

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

BULLETIN 1833

January 8, 1969

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1. APPELLATE DECISIONS - NOTO v. PASSAIC

Anthony Noto, t/a Club 62,)	
Appellant,)	On Appeal
v.)	CONCLUSIONS
Municipal Board of Alcoholic)	and
Beverage Control of the City)	ORDER
of Passaic,)	
Respondent.)	
- - - - -		
Joseph A. Banas, Jr., Esq.,	Attorney for Appellant	
Charles E. Miller, Esq.,	by Milton J. Pashman, Esq.,	
	Attorney for Respondent	

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

On June 24, 1968, respondent (hereinafter Board) unani-
mously denied the appellant's application for renewal of his plenary
retail consumption license for the license year 1968-69 for
premises 62 First Street, Passaic. The stated basis for its
action was the public necessity and convenience dictated
that it not be renewed.

Appellant challenges the Board's action in his petition
of appeal as being erroneous, arbitrary, capricious and an abuse
of its discretion. He contends that no charges have been filed
against him, that no violations of any kind have been "preferred
against him" and that he has been denied "due process of law."

The Board's answer admits the jurisdictional allegations
of the petition, denies the substantive allegations thereof, and
asserts that it "considered all the facts and circumstances per-
taining to the refusal to renew the license, and that the grounds
not to renew same were reasonable and proper and in the best
interest of public welfare."

Upon the filing of this appeal, the Director entered
an order extending the term of the 1967-68 license pending the
determination of this appeal and the entry of a further order
herein.

This is an appeal de novo with full opportunity for
counsel to present testimony and cross-examine witnesses. Rule
6 of State Regulation No. 15. Thus, full "due process" has been
accorded appellant in these proceedings.

The central issue herein is whether the evidence justi-
fies the Board's refusal to renew appellant's license. Nordco,
Inc. v. Newark, Bulletin 1148, Item 2. The burden of proof in
cases involving discretionary matters where renewal of license
is sought falls upon appellant to show manifest error or abuse
of discretion by the issuing authority. Downie v. Somerdale,

44 N.J. Super. 84; Nordco, Inc. v. State, 43 N.J. Super. 277. As the court stated in Zicherman v. Driscoll, 133 N.J.L. 586, 587:

"The question of a forfeiture of any property right is not involved. R.S. 33:1-26. A liquor license is a privilege. A renewal license is in the same category as an original license. There is no inherent right in a citizen to sell intoxicating liquor by retail, Crowley v. Christensen, 137 U.S. 86, and no person is entitled as a matter of law to a liquor license. Bumball v. Burnett, 115 N.J.L. 254; Paul v. Gloucester, 50 Id. 585; Voight v. Board of Excise, 59 Id. 358; Meehan v. Excise Commissioners, 73 Id. 382; affirmed, 75 Id. 557. No licensee has vested right to the renewal of a license. Whether an original license should issue or a license be renewed rests in the sound discretion of the issuing authority. Unless there has been a clear abuse of discretion this court should not interfere with the actions of the constituted authorities. Allen v. City of Paterson, 98 Id. 661; Fornarotto v. Public Utility Commissioners, 105 Id. 28. We find no such abuse. The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuing and renewing of licenses."

In its consideration of this matter, the Board was guided by the principles enunciated in Tumulty v. Dunellen et al. (App. Div. 1963), not officially reported, reprinted in Bulletin 1519, Item 1, as follows:

"The problem before [the Board], upon the application for the renewal of the license, was whether it was in the public interest that this establishment be licensed in the future. Subject to law and to the Director's right of review, a municipality has the power to sets its own reasonable standards for the conduct of its licensees. We hold that Dunellen had the right to say that since these licensees permitted the things recited in the Director's 'Conclusions and Order' of June 13, 1962, they were not worthy to continue to hold their license and that it was not in the public interest that the license should be renewed." (Emphasis supplied)

Victor Jacalone, a detective sergeant of the Passaic Police Department assigned to investigate applicants for tavern licenses, under whose personal supervision police reports with respect thereto are prepared, gave the following account: He is familiar with the activities at the licensed premises, having visited the said premises on numerous occasions. The patronage is "a very loud, boisterous type crowd." The premises attract "many of the criminal element or people that are known to be involved in certain activities, illegal activities... It is what I would characterize as a trouble spot in Passaic." During 1967 and through June 1968, the police reports show the following:

On April 15, 1967, at approximately 1:38 a.m., police responded to a call of a disturbance and, upon arrival, learned that a man had been assaulted and taken to Beth Israel Hospital. Interviewed at the hospital, the victim alleged that he had been

cut with a razor at the premises and received lacerations on his face.

On September 1, 1967, at 11:20 p.m., police responded to a call and ascertained that a man had been assaulted at the premises. The victim was located a short distance from the premises and informed the officers that he had been struck in the face with a pipe by an unknown assailant while drinking beer in the subject premises.

On September 30, 1967, at 12:45 a.m., police responded to a report that teenagers were drinking in the premises. Upon entering the "very crowded" tavern, they were informed by the manager that he was checking all persons who appeared to be minors. Police warned him not to permit minors in the tavern.

On December 2, 1967, at 2:20 a.m., police responded to a call from the special police officer at the premises who was having trouble with minors attempting to order drinks. The police dispersed these minors.

On December 17, 1967, at 2:06 a.m., police responded to a call from Benjamin Berman, manager of these premises, who informed them that teenage girls at the tavern refused to leave. The officers noted in their report that "There were a lot of people in the bar who seemed to be under-age, and when we started to question them Mr. Berman became excited and ordered every one out, stating he was closing for the night."

On December 24, 1967, at 1:11 a.m., responding to a call, the police entered the tavern and found one Jake Whitworth who complained that he was assaulted in the premises. He was taken to a hospital for treatment.

On December 31, 1967, at 10:30 p.m., a nurse at the General Hospital reported hospital treatment of a woman for stab wounds suffered in the subject premises. The police arrested her assailant at the licensed premises and found in her possession a .22 caliber revolver.

On January 1, 1968, at about 10:20 a.m., police were notified by the Beth Israel Hospital that one Elvira Hill had been assaulted in front of the premises and sustained serious injuries. The police learned that an argument between the victim and her assailant started in the tavern and continued until she was assaulted as they emerged from the tavern.

On March 16, 1968, at 11:28 p.m., the police found a person lying unconscious in front of the premises. Further investigation developed the fact that this person had been ejected from the tavern because he was allegedly unruly.

On April 6, 1968, at 1:56 a.m., police were summoned because a woman was being threatened with a gun. When they arrived at the premises, the manager denied that anything had happened there and said "everything was peaceful and quiet."

On cross examination, Sergeant Jacalone added that during his many visits to the premises, he had difficulty with and lack of cooperation from the employees. He particularly noted that on these visits "There are people hang around the place that have criminal records, all different kinds of records, assaults, muggings, almost anything you can think of."

Anthony Noto, the appellant, testified that he had never been warned by the Police Department or by respondent concerning any of the activities at his premises. He was never there during 1967 or 1968 when the police responded to calls; and his only knowledge of them was from information given to him by his manager.

On cross examination, the witness was asked about each specific incident and his stock answer was either that he was not present when it occurred or that he had no recollection of those incidents. With respect to several of the incidents, he admitted that he learned about them from his manager, but was not certain whether they occurred inside or outside the premises. He explained that he was present infrequently in the premises since he was kept busy all day in a vending machine business. "I had so many things on my mind I couldn't recollect a lot of that stuff." He left the operation of the business almost entirely in the hands of his manager and special policeman. He was then asked:

"Q So that so far as you are concerned you really were not very much interested in the operation of the business?

A I was interested except when I was busy I just couldn't be there."

Benjamin Berman, who commenced employment at the premises as a manager on July 15, 1967, was vague about a number of the incidents contained in the police reports. He stated that when there was a disturbance in the place or "somebody gets loud ...we try to get him out the best we can. Most of the time we get him out." He was specifically asked about a shooting that occurred in the tavern on New Year's Day. His answer: "I guess it happened - - I told them [the police], 'It must have happened in the place, but I didn't hear it because the balloons were going off and everything else.'" Since he was hired as manager in July 1967, he knew very little of what occurred before that time, except that he had been an occasional patron. Shortly after he came to these premises, he decided to hire a special policeman on weekends because of trouble with teenagers who were attracted to the premises. Nevertheless, he found it necessary to close the establishment at an earlier than closing hour on at least five or six occasions because of incidents that happened in the premises. When asked particularly about the incident of December 31, 1967, involving an alleged atrocious assault and battery and a concealed weapon at the premises, he denied any recollection thereof.

From the evidence adduced herein, I am persuaded that these premises were, indeed, conducted in such manner as to justify the characterization by Sergeant Jacalone as a "trouble spot." This tavern appears to have an unusual magnetism for minors, drunkards and undesirable patrons. It is no surprise that this type of patronage resulted in the numerous incidents hereinabove delineated, involving serious assaults and other violations of the law.

Noto seems to feel that he is not responsible for the conditions that existed outside the premises. However, as early as Conte v. Princeton, Bulletin 139, Item 8 (1936), this Division has firmly held to the principle that a licensee is responsible for conditions both in and outside the licensed premises which are caused by its patrons. See, most recently, Kaplan and Buzak

v. Englewood, Bulletin 1745, Item 1; affirmed id. nom. App. Div. 1968, not officially reported, recorded in Bulletin 1790, Item 1; certif. den. 51 N.J. 464.

It is also manifest from the testimony that Noto was not really interested in the operation of these premises because his time and attention were engaged in a vending machine business. The Board may properly have found that this lack of interest did not justify his continuance as a licensee. It is significant to note that, by its resolution (introduced in evidence), the Board refused to renew nine licenses (including the subject license) for the reason that the public necessity and convenience dictated that they not be renewed. The Board understood the sense of outrage of the residents of Passaic at certain taverns which were considered trouble spots. The members obviously felt that it was their clear obligation, in response to the public will, to rid the City of these facilities. With a community already overburdened with liquor licensees, the Board properly determined that only those facilities which were operated in an orderly manner and which did not attract undesirable elements, create disturbances or promote the objectionable conditions reflected in the record, should be permitted to exercise the licensed privilege.

By its action in denying renewal, the Board significantly and unequivocally proclaimed that the bell had tolled on this type of operation in this municipality; and that the community would no longer tolerate trouble spots such as appellant's. Nordco, Inc. v. State, supra; Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 36 N.J. Super. 512; aff'd 20 N.J. 373.

In the area of licensing, as distinguished from disciplinary proceedings, the determinative consideration is the public interest in the creation or continuance of the licensed operation, not the fault or merit of the licensee. In issuing or renewing licenses, the responsibility of a local issuing authority is "high", its discretion "wide" and its guide "the public interest." Lybliner v. Paterson, 33 N.J. 428, 449 (1960).

There is no suggestion in this case of any improper motivation on the part of the Board in its action; it must be assumed that it acted in good faith and in the best interests of the community. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501; Frey v. Hoboken, Bulletin 1768, Item 1.

The Director's function on appeal is not to substitute his personal opinion for that of the issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal view. Lekas & Paroby v. Newark, Bulletin 1802, Item 2. Or, to put it in another way: where reasonable men, acting reasonably, determine that the license should not be renewed, the Director should affirm such determination in the absence of a finding that "the act of the board was clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502, 511.

After carefully considering the totality of the evidence presented herein, the exhibits and the written memoranda of counsel submitted in summation, I reach the irresistible conclusion that the Board acted circumspectly, reasonably and in the best interests of the community in refusing to renew appellant's license for the current licensing year. It is, therefore,

recommended that the Board's action be affirmed and that the appeal herein be dismissed.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the written memoranda of counsel submitted in summation, 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 9th day of December, 1968,

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

ORDERED that my order entered on June 27, 1968, extending the term of appellant's license pending the determination of the appeal herein, be and the same is hereby vacated.

JOSEPH M. KEEGAN
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS BETS) - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against)

MARGARET D. MARGIOTTA)
t/a Park Cafe)
6013 Park Avenue)
West New York, New Jersey)

CONCLUSIONS
and
ORDER

Holder of Plenary Retail Consumption License C-60 issued by the Board of Commissioners of the Town of West New York)

-----)
Miller, Hochman, Meyerson & Miller, Esqs., by Leonard Meyerson, Esq., Attorneys for Licensee
Louis F. Treole, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"1. On February 20, March 13, April 2 and April 4, 1968 you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets in a lottery, commonly known as the 'numbers game' on all of said dates, and on horse races on said date of February 20, 1968 and on said date of April 4, 1968, you also possessed, had custody of and allowed, permitted and suffered in and upon your licensed

premises, slips, tickets, records, documentary memorandum and other writings pertaining in the aforementioned gambling activity; in violation of Rule 7 of State Regulation No. 20.

"2. On February 20, March 13, April 2 and 4, 1968, you allowed, permitted and suffered tickets and participation rights in a lottery commonly known as the 'numbers game' to be sold and offered for sale in and upon your licensed premises, and on said date of April 4, 1968, you also possessed, had custody of and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

The Division offered the testimony of two state troopers in substantiation of the charges.

Trooper Raymond Feldherr, employed as an investigator by the New Jersey State Police, assigned to the Criminal Investigation Section, and who possessed ample experience in conducting gambling investigations including horse race and numbers betting, gave the following account: He entered the licensed premises on February 20 at approximately 1:30 p.m. and seated himself "at the bar in the approximate center of the bar." James Margiotta (herein called Jimmy), husband of the licensee, was tending bar. The barroom contained a bar approximately thirty feet long, and along the opposite wall were placed three or four tables. An opening in the rear wall led to a "restaurant-type room with tables also in the back." Upon being requested to state his observations, the trooper replied, "Well, the two white males that I observed toward the rear of the bar, one I referred to as 'Jack,' was handing a slip of paper to the man next to him on his right, and I referred to this man in subsequent conversations as 'Frank', by the name of 'Frank.' He also handed Frank several dollar bills, and as he did this, I overheard his conversation which was, and I quote, 'There are some good horses on there,' and he pointed to the slip. 'The one at Hialeah is an 8 to 1 shot, and I'll be all right if he runs in.' The man known as Frank accepted the slip and the money and placed them both in his back pocket." The males conferred in a normal tone of voice, Margiotta was behind the bar at the time of this occurrence, the trooper could not state his exact position.

Approximately five minutes later an older male, seated at one of the tables in the barroom, called Frank (later identified as Frank Pisona) over to where he was seated. The officer described the next occurrence thusly:

"The older man seated at the table said to Frank, and I quote, '597 for a half.' He then said some further conversation which I wasn't able to hear clearly but I was able to hear some numbers involved in the conversation. There were numbers stated. Frank then sat down at the table and took a piece of paper out of his pocket and wrote something on it. Then, the older man handed Frank a dollar bill and Frank gave him some change in coin."

At that time the bartender was stationed behind the bar. The officer departed from the tavern approximately 2:05 p.m.

Feldherr revisited the licensed premises on February 29, 1968 (a date not included in the charges) at approximately 12:30

p.m. and seated himself at the bar. Margiotta was tending bar. A male approached Frank, who was seated at the front end of the bar, and in a loud tone of voice said, "Hey, Frank, I got a horse that's hot today, but I'm broke. Will you take a bet and trust me for the two bucks?" Frank responded, "I'm broke too."

Continuing, Feldherr testified, "A few minutes after that a white male entered having a mustache and walked over to Frank and whispered something to him. Frank then turned to the man and took a piece of paper out of his jacket pocket and he wrote something on it. The man handed Frank some dollar bills and Frank put the money and the slip back into his pocket." He departed from the tavern at approximately 1:00 p.m.

The trooper re-entered the tavern on March 13 at approximately 1:15 p.m. and sat at the bar. Jimmy was tending bar. Upon being asked what transpired, Feldherr responded, "an elderly man who was seated toward the front of the bar on the customer's side left his seat and walked down toward the rear of the bar to where Frank was seated, and I heard him say the number '765,' and I saw him hand Frank some coins." Frank accepted the money, placed it in his pocket "and nodded his head to the man who then returned to where he had been seated." Jimmy was behind the bar at that time of this occurrence.

On March 25, 1968 (a date not included in the charges) Feldherr entered the tavern at 1:50 p.m. and positioned himself "in the approximate center area of the bar." Again, Jimmy was tending bar. The trooper's main observation on that day was as follows:

"While I was there the telephone rang on three occasions, and each time the bartender, Jimmy, answered it and each time he called Frank to the phone. The calls were for Frank. On the second call while Frank was in the phone booth talking on the phone, I walked past the phone booth en route to the men's room, and I observed at that time Frank was writing on a paper, on a piece of paper, and Frank was referring to the Armstrong's Daily News Review which is commonly known as a 'scratch sheet.'"

Feldherr next visited the tavern on April 2 at approximately 1:05 p.m. and sat at the bar. Jimmy was tending bar. The trooper's testimony pertinent to the charges is as follows:

"Q What did you observe, if anything?

A On this occasion I observed Frank who was seated near the front of the bar accepting a numbers bet from a customer seated next to him to his left.

Q Did you hear the conversation between Frank and the other person?

A Not clearly enough to quote it, but I could hear clearly enough to make the determination that a numbers bet was being made. In any event I was able to hear numbers and see the passing of money."

It was the trooper's opinion that "the person known as 'Frank' was accepting horse and number bets on the premises."

Feldherr returned to the licensed premises on April 4 at approximately 12:50 p.m. and sat at the bar. On this day Frank was tending bar and Jimmy was seated on the patron's side of the bar. Shortly thereafter, Jimmy went into the rear area and out of sight. At 12:55 p.m., by prearrangement, Investigator George H. Friery of the New Jersey State Police (accompanied by two other members of the New Jersey State Police) entered the licensed premises with a warrant in his possession authorizing him to search the licensed premises and the person of Frank. Feldherr proceeded to the rear and passed through two openings into "an office type room", on one side of which "appeared to be a kitchen area, there was a stove and a kitchen table. I noticed Jimmy, the bartender, the man who had been tending bar up to that date, seated at the kitchen table." On the table he "observed an Armstrong's Scratch Sheet and several slips of paper which I immediately was able to determine contained horse bets." Feldherr identified himself as a state trooper and pointed out the slips to Trooper Friery. Friery confiscated the slips.

On cross examination, the witness testified that in view of the fact that on February 20, at the time Jack and Frank engaged in conversation concerning horse race betting while seated toward the rear of the bar and he was not aware of Jimmy's position behind the bar, he could not say that Jimmy was able to hear the conversations. On February 20 at the time he heard a male seated at a table call to Frank and play the number 597, he (the trooper) was positioned at the bar approximately fifteen feet distant from the table. At that time Jimmy was behind the bar. He did not know what Jimmy was doing or where he was standing at that time. He did not observe Jimmy accept any bets or give bets to anyone.

At the time that an unknown male placed a bet on 765 on March 13, he did not know exactly where Jimmy was positioned behind the bar.

The conversation between Frank and the unknown male concerning numbers betting on April 2 was in whispered tones, unlike the conversations on the other days. The witness reiterated that on April 4 Frank was tending bar and Jimmy was seated on the customer's side of the bar.

Trooper George H. Friery (who had experience in conducting gambling investigations) testified that he entered the licensed premises on April 4 at 12:55 p.m. for the purpose of executing a search warrant directed against the licensed premises and a person named therein as "Frank." Feldherr pointed out Frank (who was tending bar) as the person named in the search warrant. On the person of Frank the officer found and "confiscated some slips of paper with writing on them depicting numbers and horse bets." From the person of Jimmy he took a paper containing horse race bets. In the kitchen area the officer found papers containing horse race and numbers bets.

In defense of the charges, the licensee, Margaret D. Margiotta, denied that she ever allowed, permitted or suffered gambling upon the licensed premises or that she ever observed gambling activity in any form taking place in the licensed premises. Neither would she nor her husband James Margiotta (Jimmy) allow gambling upon the licensed premises. On many occasions Jimmy told Frank not to come in the licensed premises. She tends bar from 6:00 p.m. to 9:00 p.m. She never saw any gambling

activity take place upon the licensed premises; however, if she had, she would have ejected that person.

On cross examination, the licensee testified that her husband Jimmy, Jimmy's sister Josephine Stieger and a male identified as Fred Schwartz tended bar on various and recurring occasions. During the period from February to April 1968, she would come to the barroom from her apartment over the bar "maybe about one." She did not recall ever seeing Trooper Feldherr in the barroom. She recalled seeing Trooper Friery in the barroom on the day of the raid, i.e., April 4. She was acquainted with Frank (Frank Pisona) for "many years." She was a friend of Frank's wife for many years. She never requested Frank to leave the tavern; however, she remembered "my husband throwing him out." This occurred "about a month or two" prior to the raid by the state troopers. Frank was ejected from the premises many times by her husband; however, he kept returning. She never stopped Frank "from coming in."

Concerning Frank's employment, the licensee testified that "he was always selling things, shirts, ties, underwear." She had heard that Frank accepted bets.

Concerning her husband's activities she testified as follows:

"Q You mean he [Jimmy] bet, right? You know that he bet on horses, right?

A Yes. I guess I did.

Q And how long has he been playing the horses?

A Well, we are married forty-three years.

Q Some forty-three years?

A Yes.

Q And did you ever know him to accept a bet from anyone else?

A No. That's why I am working today because he is strictly a player.

Q Did you ever see your husband place a bet with Frank?

A No. They didn't get along."

During the course of the hearing, the licensee's attorney moved that the Division produce the original notes prepared by Feldherr during the course of the investigation which resulted in the charges herein. Subsequent to reserving decision thereon, I ruled that Feldherr forward his original notes or a photocopy thereof to the Division and that the attorney for the licensee be afforded an opportunity to inspect and copy the notes. It has come to my attention that the licensee's attorney availed himself of the opportunity thus afforded but did not request that Feldherr be recalled for further cross examination at a continued hearing.

Additionally, the attorney for the licensee argued against

the admission into evidence of certain slips of paper containing horse race bets which were found on a table in the kitchen towards the rear of the premises. I reserved decision thereon until I could examine a photocopy or true copy of the license application. Having had the opportunity to examine such copy, I recommend that the papers found on the kitchen table be received in evidence for the reason that the kitchen is a part of the licensed premises.

In adjudicating this matter, I am guided by the long 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. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Div. of Alcoholic Beverage Control (App. Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1945); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I closely observed the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony. It is my view that Trooper Feldherr's testimony depicting the horse race and numbers betting was persuasive and credible. Considering the totality of the testimony, it can be inferred that Frank was a horse and numbers bookmaker. The undisputed testimony to the effect that the licensee's husband James Margiotta (who was employed as a bartender by the licensee) was an inveterate horse player would reasonably give rise to an inference that Margiotta would countenance the proscribed gambling activities in the licensed premises. My view is buttressed by the finding of the numerous items (described as horse or numbers bets) not only in the kitchen area of the licensed premises but also on the person of James Margiotta and Frank Pisona on April 4. Furthermore, it is noteworthy that Margiotta, although present at the hearing, failed to take the witness stand. It may be inferred that Margiotta could not refute the testimony offered by the troopers in behalf of the Division.

The licensee is, of course, fully responsible for the activities of her employee during his employment on the licensed premises. Kravis v. Hock, 137 N.J.L. 252; In re Schneider, 12 N.J. Super. 449; Rule 33 of State Regulation No. 20. The activities and the knowledge of the bartender become the knowledge and responsibility of the licensee.

After carefully considering all of the evidence adduced herein and the legal principles applicable thereto, I conclude that the Division has proved its case by clear and convincing testimony and by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the said charges.

Licensee has no prior adjudicated record of suspension of license. I further recommend that the license be suspended for sixty days. Re American House, Inc., Bulletin 1813, Item 4.

Conclusions and Order

Written exceptions to the Hearer's report and argument thereto were filed by the licensee's attorney, pursuant to Rule 6 of State Regulation No. 16.

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

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

Accordingly, it is, on this 25th day of November, 1968,

ORDERED that Plenary Retail Consumption License C-60, issued by the Board of Commissioners of the Town of West New York to Margaret D. Margiotta, t/a Park Cafe, for premises 6013 Park Avenue, West New York, be and the same is hereby suspended for sixty (60) days commencing at 3:00 a.m. Monday, December 2, 1968,* and terminating at 3:00 a.m. Friday, January 31, 1969.

JOSEPH M. KEEGAN
DIRECTOR

*By order dated December 3, 1968, the suspension was lifted effective 12 o'clock noon, Wednesday, December 3, 1968, and the balance thereof was reimposed to commence at 12 o'clock noon, Monday, January 6, 1969, and to terminate at 3:00 a.m. Thursday, March 6, 1969.

3. STATE LICENSES - APPLICATION FOR STATE BEVERAGE DISTRIBUTOR'S LICENSE DENIED.

In the Matter of Objections)
to the Issuance of a State)
Beverage Distributor's License)
to)

Mystic Bottling Co., Inc.)
72-76 Lehigh Avenue)
Paterson, New Jersey)

CONCLUSIONS

-----)
Applicant, by Jean Stephenson, Treasurer, Pro se
Beer Distributors' Association of New Jersey, by Richard H.
Salzman, President, and Aaron Wiss, Executive Director,
an Objector, Pro se
Robert H. Chester, Esq., Attorney for North Jersey Package Stores
Association, an Objector.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Written objections to an application for a State Beverage Distributor's license for the license year 1968-69 having been filed by two objectors, a hearing was held thereon pursuant to Rule 12 of State Regulation No. 1.

The objections set forth at this hearing are grounded on the contentions that (a) there is no need or necessity for the issuance of the said license and (b) the application was not made in good faith since the applicant does not intend to operate under the said license.

Mrs. Jean Stephenson, treasurer of the corporate applicant, gave the following account: She was under the obvious misapprehension that this application was for renewal of the previous (1966-67) license, and the application was filed on the renewal form. This applicant has held an SBD license since 1961 and operated under that license in connection with its primary business as a soda distributor. It failed to renew its license on July 1, 1967 because it no longer desired to continue in business and desired to sell the same. It has now sold its business to the Tremont Bottling Company, and the applicant is no longer operating. It was under the impression that it could renew the license which terminated in June 1967 and then "sell" the same to Tremont. The witness admitted that the only reason for applying for renewal was to sell the same to Tremont.

Richard H. Salzman, president of Beer Distributors' Association of New Jersey (an objector here), testified that his Association objects to the granting of this license because there is an abundance of SBD licenses operating in the State of New Jersey, more than adequate to serve the needs of the State. He noted that while SBD licensees have the privilege of operating throughout the State, there is a great concentration of these licenses servicing Passaic County where this applicant has been operating in prior years; further, that "because of the changing needs of the consumer and changing conditions in the industry", the SBD licensee has had difficulty in meeting the economic challenges. Consequently, there have been less SBD licenses in this State

during the past few years. He felt that there has been less demand for home delivery today than before and, therefore, there is an adequate number of SBD licenses to meet the needs in the State.

Aaron Wiss, executive director of Beer Distributors' Association of New Jersey, further explained and articulated the reasons for objecting to the grant of this application. He noted, firstly, that this was not a renewal but a new application. Secondly, no new SBD license has been issued by this Division in the past fifteen years. Thirdly, not only is Passaic County adequately serviced by such licenses, but the territory is "inundated by licensees from other areas as well." Finally, he maintained that this applicant has no intention of operating but is merely endeavoring to "traffic in a license by acquiring a new one and selling it to a non-licensee." From his long experience in association with SBD licensees, it was his opinion that there is no present public need or necessity for the issuance of said license, and that the same should be denied.

I have carefully evaluated and assessed the testimony offered herein and conclude that the objections raised to the issuance of this application are meritorious.

The applicant is no longer in business, having sold its business to the Tremont Bottling Company. The applicant does not intend to operate, but merely seeks to have this license issued to it so that it may in turn sell the same to Tremont. It was under a misapprehension that it had the right to renew its license (which had expired in June 1967). The license having expired more than a year ago, the applicant retains no vested or property rights therein and stands in the position of a new applicant.

Inadvertently, it filed a renewal form of application instead of an application for a new license. Obviously, it retained no property right in the said license and had no salable interest therein. To grant its application under these circumstances would do violence to both the letter and spirit of the Alcoholic Beverage Law. The forthright approach would have been for the Tremont Bottling Company to make application for a new SBD license. Therefore, I find an absence of good faith on the part of this applicant in filing the said application.

Furthermore, I am persuaded and find that there is no present need or necessity for the issuance of such license. The testimony convincingly shows that, during the past few years, there has been a decreased demand for home delivery of beer and that in fact a number of SBD licensees have been unable to meet the economic challenge for survival. This Division has received applications for at least eight or nine less SBD licenses during the current year, reflecting that trend. Further, there seems to be an over-abundance of such licensees operating in the Passaic and Bergen counties area.

In considering the question of public need and necessity, the court, in Lakewood v. Brandt, 38 N.J. Super. 462, stated:

"...authority issuing a liquor license must take into consideration more than the matter of public convenience. ... For one thing--as may be said to be suggested by the concept of public necessity--consideration should be given to the question whether there is any deficiency or lack in present facilities. Cf. In re Washington Ave. in Borough of Chatham, 5 N.J. Misc. 858, 860 (Cir. Ct. 1927).

And of course the paramount consideration is the public interest. Cf. In re Greenville Bus Co., 17 N.J. 131, 143 (1954)."

Cf. Re Vincent Buonocore & Sons, Inc., Bulletin 1492, Item 2.

The Director has the discretionary authority to issue or deny such licenses based upon the public need and necessity and the good faith of the applicant.

Since I have determined that there is an absence of good faith in view of the admitted intention of the applicant not to exercise the privileges under this license but, rather, to traffic in the same, and that there is no need or necessity for the issuance of a new SBD license at this time, it is accordingly recommended that the application of Mystic Bottling Co., Inc., for an SBD license be denied. See Re Braunstein, Bulletin 656, Item 2; Re Hoffman, Bulletin 715, Item 9.

Conclusions

No exceptions to the Hearer's report were filed in the above matter.

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

I shall therefore deny the application.

JOSEPH M. KEEGAN
DIRECTOR

Dated: November 20, 1968

4. DISCIPLINARY PROCEEDINGS - HOSTESS ACTIVITY - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 40 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

NICHOLAS TALVACCHIA)
t/a Tally's Bar)
112 S. Georgia Avenue)
Atlantic City, New Jersey)

CONCLUSIONS
and
ORDER

Holder of Plenary Retail Consumption License C-126 for the year 1967-68 and C-45 for the year 1968-69 issued by the Board of Commissioners of the City of Atlantic City)

James F. McGovern, Jr., Esq., Attorney for Licensee
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on April 22, 23 and 24, 1968, he permitted female entertainers to drink at the expense of male patrons, in violation of Rule 22 of State Regulation No. 20.

Licensee has a previous record of suspension of license then held for premises 147 S. Texas Avenue, Atlantic City, by the municipal issuing authority for ten days effective May 9, 1949, for sale to minors, and by the Director for the instant premises for one hundred twenty days effective November 2, 1964, for permitting solicitation for prostitution, indecent entertainment and hostess activity on the licensed premises. Re Talvacchia, Bulletin 1594, Item 1; Bulletin 1600, Item 1.

The prior record of suspension of license for dissimilar violation in 1949 occurring more than five years ago disregarded, but considering the record of suspension for similar violation in 1964 within the past five years, the license will be suspended for forty days, with remission of five days for the plea entered, leaving a net suspension of thirty-five days. Re Markowitz, Bulletin 1538, Item 1.

Accordingly, it is, on this 21st day of November, 1968,

ORDERED that Plenary Retail Consumption License C-45, issued by the Board of Commissioners of the City of Atlantic City to Nicholas Talvacchia, t/a Tally's Bar, for premises 112 S. Georgia Avenue, Atlantic City, be and the same is hereby suspended for thirty-five (35) days, commencing at 7:00 a.m. Thursday, November 28, 1968, and terminating at 7:00 a.m. Thursday, January 2, 1969.

JOSEPH M. KEEGAN
DIRECTOR

5. STATE LICENSES - NEW APPLICATIONS FILED.

Rex Beer & Soda, Inc., 401-3 Montgomery St., Jersey City, N. J.
Application filed December 24, 1968 for place-to-place transfer of State Beverage Distributor's License SBD-27 from 591-3 Palisade Avenue, Jersey City, New Jersey.

Park, Benziger & Co., Inc., 99 Wall St. New York, New York
Application filed January 2, 1969 for Plenary Wholesale License.


Joseph M. Keegan
Director