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

BULLETIN 2222 April 7, 1976

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - ESSNJAY, INC. v. PERTH AMBOY.

Essnjay, Inc. t/a Isidor Gast Wines & Liquors,	)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS and ORDER
Board of Commissioners of the City of Perth Amboy,	)	
Respondent.	)	

Mutnick, Gast and White, Esqs., by Theodore E. Gast, Esq., and Louis F. Locascio, Esq., Attorneys for Appellant
Frank J. Jess, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the imposition of certain special conditions attached to the renewal of appellant's Plenary Retail Consumption License C-2, for premises 434 State Street, Perth Amboy, as imposed by respondent Board of Commissioners of the City of Perth Amboy (hereinafter Board).

The complained of special conditions attached to the appellant's license are as follows:

(1) Congregation of people and accumulation of refuse to be prohibited immediately outside appellant's premises.

(2) Congregation of persons about the rear door of premises or at rear parking lot to be prohibited, and the said rear door to be used for emergencies only.

(3) Special police or uniformed security guard to be provided outside premises from 8 p.m. to closing, or, in the alternative, a principal of appellant corporation to be in supervision in the licensed premises during those hours.

In its petition of appeal, appellant contends that the said special conditions are unreasonable in that the first relates to the outside of the premises where a bus-stop is located around which persons generally congregate. The second is equally unreasonable in that the rear door leads to a parking lot which was established to reduce traffic parking congestion; hence, if unusable because of the condition, it would increase the on-street parking problem. The third condition is unreasonable in that a special police guard would be equally ineffective in ridding the sidewalk of congregants awaiting busses or the presence of one of the principals of the appellant corporation would have little or no effect on the exterior problems.

The answer of the Board simply repeated the justification of the imposition of those conditions as alternatives to the denial of renewal of appellant's license, which is the alternative to the elimination of such conditions.

A de novo appeal was held in this Division with full opportunity afforded the parties to introduce evidence and cross-examine witnesses, pursuant to Rule 6 of State Regulation No. 15. Additionally, a copy of a transcript of the electronic recording of the hearing held by the Board was accepted into evidence pursuant to Rule 8 of State Regulation No. 15, albeit three days notice had not been served on counsel for appellant, as required by such rule.

At the hearing before the Board, eight nearby residents spoke about the difficulties they had, endeavoring to sleep, which they attributed to patrons of appellant's establishment. The Chief of Police and two police officers described the concern of the Police Department in keeping the causes of complaints to an irreducible minimum. A "roving patrol" had been established in the Police Department, and through it, a patrol car visited appellant's premises at least once each evening; and more often, more than once. There have been no complaints of consequence coming from the interior of the premises; the majority of the complaints to the police were from residents disturbed late at night by the noises made by departing patrons, the blocking of driveways by patrons, and unruly behavior by congregating patrons at or near the subject premises.

Ten patrons spoke concerning the benefits and excellent management of appellant's business. They asserted that neighborhood softball teams and other social endeavors, giving a feeling of comraderie among the patrons, had a beneficial effect upon the area.

The principals of the appellant corporation, Seymour and Jerome Gast, described to the Board the several steps that they have taken to reduce the complaints of their neighbors. They described their business establishment as having existed one hundred and two years at that same location, and although it was once prosperous, changes in the area have had their effects upon the volume of business and the nature of the patronage. They explained that it was economically unrealistic to either post a

guard on the exterior or to maintain control of the premises by their individual presence.

At the de novo hearing in this Division, testimony was elicited of Police Chief Jankovich and Officer Lovenguth who related similar observations to those given before the Board. Testimony of Laura Wojcick, corroborated by Joanne Lewis, was similar to that given before the Board in support of the good management by appellant.

Two additional neighbors, who had not testified before the Board, Margaret Kwiatkowski and Elizabeth Ann Molnar, both decried the criticism of noise in the area as being caused by appellant's patrons. A nearby recreational area, they asserted, attracts great numbers of cars and results in noise being unfairly attributed to appellant.

Photographs of the area, diagrams of the appellant's location and testimony describing them leads to the conclusions that that location is at the corner of two busy thoroughfares, the buildings surrounding it containing an assortment of small commercial establishments and some residences. A bus-stop at State Street, on the Washington Avenue corner, services four bus lines which operate until the very late night and early morning hours.

The sole and central issue in this matter is: are the conditions imposed by the Board reasonable. Appellant contends that the existing problems in the area are not attributable to it, hence, are improperly imposed upon it. Such contention is without merit. Conditions imposed may not be directed to an existing problem, but may work to "allay fears harbored by the community....". Lyons Farms Tavern, Inc. v. Newark, 68 N.J. 44 (1975). Hence, special conditions may be imposed so long as they are neither arbitrary nor capricious.

With respect to the requirement that uniformed guards be retained to patrol the exterior of a licensed premises, such was a requirement initiated by the Director on an appeal to this Division. Cf. Moon Star, Inc. v. Jersey City, Bulletin 2130, Item 3. The Alcoholic Beverage Law (N.J.S.A. 33:1-32) permits a local issuing authority to impose any special condition to any license deemed necessary and proper to accomplish the objects of the law. Where such conditions are imposed, the Director determines, on appeal, whether these special conditions were arbitrary, unreasonable or mistaken. Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423, 426 (App. Div. 1958).

As long as conditions imposed relate to the subject license (Balaniz v. East Newark, Bulletin 156, Item 1), and are made concurrent with the issuance of the license (Alanwood Holding Co. v. Atlantic City et als., Bulletin 1963, Item 1) and are reasonably required to serve the best interests of the community (Borko v.

Mansfield Township, Bulletin 1894, Item 3), the imposition of such conditions will be affirmed by the Director. A's Inn, Inc. v. Deal, Bulletin 2139, Item 3.

It has been consistently held, in this Division, that a licensee is required to maintain order both inside and outside of the licensed premises. Cf. Bayonne v. B & L Tavern, Inc., Bulletin 1509, Item 1; Kaplan and Buzak v. Englewood, Bulletin 1745, Item 1; R.O.P.E. Inc. v. Fort Lee, Bulletin 1966, Item 1.

> "Instead of outright denial of renewal of appellant's license, the Board endeavored by the imposition of these special conditions to obtain amelioration of the conditions complained of." Cf. Wenzler v. Hillside, Bulletin 2182, Item 3.

I find that the specific conditions imposed in the instant matter, overlap and, to some degree, are redundant. Condition one should specifically relate to the doorway of appellant's premises that leads to Washington Street, because the other doorway opens upon a bus-stop, in which a congregation of persons might have no connection with appellant's premises.

The second condition relating to the rear entrance is at variance with the opinion of the visiting police officer whose testimony indicates that access via the rear door is imperative to maintain safety; that barring access by means of the rear door would result in on-street parking in and about said premises. Hence, it is apparent that the Board placed this condition without considering police opinion concerning such proposed closure.

The third condition requiring the posting of a security guard or, in the alternative, requiring one of the principals of appellant corporation to be present within the licensed premises between eight o'clock and the closing hour each day the premises are open, is both reasonable and logical. It is apparent that the Board was offering an alternative to the appellant which would be economically viable.

Appellant alleges that the imposition of such special condition would result in an economic hardship to it. An issuing authority is not obligated to consider whether the financial interest of any licensee will be promoted or harmed in its determination whether to grant a liquor license application where the public interest may be adversely affected. See Paulison Liquors, Inc. v. Clifton, Bulletin 2162, Item 3, and cases cited therein. It is a well established principle that in any conflict between a licensee's financial concern and the public interest, the latter must prevail. Smith v. Bosco, 66 N.J. Super. 165 (App. Div. 1961).

From the testimony of the brothers Gast, principal stockholders of appellant corporation, they contend that the burden of either being present on each evening increases their weekly work

load beyond reasonable endurance. From the totality of all of the evidence, it is apparent that should neighborhood sentiment against the continuation of their license grow to a large enough volume, the Board could, in recognition of it, merely deny renewal of the license at some future time. By the imposition of the instant conditions, the Board may well have saved appellant's license in this period and for the future.

Lastly, appellant argues that as the conditions imposed on its license did not have the prior approval of the Director, as required by N.J.S.A. 33:1-32, the conditions are ineffective. Such contention, however, would form the basis of an effective defense should the appellant be thereafter charged with a transgression upon the license for the failure to adhere to such conditions. Such is not the case in this matter. By appellant's immediate appeal, the reasonableness of such conditions is placed before the Director, who, if he determines that they are reasonable, may approve those conditions nunc pro tunc to the date of the issuance or renewal of the license itself.

Thus, I find that appellant has not maintained its 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.

However, in accordance with the expressions herein, it is recommended that the action of the Board be affirmed, as modified to the following extent:

Condition 1. The words "on Washington Street" should be added to follow the words "their premises."

Condition 2. To be deleted.

Condition 3. Is quite reasonable and should remain on the license.

It is, further, recommended that, in all other respects, the appeal should be dismissed, and the order of the Director staying the action of the Board be vacated.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the appellant pursuant to Rule 14 of State Regulation No. 15. No answer to the said exceptions was filed by the respondent.

I have carefully considered the said exceptions and find that they have either been considered and clearly resolved in the Hearer's report or are lacking in merit.

However, I agree with the appellant's contention that it would be unnecessarily burdensome "for a principal of the appellant corporation to be in supervision in the licensed premises during those hours (8 p.m. to closing)," as alternatively required in Special Condition #3. I shall, therefore, modify the said special condition to require that the manager of the appellant corporation instead of the principal officer shall be in supervision of and at the licensed premises during the aforesaid hours.

It should be pointedly emphasized that the special conditions were deemed necessary and proper by the Board to accomplish the objects of the Alcoholic Beverage Law, and to serve the best interests of the community. Borko v. Mansfield Township, Bulletin 1894, Item 3. As was pointed out in the Hearer's report, the Board could have in the exercise of its lawful discretion denied renewal of the said license. Blanck v. Magnolia, 38 N.J. 484 (1962); Nordco Inc. v. State, 41 N.J. Super. 277 (App. Div. 1957). Instead, it endeavored, by the imposition of these special conditions to obtain amelioration of the conditions complained of. Cf. Wenzler v. Hillside, Bulletin 2182, Item 3; Bayonne v. B & L Tavern, Inc., Bulletin 1509, Item 1; Cf. Benedetti v. Trenton, 35 N.J. Super. 30 (App. Div. 1955).

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions filed with respect thereto, I concur in the findings and recommendations of the Hearer, with the modification of Condition 3, as hereinabove set forth, and adopt them as my conclusions herein.

Accordingly, it is, on this 19th day of January 1976,

ORDERED that expressly subject to the amended special conditions, as hereinbelow set forth, the action of the respondent Board of Commissioners of the City of Perth Amboy with respect to the imposition of the said special conditions be and the same is hereby affirmed in the following respects:

> (1) Congregation of people and the accumulation of refuse to be prohibited immediately outside of appellant's premises on Washington Street;
>
> (3) Special police or uniformed security guard shall be provided outside of the premises from 8:00 p.m. to closing, or in the alternative, the manager of the corporate appellant shall be in supervision, of and at the licensed premises during the aforesaid hours;

and it is further

ORDERED that Special Condition #2 in the Board's resolution and as set forth hereinabove, be and the same is hereby vacated; and it is further

ORDERED that the aforesaid Special Condition #1 and #3 be and the same are hereby approved nunc pro tunc; and it is further

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

LEONARD D. RONCO
DIRECTOR

2. APPELLATE DECISIONS - ELY ET AL. v. JERSEY CITY.

Edward W. Ely and William F. Urna,	)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS and ORDER
Municipal Board of Alcoholic Beverage Control of the City of Jersey City,	)	
Respondents.	)	

William J. Netchert, Esq., Attorney for Appellants
Dennis L. McGill, Esq., by Bernard Abrams, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

On June 30, 1975, the Municipal Board of Alcoholic Beverage Control of the City of Jersey City, (hereinafter Board), denied renewal of appellant's Plenary Retail Consumption License C-214, for premises 1507 Kennedy Boulevard, Jersey City, basing its denial on its determination that appellant's license had been improvidently issued to them for the 1973-74 licensing period. This appeal followed.

The Board determined that the license had been improvidently issued in the belief that appellant had not paid their 1973 license fee to the Board until October 11th or 12th of that year, hence, as payment was out of time, the license could not have been properly issued.

The appellants maintain that their payment was timely and the license was then properly issued. Hence, the sole issue presented herein is: did appellants make the required payments in time.

A de novo appeal was heard in this Division, with full opportunity afforded the parties to present evidence and cross-examine witnesses.

The background leading to the present controversy has to do with permission having been given by the Director of this Division to appellants to file for a renewal of their license for the 1973-74 licensing year, provided such application was filed on or prior to September 28, 1973. The Board denied having received the subject application by that date. The appellant insists its application was made by then.

At the outset of the hearing, certain exhibits were offered into evidence without objection: three checks dated September 28, 1973 which were required to accompany an application for renewal of license. A photostatic copy of one of the pages of the "deposit ledger" of the City, showing a deposit of those checks on October 11, 1973, was also admitted into evidence.

Edward W. Ely, one of the appellants, gave testimony concerning the posting of the necessary funds with the then-secretary of the Board. He stated that the checks and application were received by the Board on September 28, 1973. The Secretary of the Board at that time, Walter McDermott, received the money and the advertisements were placed in the newspaper by another Board employee, Leonard E. Greiner. The money for the newspaper insertions was paid in cash to Greiner.

The present Secretary of the Board, Joseph J. Faccone, Sr., testified that he assumed that office on February 6, 1974. Although certain changes in the existing system of office procedure were instituted by him, the custom of receiving funds and placing them in a drawer, to be transmitted, at a later date, to the Treasurer of the City is still the custom.

He explained that, when he took office, there were times when checks remained in his office for some time before being transferred to the office of the Treasurer for deposit. He acknowledged that it would be possible for a check to have remained in a drawer for a week or more prior to it being delivered into the hands of the Treasurer, during the period of the last illness of Mr. McDermott.

Leonard Greiner, the Administrative Clerk to the Board, testified that, during McDermott's last illness, he had been in charge of the office, and that illness, together with a shortage of help resulted in deposits and funds not being promptly recorded or posted. He asserted that McDermott could have received the checks given by Ely on September 28, 1973, and they may not have been deposited in the bank until Mid-October. He admitted that there was no record of the time monies and applications were received other than as indicated on the documents.

There was no proof offered by the Board to establish that the appellant's application was not received in time, other than the copy of the deposit ledger. However, the testimony of both Faccone and Greiner indicated that it was possible that, during the period of the illness of the former Secretary to the

Board, practices and conditions of the office were so hectic that the posting could have occurred much later than the date of actual receipt.

Additionally, the Board's Secretary was handicapped by inadequate clerical assistance, and certainly had no mechanical device with which to "time stamp" the material he received. Hence, there was no evidence offered in support of the Board's conclusion that the Ely application had been filed out of time.

To the contrary, a check drawn in 1975 and dated March 10th payable to the Division of Taxation and offered in evidence carries a date on its reverse side of March 20th, indicating that checks received in usual course of business off times carry a deposit date much later than the date of making.

I find that the proofs upon which the Board based its action, i.e., that the application had not been filed by the appellant in time, were totally lacking. In view of the acceptance of appellant's application and the subsequent renewals of appellant's license, the Board cloaked the appellant with the mantle of validity. In sum, I find that the appellants have sustained their burden of establishing that the action of the Board was erroneous and should be reversed.

It is, therefore, recommended that the action of the Board be reversed, and that the Board be directed to renew appellants' plenary retail consumption license for the current licensing year nunc pro tunc, in accordance with the application filed therefor.

Conclusions and Order

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

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

Accordingly, it is, on this 6th day of January 1976,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby reversed; and it is further

ORDERED that the Board be and is hereby directed to renew appellant's plenary retail consumption license for the current licensing period nunc pro tunc, in accordance with the application filed therefor.

LEONARD D. RONCO
DIRECTOR

3. SEIZURE - FORFEITURE PROCEEDINGS - ILLICIT SALE OF ALCOHOLIC BEVERAGES UNDENIED - DEFENSE OF LACK OF WARRANT WITHOUT MERIT - CASH AND ALCOHOLIC BEVERAGES FORFEITED.

In the Matter of the Seizure on August 30, 1974, of a quantity of alcoholic beverages and $174.60 in cash at the unlicensed premises at 952 West 5th Street, in the City of Plainfield, County of Union and State of New Jersey.	:	Case No. 13,124 On Hearing CONCLUSIONS and ORDER

Leavitt, Talley & Krevsky, Esqs., by Ronald Silber, Esq., Attorneys for claimant, John Connor.
David S. Piltzer, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This matter came on for hearing, pursuant to N.J.S.A. 33:1-66 and State Regulation No. 28, to determine whether property seized, as described in Schedule "A", attached hereto and made part hereof constitutes unlawful property and should be forfeited.

On August 30, 1974, agents of this Division, together with members of the Plainfield Police Department, entered unlicensed premises located at 952 West 5th Street, Plainfield, and effectuated a seizure, as aforesaid, based upon a purchase of alcoholic beverages by one of the agents immediately prior thereto.

At the hearing in this Division, John Connor appeared to assert a claim for the alcoholic beverages and cash seized.

A certification by the Director that no license or permit for the sale of alcoholic beverages was ever issued to John Connor at premises 952 West 5th Street, Plainfield, and a certification that the alcoholic beverages seized had a requisite amount of alcohol in content to come within the purview of the Statute (N.J.S.A. 33:1-1(b)), were admitted into evidence.

The uncontroverted testimony, that the sale of alcoholic beverages took place, narrowed the issue to a determination of the claimant's assertion that the search and seizure, subsequent to the arrest, was illegal because the Division agents had the opportunity to obtain a search warrant prior to the arrest, but failed to do so. The claimant contends that the search was in violation of N.J.S.A. 33:1-66, which states in pertinent part:

"a. Any officer knowing, or having reasonable cause to believe, that any person is engaged in unlawful alcoholic beverage activity, it shall be his duty to investigate, under proper search warrant when necessary, which it shall be his further duty to apply for, and to seize all property which he shall know, or have reasonable ground to believe is unlawful property,.."

The claimant's contention is without merit. The claimant offered no argument to either the factual occurrence of the sale or the validity of the arrest. The testimony elicited at the hearing established that the Division agent was lawfully within the premises at the time of both the sale and the arrest, and that the seized alcoholic beverages and $174.60, in cash, were "in plain view" within the immediate area of the arrest. The search, therefore, was a lawful search incident to a valid arrest.

The Statute mandates that the officer "...investigate, under proper search warrant when necessary,... (underlining added)." As indicated, supra, that element of necessity was lacking in this situation, given the validity of the arrest and the scope of the search.

The seized alcoholic beverages are illicit because they were intended for sale and sold without a license, N.J.S.A. 33:1-1(i) and N.J.S.A. 33:1-2, 50 (a, b). Therefore, the alcoholic beverages and cash seized constitute unlawful property and are subject to forfeiture, N.J.S.A. 33:1-66(b). Seizure Case No. 11,597, Bulletin 1679, Item 7.

Accordingly, it is recommended that the claim of John Connor be rejected, and the alcoholic beverages and the cash in the amount of $174.60 be forfeited.

Conclusions and Order

No exceptions to the Hearer's Report were filed pursuant to Rule 4 of State Regulation No. 28.

Having carefully considered the entire record herein, including the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 12th day of January, 1976

DETERMINED and ORDERED that the claim of John Connor for the return of the alcoholic beverages and cash seized, as set forth in Schedule "A" attached hereto and made part hereof be and the same is hereby denied; and it is further

DETERMINED and ORDERED that the alcoholic beverages and cash in the amount of $174.60 as set forth in Schedule "A", attached hereto, constitute unlawful property, and the same be and are hereby forfeited in accordance with the provisions of N.J.S.A. 33:1-66; the cash to be accounted for in accordance with law; and the said alcoholic beverages be and the same shall be retained for the use of hospitals, and State, county or municipal institutions, or destroyed, in whole or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

LEONARD D. RONCO
DIRECTOR

Schedule "A"

272 - containers of alcoholic beverages
$171.60 - cash
3.00 - "marked" money

4. DISCIPLINARY PROCEEDINGS - MISLABELED BOTTLES - FINE IN LIEU OF 20 DAY SUSPENSION OF LICENSE.

In the Matter of Disciplinary Proceedings against

Freddy's Bar & Grill, Inc.
t/a La Gondola Italian Restaurant & Bar
762 Roebling Avenue
Trenton, N.J.,

Holder of Plenary Retail Consumption License C-217, issued by the City Council of the City of Trenton.

CONCLUSIONS AND ORDER

Selecky & Scozzari, Esqs., by John P. Scozzari, Esq., Attorneys for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads "not guilty" to a charge alleging that, on November 19, 1974, it possessed, in and upon its licensed premises, alcoholic beverages in bottles which bore labels which did not truly describe their contents, viz.,

One 4/5 quart bottle labeled "Schenley Reserve Blended Whiskey, 86 proof",

Three one quart bottles labeled "Schenley Reserve Blended Whiskey, 86 proof",

One quart bottle labeled "Four Roses Premium American Blended Whiskey, 86 proof",

Two one quart bottles labeled "Calvert Extra Blended Whiskey, 86 proof";

in violation of Rule 27 of State Regulation No. 20.

ABC Agent B testified that, on November 19, 1974, he went to the licensed premises to conduct a routine liquor and retail inspection. He seized the seven bottles, referred to in the charge, after preliminary tests revealed that the contents appeared to be low in proof, and to contain contamination (foreign objects).

The bottles, which were topped by open-style pourers when seized, were sealed and submitted to the Division laboratory for analysis. The seven bottles were admitted into evidence at the hearing.

On cross examination, Agent B acknowledged that the level of proof will decrease naturally over a period of time, and that the licensee would not know it was happening, nor would the licensee know that there was sediment in the bottles unless he first shook the bottles and thereafter examined their contents. Agent B testified that the bottles contained fruit flies, which are visible to the naked eye, and that, "...once fruit flies get into a bottle, it don't take long to go down in proof."

Agent B stated that the same beaker, gauge and hydrometer were used to analyze samples of all seven bottles; that neither the beaker nor the gauge was washed out with water between tests; but that not washing out the gauge with water "wouldn't bother the alcoholic beverages at all". Agent B did ascertain after each separate test, and prior to the succeeding test, that the hydrometer had not acquired any foreign substance.

Penelope Moore, a qualified chemist employed as Division chemist, testified that the four separate tests conducted on the contents of each of the seven bottles indicated the proof to be low in each case.

Miss Moore explained that a visual inspection of each bottle revealed the presence of foreign matter (insects), and conceded that a layman would have been unable to ascertain, by sight, taste or smell, that either the color or proof of the alcohol was not normal. She added that the level of proof will decrease over a period of time, through a natural process of evaporation, and that there was no evidence that the contents of the bottles had been tampered with or watered down. Additionally, Moore testified that failure to cleanse the hydrometer and beaker between tests is not recommended procedure, but that the procedure as employed by Agent B would neither have affected the reading of the proof in the hydrometer, nor have resulted in a transfer of contamination.

It was established that the Division does not regulate the type of pourer which must be placed on bottles, However, it is well-known that open pourers, as used by the licensee herein, will cause significant evaporation after a period of one year, while a closed pourer will not yield an appreciable loss over the same period of time.

Angelo Peluso, the principal stockholder and operator of the subject license, testified that agent B did not cleanse the instruments between tests; that Agent B did call Peluso's attention to the presence of fruit flies in some of the bottles; that he did see the fruit flies therein and that the bottles had been open for from one to four months.

I

In adjudicating this matter it is my view that the testimony of the Division chemist, to the effect that all of the bottles mentioned in the charge were low in proof, and contained foreign matter (insects), patently sustains a finding that the bottles bore labels which did not truly describe their contents.

In its defense licensee apparently contends that it did not tamper with the bottles; that each of the seized bottles had open-throated pourers attached to them; and that it had no knowledge that the contents of the bottles were low in proof.

In its pertinent part, Rule 27 of State Regulation No. 20 (which is alleged to have been violated) reads as follows:

> "No retail licensee shall possess, have custody or, or allow, permit or suffer in or upon the licensed premises any alcoholic beverage...in violation of the Alcoholic Beverage Law, or any alcoholic beverage in any keg, barrel, can, bottle, flask or similar container which...bears a label which does not truly describe its contents...."
> (emphasis added)

The underlined portion of the subject rule is clear and unambiguous. It renders the mere possession of a container bearing a label which does not truly describe its contents a violation. Mere possession is malum prohibitum.

An offense which is malum prohibitum does not require proof of guilty knowledge or intent unless the statute or regulation clearly so provides. There is no inference that may be reasonably drawn from the quoted regulation which would give rise to the principle that guilty knowledge or mens rea or criminal intent is a prerequisite to a finding of guilt. Thus, the defenses raised by the licensee are effectively negated without considering the bona fides thereof.

A licensee is responsible for any alcoholic beverages not truly labeled found upon his licensed premises. Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156 (Sup. Ct. 1947). Said the court in that case at p. 159:

> "...We find nothing within the Alcoholic Beverage Control Act, R.S. 33:1-1, et seq., to indicate an intent that the holder of a retail consumption license must have knowledge that he possesses illicit beverages in order to make him amenable to disciplinary action. Our courts have consistently held that such knowledge is not an essential ingredient to conviction for possession under statutes similar to the one under consideration." See also The Panda v. Driscoll, 135 N.J.L. 164 (E. & A. 1946).

II

At the hearing, the licensee pleaded surprise, in that, by Division letter dated March 31, 1975, the licensee was informed that the seven bottles contained foreign matter (insects), no mention being made of the fact that the bottles were also low in proof. Upon careful consideration, I have concluded that the licensee was not prejudiced by this omission.

The thrust of the licensee's defense was the establishment of the absence of guilty knowledge or mens rea on the part of the licensee. It is reasonable to infer that the defense would have been similarly conducted, had the low proof factor been specifically noticed to the licensee at a time prior to the hearing, and similarly negated, as hereinabove set forth.

III

Applying the foregoing firmly established principles herein, I am persuaded by a fair preponderance of the evidence presented that the licensee is guilty of said charge and I therefore recommend that the licensee be found guilty of said charge.

Licensee has no prior adjudicated record. It is further recommended that, in accordance with present Division policy, the license be suspended for twenty days.

Conclusions and Order

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

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

After the submission of the Hearer's report, the licensee, by letter dated December 2, 1975, stated that it has decided to withdraw its "not guilty" plea, and entered a plea of non vult herein. At the same time it made application for the imposition of a fine, in compromise, in lieu of suspension, in accordance with the provisions of Chapter 9 of the Laws of 1971.

I have favorably considered the said application, and have determined to accept the offer in compromise by the licensee to pay a fine in the sum of $400.00 in lieu of suspension of license for twenty days.

Accordingly, it is, on this 12th day of January 1976,

ORDERED that the payment of a fine of $400.00 by the licensee is hereby accepted in lieu of suspension of license for twenty (20) days.

LEONARD D. RONCO
DIRECTOR

Samuel Gold

Dated: April 7, 1976

Samuel Gold
Acting Director