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

BULLETIN 2115 September 18, 1973

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - NEHOC TAVERN, INC. v. PATERSON.

Nehoc Tavern, Inc., t/a Jay's Corner,
Appellant,
v.
Board of Alcoholic Beverage Control for the City of Paterson,
Respondent.

On Appeal

CONCLUSIONS and ORDER

Goodman and Rothenberg, Esqs., by Robert I. Goodman, Esq., Attorneys for Appellant
Adolph A. Romei, Esq., by Ralph L. DeLuccia, Jr., Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action of the Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which on April 11, 1973 suspended appellant's plenary retail consumption license for premises 27 Paterson Street, Paterson, for sixty days following a finding of guilty to the following charge:

"On August 26, 1972, September 22, 1972, October 10, 1972, October 30, 1972, October 31, 1972, November 12, 1972, January 7, 1973 and March 3, 1973, you allowed, permitted and suffered your place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered brawls, acts of violence or other disturbances and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

The said suspension was stayed by order of the Director dated April 23, 1973, pending determination of this appeal.

Appellant's petition of appeal alleged that the action of the Board was arbitrary, capricious and against the weight of the evidence which revealed insufficient factual and legal grounds to support its findings.

The Board denied these contentions by an averment that the evidence was sufficient to warrant its determination and the penalty imposed.

The hearing in this Division was held de novo pursuant to Rule 6 of State Regulation No. 15. While full opportunity was afforded all parties to introduce evidence and present witnesses, counsel offered transcript of the testimony before the Board and stipulated that such transcript be used for purposes of this appeal in lieu of the introduction of further evidence. Such stipulation was accepted pursuant to Rule 8 of State Regulation No. 15.

As the recited charge above indicates, eight single occasions were set forth in which violations had occurred, and the transcript of the testimony taken before the Board containing testimony responsive to the several incidents related was examined with particularity in connection with the individual incidents. The thrust of the complaint charges the licensee with permitting the licensed premises to become a nuisance. Brawls, acts of violence and other disturbances committed on the dates alleged were, according to the complaint, offensive to common decency and public morals sufficient to be violative of Rule 5 of State Regulation No. 20.

I

Pertinent to the alleged incident of August 26, 1972, Officer Joseph White of the Paterson Police Department testified that he responded to a call summoning him to the local hospital where he spoke to two victims of a fracas within the licensed premises. Another participant (Arlene Johnson) testified that a fight ensued involving herself, Betty Casper and a Bob Greg. Ernestine Dawson, also involved in the fight, was hit by a chair and cut on her leg, the injuries from which required hospitalization. No testimony was advanced as to the participation or even the presence of the licensee or its agents during the incident.

II

Pertinent to an alleged incident of September 22, 1972, there was no testimony elicited from any witness concerning that date; hence it must be concluded that the charge was not established thereto.

III

Pertinent to an alleged incident on October 10, 1972, Officer Vincent Terrone, of the Paterson Police Department, testified that, in response to a call, he arrived at the licensed premises where he found a woman holding on to a bar stool and she had a laceration on her face. At that time there were thirty or thirty-five patrons in the establishment. The officer established that an assault had occurred which left her

bleeding, but her assailant, another woman, had already left the tavern.

IV

Pertinent to an alleged incident on October 30, 1972, Officer Ronald Koziel, of the Paterson Police Department, testified that, in response to a police call, he talked to one James Lewis at the local hospital and learned that Lewis had been cut in the tavern by a William Nero, who was later arrested. Paterson Police Officer Edmund W. Boyle testified that he interviewed a Helen Bell at a local hospital where she was being treated for laceration which he ascertained was the result of an occurrence in appellant's premises.

Helen Bell testified that two women (Dorothy Reed and a girl named Margaret) began a fight in the tavern which involved someone being hit with a bottle or cut with a knife as the battle spread out into the sidewalk. Helen Bell, Dorothy Reed and the girl named Margaret all were treated at the hospital for varied injuries.

V

Pertinent to an alleged incident on January 7, 1973, Walter Caldwell testified that he had been drinking in appellant's premises, departed, was accosted by a passerby and got involved in a fight which resulted in knife wounds. He admitted to being slightly inebriated.

VI

Pertinent to an alleged incident on March 3, 1973, Officer Robert Ekins, of the Paterson Police Department, testified that he visited appellant's premises in response to a radio call and there found that an altercation had taken place between the bartender George Hightower and a patron Josh Slappery. The bartender claimed to have been assaulted by the patron who was thereupon taken to the hospital. The bartender signed a complaint against the patron, which resulted in the arrest of the patron after treatment at the hospital.

Continuing in reference to the same date, Officer J. McCray, of the Paterson Police Department, testified that he responded to a call to appellant's premises as a disturbance was in progress. A large crowd had gathered in front of the premises where Officer Ekins had made an arrest. An attempt was made to reduce the crowd by urging them to return to the tavern. One officer had a door slammed in his face by a drunken female patron.

Detective Donald McAteer testified that he conducted an investigation of the incident several days later, as the patron who was injured and against whom the bartender had made a complaint, had died. He did not disclose the result of his investigation.

VII

In defense of the charge appellant called Carrie Atkins (its barmaid) who testified solely as to two incidents. To the first, presumably on August 26, 1972, she stated that she had told the girls to leave the premises and they did so. As to the March 3 incident, she described how Slappery attacked Hightower (the bartender) with a board, and was himself struck in retaliation. She described her position generally and indicated that there were always two people tending bar. She identified one as Hightower and the other as Al Price. An additional barmaid (Carol Pitkin) is also employed. She denied that Helen Bell was involved in the incident which occurred on October 31, 1972, and identified Dorothy Reed and a Miss Jones as the participants. She affirmed that, whenever trouble erupts which becomes uncontrolled, the premises are shut down upon her order. Such situation has occurred about four times. She asserted that a fourth employee walks back and forth in the premises to maintain order.

The principal stockholder of appellant corporation (Moe Cohen) testified that, upon arrival of troublemakers in the tavern, the establishment is shut down for a half-hour or an hour. However, when asked if his barmaid closed the tavern down, he responded "No. I don't have that much trouble to close it down." Later he admitted that the premises were closed down "Maybe four or five times."

Subsequent to appearance in this Division, counsel for appellant submitted written argument in support of its contention that in none of the incidents as charged in the complaint did the licensee or its agents culpably participate. The majority of the incidents, he contended, occurred outside of the premises and in the public street and hence bore no relation to the management of appellant's premises. Respondent did not elect to answer these contentions.

The charges against appellant were that it allowed, permitted and suffered "your place of business to be conducted in such manner as to become a nuisance...." "Nuisance" is defined as "an offensive, annoying, unpleasant, or obnoxious thing or practice : a cause or source of annoyance that although often a single act is usu. a continuing or repeated invasion or disturbance...." Charges of nuisance in governmental areas refer to "public nuisance" which is further defined as "a nuisance ... that causes harm or annoyance to persons in a particular locality in violation of their rights as members of the community." Webster's Third New International Dictionary, pp. 1548, 1836 Merriam, 1961).

The complaint adjudicated by the Board continued, viz., "in that you allowed, permitted and suffered brawls, acts of violence or other disturbances and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

Hence the factual issues before the Board encompassed more than proof of a brawl or act of violence; it included proof that the licensed premises was conducted as a nuisance (see definition above).

In support of such charges, proofs need only be established that the operation of the licensed premises involved conduct which in its totality was violative of the regulation. Rule 5 of State Regulation No. 20 contains the following proscription:

> "No licensee shall engage in or allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy, indecent or obscene language or conduct, or any brawl, act of violence, disturbance or unnecessary noise; nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance."

A licensee is not responsible for a brawl or act of violence occurring in the licensed premises unless he can be said to have permitted or suffered it; hence he is not accountable for a sudden "flare-up" that results in violence if he could not have forseen it and took effective means to remedy it. Jackson v. Newark, Bulletin 1600, Item 2. Thus an act of violence may not be attributable to him on the one hand, yet he can be chargeable for permitting a "disturbance" which has been defined as an interruption of a state of peace and quiet, a public commotion. 11 C.J.S. 817; Mitchell's Cafe Inc. v. Lambertville, Bulletin 1928, Item 1.

The incident in appellant's premises on August 26, 1972, was described by two witnesses and corroborated in part by the testimony of a police officer. The incident was of such severity that three persons were ultimately treated at the hospital. Although there were three or four persons employed by appellant in the premises at the time of the incident, only the barmaid's testimony related to it and that in miniscule form. She learned of the incident "afterward" and had no knowledge of its background and did not call the police. None of the other employees present was called as a witness despite appellant's obligation to show that an act of violence was such sudden "flare-up" that it could not have been prevented or reduced in intensity. Cf. Torres v. Union City, Bulletin 1802, Item 1.

Further, the applicable principle of law appears to be that, where a party has a witness or witnesses available and where they possess peculiar knowledge of the facts essential to a party's case, the failure to call said witness or witnesses gives rise to an inference that, if called, the testimony elicited would be unfavorable to said party, i.e., he could not contradict the testimony of respondent's witnesses. Jacoby v. Jacoby,

6 N.J. Misc. 86; 93 Frelinghuysen Corp. v. Newark, Bulletin 1717, Item 1.

Of the other incidents specified in the charges, it is uncontroverted that disturbances resulted. On October 8, 1972, one Maxwell Bethea was cut on the left side of her face by another patron of appellant's establishment. On October 31, 1972, one woman was hit with a bottle and another cut in the hand. The fight that caused these injuries began in appellant's premises and, although the barmaid testified that she had ordered the participants to leave, testimony of one of the participants was directly to the contrary. Again no other employee was called to describe the incident. The Board obviously preferred to believe the testimony of the participant and discounted the hollow version of the barmaid.

While the incident described as occurring on January 7 did not occur within the licensed premises, the victim of that occurrence admitted having been drinking heavily in appellant's premises and was "slightly drunk." The knife wounds in his leg were at the very least a partial result of the permissive attitude on the part of appellant's employees in allowing frequent intoxication. Substantial testimony of the other incidents referred to patrons "drinking heavily."

The incident of March 3, 1973, which resulted in the death of a patron, admittedly may not have been provoked by the bartender who, fighting in his own defense, delivered what may have been the lethal blow. The victim was admittedly inebriated and, as the barmaid testified, he had been served liquor by the bartender, leading to the conclusion that the victim's aggressiveness was at least amplified by the drinks served by the bartender.

The burden upon appellant requires it to show manifest error or arbitrary action on the part of the Board. In order to meet this burden appellant must show that the action of the Board was clearly against the logic and effect of the presented facts. Hudson Bergen County Retail Liquor Stores Association et al. v. Hoboken et al., 135 N.J.L. 502 (1947).

It has been well established that the responsibility in licensees for conditions and incidents that exist both inside and outside the premises, which are caused by its patrons, is a continuing one. Conte v. Princeton, Bulletin 139, Item 8; Kaplan v. Englewood, 51 N.J. 464 (1968) (Bulletin 1745, Item 1).

The Board found as a fact that the charges were established; from the seriatim of events from which an inescapable conclusion is reached that the premises were a continuous nuisance, I find that the Board could have come to no other conclusion. Its determination, from which the penalty ensued, allowed the imposition of a suspension for sixty days. Such penalty, under Division precedent, is not excessive. Cf. Torres v. Union City, supra.

Furthermore, the Board apparently further considered the record of prior suspensions previously imposed upon appellant, which record contains six previous suspensions during the past fifteen or more years, including such offenses as immoral activity, permitting brawls, permitting gambling on the licensed premises, and mislabeling of varied bottles of alcoholic beverages. During the period embraced by the charges herein, there were two consecutive suspensions imposed by the Director, the latest being in April 1973. Such sorry record could well have influenced the Board in determining the extent of the penalty herein imposed.

It is therefore concluded that appellant has failed to meet the burden of establishing that the Board erred in its decision and its findings should be set aside. Rule 6 of State Regulation No. 15. Accordingly I recommend that the action of the Board be affirmed, the appeal dismissed, and the Director's order staying suspension be vacated, and that an order be entered reimposing the suspension.

Conclusions and Order

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

Having carefully considered the entire matter herein including the transcripts of the testimony, the Hearer's report and the exceptions filed with respect thereto which I consider to have been satisfactorily considered in the Hearer's report or are lacking in merit, I concur with the findings and recommendations of the Hearer and adopt them as my conclusions herein.

By my Amended Order dated July 3, 1973, the subject license was suspended for forty-eight days, terminating at 3:00 a.m. Monday, August 13, 1973 following its plea of non vult to a charge alleging that it sold and permitted the sale and delivery of alcoholic beverages for off-premises consumption after hours, in violation of Rule 1 of State Regulation No. 38. I shall, therefore, reimpose the suspension heretofore imposed by the Board, to commence upon the termination of the suspension presently in effect.

Accordingly, it is, on this 6th day of July 1973,

ORDERED that the action of the Board be and is hereby affirmed and the appeal filed in the matter be and the same is hereby dismissed; and it is further

ORDERED that my order dated April 23, 1973 staying the said suspension herein pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-140 issued by the Board of Alcoholic Beverage Control for the City of Paterson to Nehoc Tavern, Inc., t/a Jay's Corner for premises 27 Paterson Street, Paterson, be and the same is hereby suspended for sixty (60) days, commencing 3:00 a.m. Monday, August 13, 1973 and terminating 3:00 a.m. Friday, October 12, 1973.

ROBERT E. BOWER
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS BETS) ON LICENSED PREMISES - CHARGES DISMISSED.

In the Matter of Disciplinary Proceedings against

Victory Tavern, A Corporation
t/a Victory Tavern
1303-05 Baltimore Avenue
Linden, N.J.,

Holder of Plenary Retail Consumption License C-59, issued by the Municipal Board of Alcoholic Beverage Control of the City of Linden.

CONCLUSIONS and ORDER

Weiner, Weiner & Glennon, Esqs., by John T. Glennon, Esq., Attorneys for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's report

Licensee pleads not guilty to a charge alleging that on June 12, 14 and 21, 1972, it permitted gambling in the form of "numbers game" on the licensed premises, in violation of Rule 6 of State Regulation No. 20.

Agent V of this Division testified that on June 12, 1972, shortly after noon, acting as an undercover agent, he entered the licensed premises alone. He engaged in conversation with the bartender whom he later identified as Mason Mickens. The conversation got around to the subject of placing of numbers bets, and he told Mickens he had to go to Newark to place such bets. Mickens indicated that such bets might be placed in these licensed premises and stated that if the bets were written on a slip "...I will put it in for you."

After giving Mickens the slip and a dollar, Mickens left the area behind the bar where the conversation took place, advanced to the other end where another patron was sitting and handed over the slip and money. The agent referred to the patron by the nickname of "Pop", but his identity was later learned to be Ernest Hemphill. The agent then asked the bartender if, in the future, he could give his bets directly to Hemphill, and he was assured by Hemphill that it would be satisfactory.

Prior to noon on June 14, 1972, the agent again returned alone to the licensed premises and, after receiving paper and pencil from the bartender went directly to Hemphill and gave Hemphill the bet slip and fifty cents. Mickens, the bartender, was again on duty at that time; the entire visit took seven minutes.

On June 21, 1972 at 11:20 a.m. agent V entered the premises alone but was joined therein a few moments later by Investigator Rudy Rivera of the Union County Prosecutor's Office. Mickens was on duty as the sole bartender and Hemphill was in the premises, sitting at the bar. Agent V gave Hemphill a brown piece of paper with two numbers written thereon, 524 and 123, and two one-dollar bills, the serial numbers of which had been previously recorded. He recited the only conversation between Hemphill and himself to have been "How are you doing?" and "I need a little bit of luck" and "...here it is". Agent V made a prearranged signal and law enforcement officers of the Union County Prosecutor's office and other agents of this Division entered the premises. He recounted that his conversation with Hemphill had been "... in a clear voice where everybody could hear...."

On cross examination, the agent admitted a divergence in his direct testimony in respect to possession of a slip on which the numbers had been written prior to entry. He admitted further not being knowledgeable on the subject of lottery or numbers.

The agent admitted further that at no time did he see any other person placing a bet with Hemphill, nor did he notice any vision difficulties Hemphill may have had. He denied that on that date he had had any conversation with Mickens, the bartender. Another patron was then in the bar whom agent V recognized as a bartender or patron of another tavern with whom he had a slight acquaintance, and with whom he had a short conversation on this occasion. By prearrangement, the agent had been treated as a regular patron by the raiding party, and was thereupon searched and handcuffed.

Investigator Rudy Rivera of the Union County Organized Crime Control Unit of the Prosecutor's office, testified that he followed agent V into the licensed premises on June 21, 1972, and seated himself at the bar across from agent V, who he observed walk up to an older man, identified thereafter as Hemphill, put his arm around him and hand him money and a piece of paper. A conversation between agent V and Hemphill concerned the agent's previous bad luck. Within seconds other law enforcement agents entered and Rivera was told to leave. At the moment that agent V

handed Hemphill the bet slip and the money the bartender, Mickens, was ringing up a sale on the cash register a short distance away.

He offered neither conjecture or opinion concerning the bartender's knowledge of the proffered bet nor indicated if the conversation between the agent and Hemphill was of sufficient clarity that the bartender could have heard it. He did not indicate that, at his initial entry, he saw anything but agent V being seated at the bar apparently awaiting his arrival, and particularly indicated nothing concerning a request for a pad and pencil by agent V.

Agent B of this Division testified that he was part of the raiding party on June 21, 1972 and observed Hemphill on the search, placing slips and money on the bar at the direction of the Assistant Prosecutor of the County, who led the search. He affirmed that the money discovered on Hemphill contained the two "marked" bills, previously in the hand of agent V.

ABC agent D testified that he participated in the raid, but entered the licensed premises through its inter-connecting package store. He required the company of Norman Rhodes, who along with his wife, is the owner of the corporate stock of the corporate licensee. He examined copies of slips recovered from Hemphill and, as an expert on gambling matters, characterized such slips as "numbers" bets.

Lieutenant Richard J. Mason, commanding officer of the Organized Crime Section of the Union County Prosecutor's office, testified that he participated in the raid on the licensed premises conducted June 21, 1972. He confiscated three bet slips, a knife and wallet from Hemphill, which he removed from Hemphill's pockets.

Mason Mickens the bartender, testified on behalf of the licensee. He recalled the circumstances leading to the raid on the licensed premises on June 21, 1972 when he was on duty as a bartender. He had never seen agent V before, but a patron in the premises (presumably the same patron described by agent V as a prior acquaintance) advised him that there were "agents in the club". He did see agent V walk over to Hemphill but saw nothing further until all of the law enforcement officers entered and commanded: "Nobody move".

He admitted that agent V had ordered a drink but was never served because the raiding party entered before that was possible. He denied ever taking or placing any bets and further denied reference for betting purposes to Hemphill. He explained that he became bartender when Hemphill, who was the former bartender, lost his sight. On cross examination, he admitted seeing agent V place his arm around Hemphill but saw neither slips nor money.

Mickens further explained that he and Claude Washington are the only regular bartenders in the premises. The day and night shifts are alternated between them beginning each Sunday night. As he was on duty June 21, in the daytime, he would have been on the night shift on the two prior dates in the charge.

He candidly admitted that day and hour records of employment are not kept, but the alternation of shifts, week to week, is so automatic that their hours of service can be reconstructed from any given date.

Claude Washington, the alternate bartender, corroborated the employment schedule described by Mickens and affirmed that he had been the daytime bartender on June 14 and June 12 of 1972. He denied ever having seen agent V before coming to the hearing at this Division.

The principal stockholder of the licensee corporation, Norman Rhodes, testified that at the time of the raid, he was engaged in the package store operation of the licensed business, where he is apparently regularly engaged. He described being shunted into the bar portion of the premises by agent D but returned to the package store momentarily to lock the front door. During that brief period the search of Hemphill had already been conducted.

A search of the entire area had been made and no slips or betting data were found. He recounted his long friendship with Hemphill whose loss of sight was so profound as to require someone assisting him across the street, reading to him and treating him as one completely sightless, although he knew Hemphill could discern light and shadows. He confirmed the work schedule of his two bartenders, Mickens and Washington, adding that as Mickens was on duty the day of the raid, he would have been on duty on nights during the previous week.

Ernest Hemphill testified that he is sixty-three years old, receives social security payments, and spends most of his time in the licensed premises as that is where his friends are. He lives directly upstairs over the tavern. He described his sight as so limited that he cannot distinguish people nor can discern any writing. He recognizes currency only by feel. He denied all of agent V's testimony and particularly denied accepting any bets. He insisted that he has no knowledge of numbers, lottery or gambling activities. He admitted that on the day of the raid, someone asked him if he would write a dollar bet on numbers to which he replied: "I don't write numbers". He did not, however, satisfactorily explain the presence of the bet slips or marked money on his person.

It must be noted here, that an unnoticed observation of Hemphill was made during recess at the hearing in this Division, and that his actions in the corridor and in the building were those of a blind person; he apparently guided himself by feel and was assisted by others when going from one area to another.

In adjudicating matters of this kind, 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). In appraising the factual picture presented and having had the opportunity to observe the demeanor of the witnesses, as they testified, their credibility has been assessed. 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 common experience and observation of mankind can approve as probable under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The general rule in these cases is that the finding 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.

The basic issue involved here is not that gambling did or did not take place, but rather that if gambling did take place, the licensee or his agents knew or should have known that it did, in order to establish the present charges. In short, did the licensee or its agents suffer or permit the proscribed activity.

There is an obvious dichotomy of testimony between that presented by the Division and that given on behalf of the licensee. While the presence of "marked" money and the gambling slips found on Hemphill would weigh heavily against any presumption of innocense, it is hard to understand how a person as limited as Hemphill could be an active agent in any gambling activity requiring written documentation. While it can be acknowledged that some lifetime-blinded persons develop compensatory senses far above those of sighted persons, it is incredible that in three years of blindness Hemphill could have developed such abilities permitting him to run a "numbers" operation without vision. However, assuming that he was used as a mere passive repository for clandestine bets, he would have had to develop such senses as to enable him to distinguish one bettor from another. How that might be done was unexplained. In any event, the basic issue extends past Hemphill's activity toward the primary question of the presumed knowledge or acquiesence by the licensee or its agents, of such activity.

The testimony of agent V was in sharp conflict with the testimony of the bartenders and Rhodes, all of who confirmed that agent V could not have had conversations with bartenders Mickens during the daytime in two successive weeks. The whole system of their day and hour work schedule was a revolving one, and as Mickens was on duty in the daytime of June 21st, he would of necessity have been on duty evenings on June 12th and 14th. The uncorroborated testimony of agent V in this regard creates a serious question.

In any event, coming to the day of the raid and immediately prior thereto, Investigator Rivera was directed into the

licensed premises only to provide corroboration of agent V's activity. By his testimony there was no implication of the bartender. Contrary to usual practice in gambling investigations, there was no conversation respecting gambling that was corroborated. While Rivera's testimony was forthright and convincing as to agent V accosting Hemphill and giving him money, no reference to the knowledge, participation or inquiry to the bartender was offered. Hence, by subtraction, implication by the licensee in Hemphill's activities can be gleaned only by agent V's visits on the prior occasions.

The logic of the presented facts are contrary to human experience. Hemphill has known or worked for Rhodes during the past thirty years. He lives in Rhodes' building and is dependent upon Rhodes or his employees for guidance and comfort. Rhodes has an enterprising package goods and tavern business. Only by gross stupidity would Rhodes knowingly permit Hemphill to jeopardize the license.

The discovery of the "marked" money and slips on the person of Hemphill may well have established that gambling took place in the licensed premises, but the concomitant burden of establishing that such gambling took place with the knowledge and acquiescence of the licensee or its agents has not been met. Re Columbia Tavern, Inc., Bulletin 1750, Item 8.

Since there appears to be a lack of the necessary preponderance of the evidence herein, I recommend that the licensee be found not guilty and the charges herein be dismissed.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the Deputy Attorney General appearing on behalf of the Division, and written answers to the said exceptions were filed by the attorneys for the licensee, pursuant to Rule 6 of State Regulation No. 16. In addition, pursuant to my request, oral argument was had before me, pursuant to the same rule.

It was contended both by way of the exceptions and in the said oral argument that the Hearer erred in determining that the preponderance of evidence was short of that degree necessary to find against the licensee. The attorneys for the licensee urged the adoption of the Hearer's report.

I have carefully examined the transcripts of the testimony, the evidence presented, the Hearer's report, the exceptions filed thereto, the answer to the said exceptions and the oral argument before me. I find that the evidence against the licensee

lacked sufficient substance to substantiate the charge. Consequently, I concur with the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of June 1973,

ORDERED that the charge against the licensee be and the same is hereby dismissed.

Robert E. Bower
Director