council of the City of Gloucester City to Alhe, Inc., t/a Erin Bar, for premises 300-302 N. Broadway, Gloucester City, be and the same is hereby suspended for thirty (30) days, commencing* at 7:00 a.m. Monday, September 25, 1967, and terminating at 7:00 a.m. Wednesday, October 25, 1967.

JOSEPH P. LORDI
DIRECTOR

*By order dated September 22, 1967, the suspension was deferred to commence at 7:00 a.m. Monday, October 23, 1967, and to terminate at 7:00 a.m. Wednesday, November 22, 1967.

4. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

McGIN, INC.
t/a "BOTTOMS UP"
71 Oceanport Avenue
West Long Branch, New Jersey

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-3 issued by the Borough Council of the Borough of West Long Branch

Landy, Bonello and Bonello, Esqs., by Francis V. Bonello, Esq., Attorneys for Licensee.
Leon Chorkavy, Jr., Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on May 11, 1967, it possessed alcoholic beverages in five bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Re State Restaurant, Inc., Bulletin 1754, Item 6.

Accordingly, it is, on this 1st day of November, 1967,

ORDERED that Plenary Retail Consumption License C-3, issued by the Borough Council of the Borough of West Long Branch to McGin, Inc., t/a Bottoms Up, for premises 71 Oceanport Avenue, West Long Branch, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Wednesday, November 8, 1967, and terminating at 2:00 a.m. Tuesday, November 28, 1967.

Joseph H. Lordi,
Director.