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

BULLETIN 2082

FEBRUARY 1, 1973

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ITEM

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1. APPELLATE DECISIONS - PAITAKIS v. NEW BRUNSWICK.

Christ J. Paitakis, Appellant, v. City Council of the City of New Brunswick and Joyce Kilmer Bowling Corp., Respondents.	On Appeal CONCLUSIONS and ORDER

William F. McCloskey, Jr., Esq., Attorney for Appellant
J. Norris Harding, Esq., by Franklin F. Feld, Esq., Attorney for Respondent City Council
Garrenger & Rosta, Esqs., by Robert Garrenger, Jr., Esq., Attorneys for Objector Court Tavern

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant appeals from the action of respondent City Council of the City of New Brunswick (hereinafter Council) which on December 15, 1971, denied the application of appellant for a person-to-person and place-to-place transfer from respondent Joyce Kilmer Bowling Corp., to him and to the proposed premises at 57 Paterson Street, New Brunswick.

In his petition of appeal, appellant alleges that the action of the Council was erroneous in that the Board of Adjustment of the City of New Brunswick had granted appellant a variance to occupy the premises as a restaurant, knowing an application for transfer of a plenary retail consumption license to the proposed site would be made. Furthermore, the basis for its rejection was an anticipated increase of traffic congestion when, in fact, no such increase could reasonably be contemplated.

The Council, in its answer, denies that its action was improper; and by its resolution disapproved the transfer in that it:

> "...would be contrary to the health, safety, and general welfare of the community due to the proximity of the site to the ... Court House ... Administration Building ... County Jail ... City Hall ... due to increased traffic congestion in the area ... delivery ...."

At the de novo hearing held herein pursuant to Rule 6 of State Regulation No. 15, the testimony and exhibits established the following:

The appellant herein purchased the building at 57 Paterson Street into which he intended to move his present luncheonette business located around the corner on a neighboring street. His patronage presently consists, and presumably would continue to consist of persons who work, serve or visit the County administrative complex to which his present and new location are adjacent. He had arranged for the parking of his employees' cars in a lot nearby and had an arrangement with the owners of contiguous land for deliveries to be made in the rear of the proposed premises. Admittedly, the building to which the transfer was proposed fills the entire plot.

An extract of the tax map, offered into evidence, disclosed that Paterson Street is a narrow one-way street on which all parking is prohibited. The proposed site is immediately contiguous to a large municipal parking facility, and diagonally across the street from the Middlesex County Court House. It is uncontroverted that traffic congestion, both vehicular and pedestrian, is heavy in the entire area, particularly at the coming-to-work and the going-home hours of the day.

The thrust of appellant's argument is that, as his patronage does not visit by car and is made up of persons who are in the area anyway, there is no validity to the argument that the proposed location would add to traffic problems. As the inclusion of alcoholic beverages to his menu would alter the character of the establishment to be more a restaurant than luncheonette, there would be fewer tables and a slower "turnover" during the luncheon hour, hence, a lessening of congestion rather than an increase, would result.

Councilman George Hendricks testified that he is an attorney with offices in the immediate area and that he and his colleagues on the Council are particularly familiar with this zone which he described as the "County complex". The Council felt that a licensed premises in the proposed location would not be in keeping with the development of the "County complex" and, notwithstanding appellant's assurances to the contrary, there was no practical way on-street deliveries to the proposed licensed premises could be avoided.

It is apparent that the dispositive issue is whether the Council acted reasonably and in the best interests of the community.

In matters of this kind we are guided by the well established principle of law that a transfer of a liquor license to other premises is not an inherent or automatic right. The issuing authority may grant or deny a transfer in the exercise of reasonable discretion. If denied on reasonable grounds, such action will be affirmed. Zicherman v. Driscoll, 133 N.J.L. 586 (1946). As the court said in Fanwood v. Rocco, 59 N.J. Super. 306, 320 (App. Div. 1960) affd. 33 N.J. 404 (1960):

> "No person is entitled to [the transfer of a license] as a matter of law...If the motive of the governing body is pure, its reasons whether based on morals, economics or aesthetics are immaterial."

The Legislature has entrusted to municipal issuing authorities the initial authority and charges them with the duty to approve or disapprove place-to-place transfers. The action of the Council in either approving or denying an application for such transfer may not be reversed by the Director unless he

finds "...the act of the Board was clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (1947). In the recent case of Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, 303 (1970) the court held:

> "Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record."

In a letter memorandum, counsel for appellant attempts to dissipate the effect of Fanwood and Lyons Farms, supra, by pointing to factual variables between them and the facts in the matter sub judice. Factual differences do exist, of course, but such differences are not so substantial as to diminish the underlying principles, i.e., that in the absence of unreasonableness the Council should be affirmed.

The objections voiced herein are specific in nature and surround the Council's collective apprehension that the grant of a transfer to the proposed location would result in a traffic impasse not readily remedial. It rejected appellant's rather vague proposal that deliveries could be made by the use of the rear portion of neighboring property. From all of the testimony on this subject, it is readily apparent, that in the absence of total dominion by appellant of such neighboring land, rear deliveries via that route would be mere conjecture. That the Council so found. As was stated in Ward v. Scott, 16 N.J. 16, 23 (1954):

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

It is apparent that the Council determined that in addition to the specific objections above noted, there existed a further underlying objection to the grant of a transfer to the "County complex" area. The Court House, County Administration Buildings, County Jail, City Hall and Post Office, are all within a area the circumference of which includes the site of the proposed transfer. Evidently the Council considered the presence of a liquor purveying establishment in that area would unduly denigrate it and would not serve the best interests of the community.

All of these factors were conscientiously evaluated by the Council in reaching its ultimate determination. Absent improper motivation the action of the local issuing authority, based upon lawful and bona fide use of its discretion must be affirmed. Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, supra.

After considering all the evidence herein, including the transcript of the testimony, the exhibits and the memoranda of counsel, I conclude that appellant has failed to sustain the burden of establishing that the action of the Council was unreason-

able or constituted an abuse of its discretionary power. Hence, I recommend that an order be entered affirming the action of the Council and dismissing the appeal. Rule 6 of State Regulation No. 15.

Supplemental Hearer's Report

This is a supplemental hearing in the above captioned matter following an initial de novo hearing on appeal from the action of respondent City Council of the City of New Brunswick (hereinafter Council) which had denied the application of appellant for transfer of his plenary retail consumption license, both person-to-person and place-to-place, from respondent Joyce Kilmer Bowling Corp. to him and from premises on Joyce Kilmer Avenue to proposed premises at 57 Paterson Street, New Brunswick.

Following the submission of the Hearer's report and prior to the entry of the Director's Conclusions and Order in respect thereto, written exceptions and additional petition for supplemental hearing of the matter based upon alleged newly discovered evidence were filed. An order was thereupon entered on August 7, 1972, by the Director providing appellant an opportunity to challenge the action of the Council at this supplemental hearing based upon such alleged newly discovered evidence.

The petition to reopen by appellant alleges that the principal objector to appellant's application for transfer, Vincent R. Albert (owner of the Court Tavern situate nearby) is a close friend of John A. Smith, one of the members of the Council; that Smith is indebted to Albert, and that Smith, who practices law in an adjacent building to that of Albert, has a telephone connection in Albert's tavern, in consequence of all of which there exists such interrelationship between Smith and Albert as to vest any action by Smith as a member of the Council with conflict of interest.

In response to the petition, an answer filed by counsel to objector Albert denied the allegation of such personal interest as to constitute a conflict of interest or, in the alternative, asserted that even if, but not admitting that, Councilman Smith should not have voted on the issue, his vote was not influential upon the Council.

The hearing was held pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded the parties to produce testimony and cross-examine witnesses.

Appellant Christ J. Paitakis testified in support of the petition and his affidavit filed and made part of the record. He alleged an indebtedness by Smith to Albert, but admitted that such information was merely hearsay. He had no direct knowledge of particular friendship between Smith and Albert and referred only to bits of hearsay which he claims were related to him. He did state that on March 7, 1972, about 7 p.m., he called Smith's office and a person responded indicating that it was Smith's office; at that moment he had arranged with another person to be at Albert's tavern when such call came in. Other than the mention of the telephone call, there was no substantive allegations in support of the statements in his affidavit.

Paul M. Bruno (a private investigator of Piscataway Township) testified that he was retained by appellant in March 1972 to determine if Smith did in fact have his law office telephone answered by employees in Albert's tavern. He recited in detail the results of his investigation which did in fact verify that a wall telephone in the kitchen of Albert's tavern did have a connection with Smith's office. On Saturday, March 18, 1972, about 3:30 p.m., while Bruno was in Albert's tavern,

the telephone in the kitchen rang by prearrangement and one of the patrons answered indicating to Bruno's secretary, who had placed the call to Smith's office, that the "night watchman" was answering.

The crucial issue here revolves about the question as to the existence of such relationship between Councilman Smith and objector Albert as to clothe Smith's actions with a conflict of interest which would vitiate the action of the Council.

I find that the proofs supplied fall far short of that measure necessary to support the contention of conflict of interest. There was no proof whatever offered in support of any personal relationship between Smith and Albert. While respondents offered no testimony in rebuttal, contending that none was needed, the existence of the telephone connection between the law office and the tavern was uncontroverted. By conjecture alone, it is thus assumed that Smith does have such connection, the use for which appears from the proofs to be a late-hour or weekend convenience. Proofs were totally lacking respecting the relationship, financial or otherwise, that gave rise to this extra-hour telephone convenience.

In matters involving conflict-of-interest questions, the court has succinctly held that:

> "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.... No definitive test can be devised. The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty...."

Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958), cited in McNamara v. Saddle River, 60 N.J. Super. 367, 378 (Sup. Ct. 1960).

The crucial test is whether the public officer is placed in a "situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect...." Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App.Div. 1956).

Patently, a telephone connection, like the telephone itself, cannot invest the official with such taint that his action is necessarily void. Far more proof than the naked existence of a telephone connection would be required to be convincing of a benefit or temptation of benefit likely to prejudice the official's sworn duty. A public official's action is presumed to be the exercise of his sworn duty, performed in a conscientious and impartial manner. Any challenge to the contrary requires more than mere supposition or conjecture, more than mere off-hand allegation; it requires some positive degree of substantive proof. Such proof is clearly lacking here.

I find that appellant has not maintained the burden imposed upon him by Rule 6 of State Regulation No. 15. Accordingly I recommend that an order be entered affirming the action of the Council (as heretofore recommended in the initial Hearer's report) and dismissing the appeal.

Conclusions and Order

Written exceptions to the Hearer's report and supplemental Hearer's report were filed by the attorney for appellant, pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including transcripts of testimony, exhibits, the Hearer's report and supplemental Hearer's report and the exceptions thereto which I find lacking in merit, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 4th day of December 1972,

ORDERED that the action of respondent City Council of the City of New Brunswick be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Robert E. Bower,
Director.

2. APPELLATE DECISIONS - VAZQUEZ-PEREZ CORPORATION v. NEWARK.

Vazquez-Perez Corporation, t/a Orchard Tavern, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Soriano, Henkel & Klein, Esqs., by Joseph Klein, Esq., Attorneys for Appellant
William H. Walls, Esq., by Beth M. Jaffe, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Newark (Board) whereby it suspended appellant's plenary retail consumption license for fifteen days effective January 3, 1972, after finding appellant guilty of permitting its licensed premises to remain open during prohibited hours, "when the entire licensed premises shall be closed", in violation of City Ordinance Number 4, Section 4:1-1 B.

It is further noted that, with respect to an additional charge of selling, delivering, serving and permitting the consumption of alcoholic beverages between the hours of

2 a.m. and 7 a.m., in violation of City Ordinance Number 4, Section 4:1-1 A, the Board resolved that it "found no cause to suspend on the sale of alcoholic beverages." Construing this clause to mean a finding of not guilty, this report will be confined to the charge of permitting the licensed premises to remain open during prohibited hours, in violation of the aforementioned local ordinance.

Upon filing of the appeal an order was entered by the Director on January 3, 1972, staying the Board's order of suspension until determination of this appeal. N.J.S.A. 33:1-31; Rule 11 of State Regulation No. 15.

Newark City Ordinance Section 4:1-1B provides in pertinent part as follows:

> "During the hours when sales of alcoholic beverages are prohibited the entire premises shall be closed ...."

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before the Board was submitted in evidence, and additional testimony was presented by appellant in accordance with Rules 6 and 8 of State Regulation No. 15.

The transcript discloses the following testimony:
Theodore Laux, Jr. (a detective in the Newark Police Department) was on duty in the vicinity of the premises herein during the early morning hours of Tuesday, March 16, 1971. At approximately 3:18 a.m. he noticed that the premises were fully lighted. Upon closer inspection he observed four persons at the bar, and further observed two partially filled glasses on the bar. He knocked at the locked door and received no response. He then proceeded to the side door which was opened in response to his knock. He determined that one of the four persons present was the owner Domingues Vazquez. He did not recall ascertaining whether the remaining three persons were present for any specific reason or whether or not they were employees. He observed that the glasses remained on the bar but he did not identify their contents. He also noted that the licensee was behind the bar and the remaining three males were standing on the patrons' side of the bar. He did ask the licensee why the four were present at this late hour but does not recall the answer to his inquiry.

Felix Figueroa, called as a witness by the Board, testified that he was on the premises when the police officer entered the premises, along with the licensee and two other males. He was waiting for the licensee while the licensee and the two remaining males repaired a leaking pipe behind the bar. The premises were closed shortly before the 2 a.m. closing hour so that the licensee and the two males could commence repairing the pipe. At the time the police entered, he alone was on the patrons' side of the bar while the remaining three were behind the bar making the repairs. The doors to the premises were locked and no patrons entered after 2 a.m.

Domingues Garcia Vazquez (principal officer of the corporate licensee) testified that a leak in a pipe behind the bar had developed early in the day but he was unable to repair it while the bar was functioning. He determined that he would close early and make the necessary repairs. At the time of early closing the two patrons offered to assist in the repairs.

He did not call the police to notify them that he would be working on the premises after hours because he did not anticipate that the job would take very long. When Officer Laux entered, Vazquez showed him the repair work that was in progress and Officer Laux assured him that no problem existed.

At the de novo hearing before the Division Domingues Vazquez testified substantially as he had at the hearing below.

It appears that factually there is no significant dispute with respect to the presence of the four males on the premises at 3:18 a.m. However, while the licensee testified that two of the males were assisting him with the repairs and the third was awaiting completion of the work so that he could drive the licensee home, Officer Laux testified that there were drinks on the bar and the three males were standing in front of the bar.

The critical question, therefore, becomes whether such conduct violates the Newark City Ordinance 4:1-1B.

As used in the ordinance "closed" means that all members of the public must be excluded. Proof of the charge "keeping open" (which is the same as not being closed) requires only proof that the licensee continues to entertain the public. 32 Club, Inc. v. Newark, Bulletin 1373, Item 2.

In construing a similar ordinance it has been held that it means all members of the public must be excluded and the mere closing and locking the door is not enough. See Town House, Inc. v. Montclair, Bulletin 792, Item 3, and cases cited therein. In Town House police observed two males and two females seated at a bar singing and drinking during prohibited hours. While one of the males was the licensee, the remaining three were in no way connected with the licensee. The three were, therefore, clearly members of the public, and the then Commissioner properly found the licensee in violation.

In Re Hoover, Bulletin 1521, Item 1, an ABC agent was served and permitted to consume alcoholic beverages during prohibited hours and he observed other patrons similarly served. The licensee was found to be clearly in violation.

The burden of establishing that the Board acted erroneously and arbitrarily is upon the appellant. The ultimate test in these matters is one of reasonableness on the part of the Board or, to put it another way: Could the members of the Board, as reasonable men acting reasonably, have come to this determination based upon the credible evidence presented? The Director should not reverse unless he finds that the act of the Board was clearly against the logic and effect of the presented facts. Fred Geiger Bar, Inc. v. Newark, Bulletin 1937, Item 2.

From my evaluation of the testimony I find that the charge has been established by a fair preponderance of the credible evidence. Thus I conclude that the Board could reasonably have reached its determination after assessing the credible evidence presented. They could have reasonably concluded, as Officer Laux testified, that the three males were indeed in front

of the bar and the two partially consumed drinks were on the bar. The Board could reasonably conclude, therefore, that the licensee was entertaining the public within the meaning of 32 Club, Inc., supra.

It is, therefore, recommended that the action of the Board be affirmed, the appeal be dismissed, the order of the Director staying the suspension be vacated, and effective dates of the fifteen-days suspension heretofore imposed by the Board and stayed pending the determination of this appeal be fixed.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report were filed by the attorneys for appellant.

I find that the matters contained in the exceptions have either been fully considered by the Hearer in his report or are without merit.

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

Accordingly, it is, on this 30th day of November 1972,

ORDERED that the action of respondent be and the same is hereby affirmed and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the order dated January 3, 1972, staying the Board's order of suspension until determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-222, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Vazquez-Perez Corporation, t/a Orchard Tavern, for premises 114 Orchard Street, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2 a.m. Thursday, December 7, 1972, and terminating at 2 a.m. Friday, December 22, 1972.

Robert E. Bower,
Director.

3. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - HINDERING - PERMITTED FOUL LANGUAGE - LICENSE SUSPENDED FOR 70 DAYS.

In the Matter of Disciplinary Proceedings against

Frederick A. Koech, Inc.
t/a Delaware House
Clinton St. and Railroad Ave.,
Knowlton
P.O. Delaware, N. J.,

Holder of Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Knowlton.

CONCLUSIONS and ORDER

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Licensee
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to three charges alleging that on October 9, 1971 it (1) sold alcoholic beverages to two minors, ages 17 and 18; (2) permitted foul language upon the licensed premises, and (3) hindered an investigation by Division agents. These charges encompassed violations of Rules 1 and 5 of State Regulation No. 20 and N.J.S.A. 33:1-35.

Pursuant to a specific assignment to investigate alleged sales of alcoholic beverages to minors, Agents O and R of this Division entered the licensed premises on October 10, 1971 at approximately 1:25 a.m. Both agents seated themselves at the bar which was attended by Edward Koech (the twenty-two-year-old son of the licensee) and another unidentified male. They noticed two youthful-appearing females at the bar who shortly thereafter carried their glasses of beer to a table in a larger area of the premises. The agents followed and sat at a nearby table.

Agent O testified that one of the females repeated loudly a vulgar and obscene word (it would serve no useful purpose to quote it here) as part of her demand that someone buy her a beer. Agent R requested aid of the New Jersey State police and, upon their arrival, both agents identified themselves and placed one of the females (Ann ---) under arrest.

A large number of patrons, between 45 and 50, were then present in the rear portion of the licensed premises and their mood appeared ugly; some of them began to yell "Kill the pigs" a phrase of derision directed toward the enforcement officers. The State Police trooper requested additional aid as the crowd started to get out of hand. The patrons milled around the agents and police and pushed and shoved them. The musicians gave accompaniment to the chant "kill the pigs" which was joined in and encouraged by the bartender. During the commotion the arrested girls escaped, although the agents secured samples of the beverages they had been consuming.

Upon an attempt by the agent to obtain identification of one of the musicians, that employee produced a bear claw and said, "This is my identification, man", at which the bartender Koech laughed loudly and responded to the agent,

"What do you want me to do, man? He showed you his identification. There it is." When the agent advised the bartender that a charge of hindering investigation would be made, the bartender responded with filthy language directed at the agents.

Agent R testified in general corroboration of that of Agent O.

State Trooper Peter J. Welsh testified that he and a fellow officer (Trooper Tanner) arrived at the licensed premises about 2 a.m., located the agents of this Division and, as the crowd was angry and belligerent, radioed for assistance. Patrons shouted "kill the pigs" and other obscenities, including four-letter vulgarities, at them and no effort by the employees of the licensee was made to quell the disorder. Additional State police support arrived and the disturbance subsided.

Ann --- testified that she was born May 29, 1953, and was in the licensed premises on the night in question, acknowledged that she consumed beer but denied that she had been served that beer, stating that she had been given it by some patron.

A patron of the establishment and friend of the owner, Donald Hanlein, testified on behalf of the licensee. He stated that he had been present in the licensed premises on the evening and early morning hours when the agents and State troopers were present. He denied that the alleged minors were served and that the bartender Koech had in any way impeded the investigation. He admitted the crowd was milling around the agents and the troopers and that the band increased its volume when the agents were attempting to obtain order. He denied hearing profanity.

No other witnesses testified on behalf of the licensee.

The agent's and trooper's version of what occurred on the date in question is a factual and believable account. The defense to the charges is entirely unconvincing in view of the details presented by the witnesses for the Division. Furthermore, testimony of the minor Ann --- has an unconvincing ring when she asserts that she was given a beer by a patron instead of being served by the bartender. Weighed against the forthright testimony of the agent who watched her carry the beer to a table, her testimony on this point appears contrived.

It is a well established and fundamental principle that a licensee is responsible for the activities of his employees in the licensed premises. In re Olympic, Inc., 49 N.J. Super. 299 (App.Div. 1958); In re Schneider, 12 N.J. Super. 449 (App.Div. 1951); Rule 33 of State Regulation No. 20. Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); F. & A. Distrib. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961).

The defense to the charges is without merit. While a part of the charge involving sale to minor Dianne --- was nolle prossed due to the unavailability of her testimony, I find that the remainder of that charge and the remaining charges were proven by a fair preponderance of the believable evidence.

Absent prior record, it is recommended that the license be suspended for fifteen days on the first charge (Re Liquor Circus Inc., Bulletin 2057, Item 7); for fifteen days on the second charge (Re Seely Enterprises, Bulletin 2012, Item 4) and for twenty days on the third charge, the said hindering considered aggravated under the aforementioned circumstances (Re Rova Farms Resort, Inc., Bulletins 1877, Item 3, and 1884, Item 6) or a total suspension of fifty days days on these charges.

In addition to the charges initially recited, the licensee entered a plea of non vult to a fourth charge alleging that on April 7 and 8, 1972, it sold alcoholic beverages to four minors, aged 17, 18, 18 and 19, in violation of Rule 1 of State Regulation No. 20. It is recommended that on this charge the license be suspended for twenty-five days with remission of five days for the plea entered, leaving a net suspension on this charge of twenty days. Re Inlet Hotel Bar and Cafe, Inc., Bulletin 1820, Item 7.

Accordingly, it is recommended that the license be suspended on all charges herein for a total of seventy 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 transcript of the testimony, exhibits and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of November 1972,

ORDERED that Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Knowlton to Frederick A. Koech, Inc., t/a Delaware House, for premises Clinton St. and Railroad Ave., Knowlton, be and the same is hereby suspended for seventy (70) days, commencing at 12:01 a.m. Wednesday, December 13, 1972, and terminating at 12:01 a.m. Wednesday, February 21, 1973.

ROBERT E. BOWER
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - VIOLATION OF RULE 1 OF STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD - FAILURE OF DISCLOSURE OF SUCH RECORD - LICENSE SUSPENDED FOR 35 DAYS.

In the Matter of Disciplinary Proceedings against

Larry Young
t/a Larry Young's Peraisian Lounge
126 Avon Avenue
Newark, N.J.,

Holder of Plenary Retail Consumption License C-232, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS and ORDER

Leon Sachs, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein.

Hearer's Report

Licensee pleaded guilty to Charge 2 and not guilty to Charge 1 which reads as follows:

"1. On Wednesday, April 19, 1972, at about 11:05 P.M., you sold and delivered and allowed, permitted and suffered the sale and delivery of an alcoholic beverage, viz., a 4/5 pint bottle of White Label Dewar's Blended Scotch Whisky, at retail, in its original container for consumption off your licensed premises, and allowed, permitted and suffered the removal of said alcoholic beverage in its original container from your licensed premises; in violation of Rule 1 of State Regulation No. 38."

In support of the contested charge, ABC Agent S testified that, accompanied by ABC Agent G and two local police officers, he arrived in the vicinity of the licensed premises on April 19, 1972, at approximately 11 p.m. He entered the premises at that time alone.

While positioned at the bar, he observed the licensee behind the bar conversing with a musician on the bandstand. A female seated at the bar asked Agent S if she could be of service. Upon informing the female that he was waiting for Young, she spoke to Young and he proceeded to the place where Agent S was positioned. Agent S asked Young for a pint-bottle of scotch whisky "to go." Young picked up a pint-bottle of Dewar's White Label Scotch Whisky from a cabinet behind the bar, cracked the seal on the bottle, placed the bottle in a brown paper bag, placed it in front of the agent and asked for payment of $6.50. The agent made payment with two marked five-dollar bills. Young rang up the sale on the cash register and returned the change to the agent. No glasses were placed on the bar.

Agent S then placed the bag containing the bottle behind his belt and departed from the premises. Thereafter, he immediately re-entered the premises with Agent G and the local police officers. Agent G informed Young of the alleged violation and recovered the two five-dollar marked bills from Young. Young asserted that he sold the bottle as a "set-up." He did not

respond upon being questioned by Agent G concerning his reason for not giving glasses. Young did not deny selling the whisky or placing it in the bag. The marked currency, the bag and the bottles were admitted into evidence.

On cross examination, Agent S testified that he was aware that the whisky should sell for $4.10. He did not object to the price charged. Agent S paid him after he was informed of the cost of the liquor. He denied being directed to a booth by Young, or sitting in one.

Agent G testified that on the date and time above mentioned, he observed Agent S enter the licensed premises carrying nothing upon his person or hands; he waited at a post of observation and, upon his return, he observed that Agent S was carrying a brown paper bag. He subsequently learned that the bag contained a bottle of White Label Scotch. Upon entering the licensed premises with Agent S and the two local police officers, he identified himself to Young and informed him of the alleged violation. Young asserted that he sold the pint of scotch whisky to Agent S for a set-up. Upon inquiring of Young why he placed the bottle in a bag and, whether he had given Agent S glasses, Young failed to respond.

In defense of the contested charge, the licensee, Larry Young, testified that upon being asked by Agent S to give him a pint of scotch whisky, he placed a pint of scotch whisky (Dewar's) on the bar and, upon observing a five-dollar bill on the bar, informed Agent S that this was a set-up and that it would cost him $6.50. Agent S thereafter placed a second five-dollar bill on the bar. Young asserted that he broke the seal, gave Agent S a glass and told him to go to a booth next to the door. He observed Agent S proceed towards the booth; however, he did not keep him under observation and he did not see him again until he returned with the other agent. He remonstrated with Agent S and told him that he had no right to take the bottle out, and that the agent had been directed to a booth.

Continuing, Young testified that he did not place the bottle in a bag. He asserted that Agent G put the bottle in a brown paper bag which he picked up from the floor after the agents came in to identify themselves. His normal charge for the pint bottle set-up is $6.50. He denied selling any bottles of whisky, at all, "to go".

Alexander Thornton, the day-time bartender, testified that he was seated five stools removed from where Agent S was positioned. He heard Agent S ask Young for a pint of scotch. Young broke the seal and gave the agent a pint bottle of Dewar's scotch, received payment and directed him to a booth. Agent S headed for a booth with the bottle and a glass and seated himself. A female then informed him that the agent left the premises.

The testimony of Sherry Shelton who was employed as a barmaid by the licensee was substantially corroborative of the testimony offered by Thornton.

Preliminarily, it should be observed that we are dealing with a purely disciplinary action, and such action is civil in nature, and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus the proof must be supported by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Since the matter sub judice presents a basically factual situation, the credibility of witnesses must be weighed. Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as 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).

I have had an opportunity to observe the demeanor of the witnesses as they testified and, in view of the conflict in the testimony, I have made a careful analysis and evaluation of their testimony.

I am imperatively persuaded that the agents' version with respect to the alleged sale of an alcoholic beverage in violation of the rule as charged was truthful and presented an accurate portrayal of alleged occurrence. Additionally, I find that there was no improper motivation on the part of the agents, nor, indeed, was there such allegation. On the other hand, I have an abiding feeling that the testimony presented by the licensee and his witnesses was lacking in candor, and is unbelievable.

Accordingly, upon considering the entire record herein, I am persuaded by the clear and convincing proofs that Charge 1 has been sustained by a fair preponderance of the credible evidence. I, therefore, recommend that the licensee be found guilty of the said charge.

As heretofore indicated, licensee has pleaded guilty to Charge 2 alleging mitigating circumstances in that the act was the result of an unintentional error.

Licensee has a previous record of suspension of license by the municipal issuing authority for ten days effective May 11, 1970 for a similar offense, in violation of Rule 1 of State Regulation No. 38.

It is further recommended that an order be entered suspending the license on the first charge for fifteen days (Re Kwiatek Brothers, Inc., Bulletin 2061, Item 10) and on the second charge for ten days (Re Perton's Corporation, Bulletin 2038, Item 11), to which will be added ten days by reason of similar violation occurring within the past five years, without remission for the confessive plea to the second charge in view of the contest to the first charge (Re Lawnside Republican Club, Bulletin 2036, Item 3), or a total of thirty-five days.

Conclusions and Order

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

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

Although the Hearer assessed and recommended the proper penalty in accordance with the established policy of this Division with respect to Charge 2, the Hearer in his report failed to detail the nature of the said charge. In Charge 2 the licensee was charged with failure to disclose in his application filed with the local issuing authority, upon which he obtained his then current plenary retail consumption license, the fact that his license had been suspended by the municipal issuing authority for ten days effective May 11, 1970, for sale of alcoholic beverages in violation of Rule 1 of State Regulation

No. 38; such evasion being in violation of N.J.S.A. 33:1-25. I shall therefore impose the recommended penalty based on both charges, i.e., a suspension of license for thirty-five days.

Accordingly, it is, on this 5th day of December 1972,

ORDERED that Plenary Retail Consumption License C-232, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Larry Young, t/a Larry Young's Peraisian Lounge, for premises 126 Avon Avenue, Newark, be and the same is hereby suspended for thirty-five (35) days, commencing at 2 a.m. Tuesday, January 2, 1973, and terminating at 2 a.m. Tuesday, February 6, 1973.

Robert E. Bower,
Director.