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

BULLETIN 2093

March 22, 1973

TABLE OF CONTENTS

ITEM

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

BULLETIN 2093 March 22, 1973

1. APPELLATE DECISIONS - PARK WEST, INC. v. NEWARK.

Park West, Inc., Appellant,	)	
v.	)	On Appeal
Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	CONCLUSIONS and ORDER

Sills, Beck, Cummis, Radin & Tischman, Esqs., by Thomas J. Demski, 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

On July 31, 1972 the Municipal Board of Alcoholic Beverage Control of the City of Newark (Board) denied appellant's application for a person-to-person and place-to-place transfer from Frank A. Shattuck Company, t/a Schrafft's, to appellant, and from premises 679-81 Broad Street to 601 Broad Street, Newark.

The Board, after a full hearing on the application adopted a resolution setting forth the following reasons for its action:

> 1. That the application "is in complete violation of City Ordinance #4:2-17... [because] the distance from 679-81 Broad Street to 601 Broad Street, is 810 feet and...there are 13 licensed premises within a distance of 1,000 feet"of the proposed location at 601 Broad Street.
>
> 2. That after considering the objections raised to the said application and reasons set forth in the police recommendations and after a full consideration of the transcript of the hearing determined that the said transfer would not "be in the public good and welfare of the community."

Appellant alleges that the action of the Board was erroneous for reasons which may be summarized as follows:

1. The subject ordinance is "discriminatory as applied to appellant." Since there are thirteen such licenses in operation in the area, these licenses "necessarily would have had to have been issued within the proscribed 1000 foot area in order for there to be so many licensees in the area.

2. "There is no restaurant-licensee within a distance of 1000 feet of appellant which services a similar clientele".

3. The proposed transfer would be beneficial to the City of Newark because the appellant intends to operate a moderate-priced restaurant, serving a dinner trade and will be open evenings.

In its answer, the Board denies the substantive allegations of the said petition. The hearing on appeal was heard de novo in accordance with Rule 6 of State Regulation No. 15 and was based upon the transcript of the hearing below, supplemented by additional testimony on behalf of the appellant adduced at the hearing herein, in accordance with Rule 8 of State Regulation No. 15.

I

Appellant alleges, both in its petition of appeal and in argument at the hearing that the ordinance is discriminatory as applied to the appellant and that, in any event, the local Board "can use a certain amount of discretion in its interpretation of the ordinance in permitting the said transfer."

It has been well established that the validity of an ordinance is not justiciable in an administrative proceeding, but can only be challenged by judicial ruling by a plenary action in a civil court of competent jurisdiction. Klein and Tucker v. Fair Lawn, Bulletin 1175, Item 3; Matthews et als. v. Orange et al., Bulletin 936, Item 9; Seip v. Frenchtown, 79 N.J. Super. 521 (App. Div. 1963); Blanck v. Magnolia, 73 N.J. Super. 306, 311-312 (App. Div. 1962).

The subject ordinance Section 4:2-17 in its pertinent part reads as follows:

"(a) No plenary retail consumption license, except renewals for the same premises and transfer of licenses from person to person within the same premises, shall be granted or transfer made to other premises within a distance of one thousand feet from any other premises then covered by any other plenary retail consumption license or any plenary retail distribution license; provided, however, that the local license issuing authority may, in its discretion, grant a transfer of an existing license to the same licensee only, to other premises within 600 feet of the premises from which the transfer is made, notwithstanding that the premises to which the license is so transferred is within 1000 feet of premises for which there is an existing plenary retail consumption license or plenary retail distribution license; provided, however, that such transfer shall be made in good faith and shall inure solely for the benefit of the same licensee.

> The foregoing provisions of paragraph '(a)' shall not apply to the grant or transfer of a plenary retail consumption license for premises operated as a bona fide hotel or motel containing at least 100 guest sleeping rooms, notwithstanding that such premises operated as bona fide hotel or motel are within 1000 feet from any other premises then covered by any other plenary retail consumption license or any plenary retail distribution license. Nothing contained in this paragraph shall prevent the granting or transferring of a plenary retail license within a distance of 1000 feet from a bona fide licensed hotel or motel."

The language of the ordinance is plain, simple, clear and unambiguous and allows for no discretion except for the exceptions as set forth therein, none of which concededly applies to the appellant's application. Cf. Essex Co. Retail, etc., v. Newark, etc. Bev. Control, 77 N.J. Super. at p.74 (App. Div. 1962); Petrangeli v. Barrett, 33 N.J. Super. 378 (App. Div. 1954). Therefore, since it is admitted that there are thirteen licenses within the proscribed distance limitation as set forth in the ordinance, the Board was without authority to approve the said transfer.

I find the appellant's argument that the action of the Board was discriminatory because there are other licensees within the area which may have been transferred in violation of the ordinance to be specious and without merit. There was no showing that these licenses had been transferred to the area after the adoption of the said ordinance. In any event, it would be totally irrelevant in the instant matter since the Board has no jurisdiction to transfer a license in violation and disregard of the terms of the said ordinance. Petrangeli, supra at p.384; Tube Bar Inc. v. Commuters Bar, Inc., 18 N.J. Super at p.354.

It should be further noted that the Board may grant a transfer of an existing premises to the same licensee only to other premises within 600' of the premises from which the transfer is made if the same is made in good faith and for the benefit of the same licensee. Obviously, the transfer here was not made to the same licensee nor is the proposed transfer site within 600' of the said premises. Nor does the appellant as stated above, come within the other exceptions set forth in the said ordinance. Therefore, the Board acted within its legal responsibility and in accordance with the clear terms of the ordinance in denying the said transfer.

II

Although the critical and dispositive issue has been resolved, I shall, nevertheless, briefly consider appellant's further allegation that the said transfer would be "beneficial to the City of Newark." Appellant asserts that, because of its declining sales and rising costs, it has contemplated leaving Newark. It reasons that such facilities that it contemplated operating at the proposed transfer site "...are needed if the city is to survive as an economic and financial center."

Murray Dinsfriend, the president of the corporate appellant and a principal stockholder, testified that the transfer will "...help us stay in business in Newark; that is what it really amounts to. We have had a decline in business in the past four or five years to the degree that we are almost to the point that we will be forced to leave Newark."

He stated that appellant intends to operate a moderate-priced restaurant, serving a dinner trade.

Several witnesses produced on behalf of the Board objected to the said transfer on the ground that there are already thirteen existing licenses in the said area and that such transfer would be clearly violative of the ordinance. Furthermore, as expressed by C.E. Cameron, the president of the Lauter Piano Company, which owns the building at 591 Broad Street:

> "One of the reasons we object strongly to having liquor sold from the Park West Restaurant is that this is one of the few remaining nice retail shopping blocks in the City of Newark, and I don't mean to criticise the Park West Restaurant, but it is not the type of place which should be selling liquor in a nice retail shopping area. You are going to sell liquor from the Park West Restaurant, you are going to do considerable harm to that block as a shopping area. It is difficult now to induce people to come down into that area and the sale of liquor would make it more difficult."

The Police Department has also recommended the denial of the said application because of the large number of licensees already operating in that area; and for the further reason that such transfer would be clearly in violation of the ordinance.

The burden of establishing that the action of the Board in rejecting the application for transfer was erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15. It has been consistently ruled that no one has a right to the issuance or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (1946); Biscamp v. Teaneck, 5 N.J. Super. 172 (App. Div. 1949). The decision as to whether or not a license should be transferred to a particular locality rests in the first instance within the sound discretion of the issuing authority. Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App. Div. 1954).

A local issuing authority has been held to possess wide discretion in the transfer of a liquor license, subject of course, to review by this Division in the event of abuse thereof. Blanck v. Magnolia, 38 N.J. 484 (1962). The action of a municipal issuing authority may not be reversed by the Director unless he finds the act to have been 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, 511 (E. & A. 1947).

The Alcoholic Beverage Act expressly authorizes the governing board of a municipality to limit, by ordinance, the number of licenses to sell alcoholic beverages at retail in the community. R.S. 33:1-40. Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246 at p.252. It is clear that this ordinance was adopted to further prevent the ganging up of liquor establishments, and was based on considerations of public welfare.

I have carefully considered the entire record herein, and find that the primary reason motivating the action of the appellant in seeking the said transfer was that it was unprofitable for it to operate at its present premises.

However, this does not offer a valid reason for the approval of such application. It is elementary that concern for the licensee's own financial problems will not be elevated above the public interest. Bosco et al v. Jersey City et al., Bulletin 1353, Item 1, aff'd 66 N.J. Super. 165 (App. Div. 1961); Cf Hudson-Bergen County Retail Retail Liquor Stores Association et al. v. Hoboken, supra at p.510.

As the court stated in Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, at p.302-303 (1970):

> "Responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place... is primarily committed to municipal authorities. N.J.S.A. 33:1-19,24... In allocating spheres of operation between the State Division and municipal authorities, the Legislature wisely recognized that ordinarily local officials are thoroughly familiar with the community's characteristics...the nature of a particular area....
>
> "Obviously when the lawmakers delegated to local boards the duty 'to enforce primarily' the provisions of the act it invested them with a high responsibility, a wide discretion and intended their principal guide to be the public interest. Lubliner v. Paterson, 33 N.J. 428, 446 (1960).
>
> "The conclusion is inescapable that if the legislative purpose is to be effectuated, the Director and the courts must place much reliance upon local action (and) its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion."

To the same effect, see Fanwood v. Rocco, 33 N.J. 404 at p.414.

I find that the Board has acted circumspectly, fully in accord both with the statutory imperative and in the public interest in denying the said application.

Thus, appellant has failed to sustain the burden of establishing that the action of the Board was erroneous or an abuse of its discretion. Rule 6 of State Regulation No. 15.

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

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 transcripts of testimony, the exhibits, the 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 6th day of February 1973,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

2. APPELLATE DECISIONS - EUELL v. JERSEY CITY.

Richard G. Euell & Virginia G. Euell, Appellants, v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent.	On Appeal CONCLUSIONS and ORDER

John J. Lipari, Esq., Attorney for Appellants
Samuel C. Scott, Esq., by Bernard Abrams, 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 respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which by resolution of September 26, 1972, suspended appellants' plenary retail consumption license for premises 182 Duncan Avenue, Jersey City, for fifteen days upon a finding that appellants permitted the premises to be conducted in such manner as to become a nuisance, i.e., it permitted an act of violence or brawl to take place on the licensed premises, in violation of Rule 5 of State Regulation No. 20.

The petition of appeal of appellants alleges that the premises were not conducted in such manner as to become a nuisance nor was any act of violence permitted. The Board answered that there had been adequate testimony before it in support of the charge and its determination.

The hearing was held de novo in accordance with Rule 6 of State Regulation No. 15, the parties being permitted to introduce testimony and cross-examine witnesses.

The Board relied upon the testimony of Officer Walter Cuozzo of the Jersey City Police Department, who testified in essence that on September 2, 1972, about 10:30 p.m., following citizen inquiry, he had occasion to peer into the window of the licensed premises to observe whether a mother and her baby were inside. Seeing a large woman toss a baby into the air and catch it, he then walked away from the premises while he considered appropriate police action. About fifteen minutes later, having

determined a course of action, he returned to the premises and again peered into the window. At this moment he described what he saw as "... and just as I got to the window a fight broke out in the bar." Moving away from the window, he summoned police reinforcements on his portable radio, then entered the licensed premises and walked to the rear of the establishment. "When I went in the fighting stopped...." In response to a question attempting to establish the time sequence from the call for reinforcements to the arrival at the scene, the witness estimated such time as "ten seconds."

The manager of the licensed premises (Peter J. Poggioli) testified that, shortly before the arrival of the policeman, a patron entered who appeared intoxicated and to whom service was refused. The patron had placed some change on the bar and, upon being refused, walked to a refrigerator and extracted a can of beer, turned to the bar and picked up a dollar bill belonging to another patron. With that, the manager simultaneously recovered the beer-can from that patron and held off the other irate patron who was demanding the return of his dollar. He denied that any blows were struck or that there was any altercation whatever. The policemen entered as did a friend of the inebriated patron who promptly escorted the patron out of the establishment toward home. The manager stated that he explained the incident to the policeman who asked if he wished to make a complaint against the patron. However, although he first agreed to do so, he then realized that the friend would take the patron home and declined to press any charge. No other police arrived nor had he seen any woman or baby present.

Andrew William Metro testified that he was the patron described by the manager and admitted entering the premises, attempting to buy a drink and taking a can of beer as described. He candidly admitted that on that evening he was "fuzzy" and took another patron's money by accident. While denying any violence, he admitted both he and the other patron were restrained by the manager and that he had been escorted home by a friend. He recalled the presence of the policeman but did not recall the presence of any woman with a baby.

Another patron who had been in the licensed premises on the evening in question, Francis Flynn, testified that he is a week-end cab driver who completed work on that Saturday night at 6:00 p.m., came into the tavern and was sitting at the far end of the bar where his view of the entire interior was unobstructed. He recounted the incident of Metro's visit in substantial corroboration of the testimony of both Metro and Poggioli. He recalled seeing the officer enter almost simultaneously with the restraint put upon Metro by the manager. He too saw no woman with a baby, but did see two women sitting at the further end of the bar.

The specific incident testified to by the police officer as he had seen it from the outside through the window appeared to him thusly:

"Q Do you say there was a fight or brawl taking place?
A Yes.
Q Will you describe it, please?
A About six or seven people involved. There was cue sticks being swung, chairs knocked over, somebody went in and knocked down a machine, I believe it is a bowling machine."

Despite the description of this fracas, the entire incident was over in less than ten seconds; there was no further testimony

concerning a turned-over machine or identification of the parties involved other than Metro, the manager and the other patron. No arrests were made; no other police called for reinforcements arrived in the premises, nor was there any other observation by the bystander witness that any pool sticks were used at the alleged incident. The officer recounted the explanation given to him by the manager which in substance was substantially similar to the testimony of all of the other witnesses.

While there is no set formula for determining the quantum of evidence required, each case being governed by its own circumstances, the verdict must be supported by substantial evidence. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (1956). In determining the factual complex herein, the guiding rule 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.

In order for appellant to prevail in the instant matter it must appear that the evidence did not preponderate in support of the determination of the Board. Feldman v. Irvington, Bulletin 1969, Item 2.

Within the context of our regulation, a brawl is a clamorous or tumultuous quarrel in a public place to the disturbance of the public peace. A disturbance is an interruption of a state of peace and quiet; a public commotion synonymous with brawl. Snug Tavern, Inc. v. Orange, Bulletin 1425, Item 1. "Violence" is defined as "Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury." Black's Law Dictionary, 4th Ed. 1968.

Applying the above definitions to the evidence presented at this de novo hearing, I find that the conduct described does not come within the prohibited activity. The testimony of the witness for the Board indicates no sustained conduct which would justify the determination of the Board.

I therefore find that the evidence presented does not preponderate in support of a determination that appellant allowed, permitted or suffered a brawl, act of violence or disturbance in or upon the licensed premises. Thus appellant has sustained the burden of establishing that the action of the Board was erroneous and should be reversed. Rule 6 of State Regulation No. 15. It is accordingly recommended that an order be entered reversing the action of respondent Board and dismissing the charge herein.

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 exhibit, 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 7th day of February 1973,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby reversed and that the charge herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

3. APPELLATE DECISIONS - BRAVO v. PATERSON.

Nilo Bravo, t/a Nilo's Caribbean Tavern,

Appellant,

v.

Board of Alcoholic Beverage Control for the City of Paterson,

Respondent.

CONCLUSIONS and ORDER

Joseph M. Keegan, Esq., Attorney for Appellant
Joseph A. La Cava, Esq., by William A. Feldman, 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 the Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which by resolution dated September 28, 1972, suspended the plenary retail consumption license of appellant for fifteen days following a finding that appellant did on May 12, 1972 sell alcoholic beverages to two minors, both age 17, in violation of Rule 1 of State Regulation No. 20.

The petition of appeal filed by appellant alleges that the said action was erroneous because it was contrary to the evidence presented before it. The Board in its answer denies this contention.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15. The appeal was based on the transcript of testimony taken at the hearing before the Board and was supplemented by additional testimony in behalf of appellant. Rule 8 of State Regulation No. 15.

From the transcript of testimony at the hearing before the Board, as well as the additional testimony of appellant at this hearing de novo, it appears that the factual situation is not substantially in dispute. An officer of the Paterson Police Department (Angelo De Chellis) testified that on May 12, 1972, about 11:15 p.m., he observed two men departing from the licensed premises carrying a bag which contained bottles of beer. Both "men" were seventeen years of age and, when the officer ascertained their true age, he accompanied them back into the tavern and notified the appellant of the alleged violation. There were a number of patrons in the premises and, after indicating to appellant the apparent violation, appellant denied ever making a sale to the minors.

One of the minors (Joseph ---) testified that he and his friend entered the tavern and spoke to a patron to whom they made known their desire to obtain beer. The patron, who remained unidentified, made the purchase for them, received payment and gave them the bag containing the beer. The minor denied having any conversation or making any contact with appellant. The other minor, who accompanied the first, testified in substantial corroboration of the sale made to them by a patron.

Appellant Nilo Bravo testified before the Board and at the hearing in this Division that on the evening of May 12, 1972, his tavern was crowded but he made no sale to the minors. He had seen the minors come in, but his attention was distracted and he does not recall seeing them leave. He did recall the visit by the police officer. At the hearing at this Division he affirmed having seen the two minors walking to what he thought was a visit to the cigarette machine. He alone sells beverages for off-premises consumption and recalled distinctly that he made no sale to the minors.

It is noteworthy that at the hearing before the Board one of the Commissioners, speaking for the Board, said "There's a reasonable doubt in the mind of Commissioners Cheevers and myself concerning some of this testimony, primarily the fact that one of the individuals is not present, who probably could have shed some light on this and that is the person who bought the beer for the young men...."

There is little question that, although the minors were able to make a purchase of beer through the assistance of a patron, there was no sale made by the licensee-appellant. There was no proof that such sale was made either with the knowledge or acquiescence of appellant. The testimony was barren of the means by which a sale was made and, other than the testimony of the officer who witnessed the minors departing from the premises with a bag of beer, there was no testimony indicating that any sale was made except through the assisting patron.

Rule 1 of State Regulation No. 20 provides in part:

> "No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the age of twenty-one (21) years...."

That there was no sale is undisputed. The only issue revolves about the wording "allow, permit or suffer the sale ... directly or indirectly...." In order to allow, permit or suffer such sale, indirectly or otherwise, the licensee must have knowledge or scienter of such act. There must be some affirmative testimony to show that the licensee should have known by the effective use of his facilities that the alcoholic beverages were in fact purchased for the minors.

In this instant case there was no proof of an effective act done within the knowledge of appellant or done in such manner as could have been prevented. The only proof that a sale was made was by the testimony of the minors, and such testimony failed completely to inculpate appellant.

Chairman Cheevers of the local Board indicated at the conclusion of the hearing "We were trying to be lenient with this penalty, so much of this going on in our city in the past. We are under tremendous pressure from the public about these children going into these taverns and buying beer so easily. There is no doubt that these boys were served in your tavern, and the fact that we only gave you 15 days is based on your previous record...."

The attempt to eliminate the dangers inherent in the ability of minors to procure drinks is very laudable. However, the mere suspicion is no substitute for proof. While the duty of appellant to keep his premises under observation at all times is a continuous one, he cannot be charged with a responsibility beyond the physical capacity to do so. Were the merest scintilla of evidence present indicating that appellant either

knew or should have known of the surreptitious sale, the conclusions reached by the Board would be subject to affirmance. However, the proofs fall short of such requirement.

Accordingly, I find that the sale to the minors by appellant or his agents was not established nor was the presumed purchase by the minors made with the knowledge of appellant or his agents. I find that appellant has sustained the burden required of Rule 6 of State Regulation No. 15 of establishing that the action of respondent Board was erroneous. I therefore recommend that an order be entered reversing the action of the Board and dismissing the charge.

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 transcripts of the testimony, the exhibit and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 7th day of February 1973,

ORDERED that the action of respondent Board of Alcoholic Beverage Control for the City of Paterson be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed.

Robert E. Bower
Director

4. DISCIPLINARY PROCEEDINGS - HOURS REGULATION - HINDERING - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against 117 Remsen Avenue Corporation t/a Remsen Cafe 117 Remsen Avenue New Brunswick, N.J., Holder of Plenary Retail Consumption License C-11, issued by the City Council of the City of New Brunswick.	CONCLUSIONS and ORDER

Licensee, by Frank Wilhelm, President of Licensee Corporation
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to charges alleging that (1) on Saturday, May 20, 1972 at about 10:25 p.m. it sold alcoholic beverages for off-premises consumption, in violation of Rule 1 of State Regulation No. 38; and (2) on the said date it hindered an investigation of the licensed premises in violation of N.J.S.A. 33:1-35.

Although the licensee was not represented by counsel, its corporate president (a major stockholder) was permitted upon request, to conduct its defense to the charges.

ABC agent D testified that he and ABC agents P and V participated in an investigation of the licensed premises on May 20, 1972 arriving there about 10:00 p.m. He and agent P remained outside the premises while agent V entered. About 10:25 p.m., which time was confirmed by radio time signals, agent V emerged from the licensed premises, displayed a bottle containing alcoholic beverages and, upon pre-arranged signal, all three agents entered the premises. A bartender, later identified as Curtis Glover, was apprised of the violative sale and he responded by stating that agent V had purchased the bottle at 9:30 p.m. but did not emerge until the later time. Hence the bartender contended that no after-hours sale had been consummated.

There were about fifty male and female patrons in the premises and the bartender asserted to the agents: "Why don't you go bother white people and leave us colored people alone? If this was a white place you wouldn't be here doing this." Thereupon, the patrons, all black, became belligerent and despite the agents' request to the bartender that he restrain his patrons he refused to comply therewith and some of the patrons gathered about the agents, began making threatening statements and one of them pushed the agent.

A number of male patrons approached the agents, who in dire fear, departed the premises from another door. Several of the patrons followed and as they were surrounded on the sidewalk, the president of the licensee corporation arrived in his car, inquired as to the disturbance and was apprised by the agents of the difficulties. The agents, still in fear, left the area.

Agent P testified in general corroboration of the testimony elicited from agent D. The bottle purchased by agent V was placed in evidence and was identified as a pint bottle of Seagram's Whisky. Agent V testified that he had made the purchase from Glover after ten o'clock, and identified the bottle.

Curtis Glover, the bartender, testified that agent V had arrived in the premises about nine o'clock and began shooting pool. He denied any sale to the agent, and, on cross examination, explained that any admission at the time of a sale to agent V was that any sale for off-premises consumption would have to have been made prior to 9:30 p.m.

Since there is a sharp conflict in the testimony, the credibility of the witnesses must be assessed. The agents testified of a pre-arranged plan to visit the premises; their watches were checked against a radio time signal and care was taken that agent V not enter the premises until ten o'clock. The remaining agents awaited on the exterior maintaining a view of the entrance until agent V emerged, the time of which was carefully noted. It is further apparent that the attitude of the bartender was so belligerent that the patrons were incited and encouraged to act in such manner as to put the agents in fear of their own safety.

It was the licensee's duty, through its bartender, to assist in the investigation and to take whatever steps were necessary to control its patronage. "It has been well established that the responsibility lies in licensees for conditions and incidents that exist both inside and outside premises which are caused by its patrons...." Mitchell's Cafe, Inc. v. Lambertville, Bulletin 1928, Item 1.

The testimony of the agents was forthright and convincing; their detailed explanation of the circumstances surrounding the initial inquiry and the difficulties which were imposed on them by the conduct of the bartender and patrons leads to no other conclusion than the situation developed as they said it did. "The test of the sufficiency of evidence in a civil action is probability not possibility." Pabon v. Hackensack, 63 N.J. Super. 476 (App. Div. 1960); Bergen v. Shapiro, 52 N.J. Super. 94 (App. Div. 1958), aff'd 30 N.J. 89 (1959).

The truth of charges in a proceeding before an administrative agency need be established by a preponderance of the believable evidence only, and not beyond a reasonable doubt. Atkinson v. Parsekian, 37 N.J. 143 (1962); Benedetti v. Trenton, 35 N.J. Super. 30 (App. Div. 1955). I find that the charges have been supported by substantial evidence and recommend that the licensee be found guilty of both charges.

The licensee has a prior adjudicated record of suspension for twenty days by the local issuing authority, effective June 1, 1970 for sale to minors.

It is accordingly recommended that the license be suspended for fifteen days on the first charge (Re Alfano, Bulletin 2068, Item 1(R)), and for ten days on the second charge (Re Hour Bar, Bulletin 2044, Item 11), to which should be added five days by reason of the dissimilar offense occurring within the past five years, making a total suspension of thirty days.

Conclusions and Order

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

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

Accordingly, it is, on this 2nd day of February 1973,

ORDERED that Plenary Retail Consumption License C-11, issued by the City Council of the City of New Brunswick to 117 Remsen Avenue, t/a Remsen Cafe for premises 117 Remsen Avenue, New Brunswick, be and the same is hereby suspended for thirty (30) days,*commencing at 2:00 a.m. Thursday, February 15, 1973, and terminating at 2:00 a.m. Friday, March 2, 1973. *

Robert E. Bower
Director

*By order dated February 5, 1973, commencing at 2:00 a.m. Thursday, February 15, 1973 and terminating at 2:00 a.m. on Saturday, March 17, 1973.

5. SEIZURE - FORFEITURE PROCEEDINGS - SPEAKEASY IN RESTAURANT - CLAIM OF VENDING MACHINE OWNER RECOGNIZED - CLAIM FOR RETURN OF PERSONAL PROPERTY, CASH AND ALCOHOLIC BEVERAGES DENIED AND THE SAME FORFEITED.

In the Matter of the Seizure on February 2, 1972 of a quantity of alcoholic beverages, fixtures, furnishings, equipment and personal property, foodstuffs and $58.25 in cash at Pampa Tipico Restaurant and Pizzeria Argentina, 26 Cianci Street in the City of Paterson, County of Passaic, and State of New Jersey.	:	Seizure Case No. 12,670 On Hearing CONCLUSIONS and ORDER

Joseph C. Mugno, Appearing for Claimant, J & R Distributors.
Harry D. Gross, Esq., Appearing for Division.

BY THE DIRECTOR:

This matter comes before me pursuant to the provisions of N.J.S.A. 33:1-66 and State Regulation No. 28 and further pursuant to stipulations to determine whether 23 containers of alcoholic beverages, miscellaneous personal property, furnishings, fixtures, equipment, foodstuffs and $58.25 cash as set forth in inventory attached hereto and marked Schedule "A" seized on February 2, 1972 at the unlicensed premises at 26 Cianci Street, Paterson constitute unlawful property and should be forfeited; and further to determine whether the sum of $700.00 deposited with the Dirctor, under protest, pursuant to a stipulation, entered into by Peter Shpiruk, individually and trading as Pampa Tipico Restaurant, representing the appraised value of personalty, exclusive of the alcoholic beverages, which was returned to him as set forth in the aforesaid Schedule "A" should be forfeited or returned to him; and further, to determine whether the sum of $200.00 deposited with the Director pursuant to said stipulation, under protest, by Joseph C. Mugno, on behalf of J & R Distributors, representing the appraised value of a juke box and pinball machine, which was returned to claimant as set forth in the aforesaid Schedule "A" should be forfeited or returned to it.

The seizure was made by ABC agents because of alleged unlawful sales of alcoholic beverages at a speakeasy conducted at the said premises.

When the matter came on for hearing pursuant to N.J.S.A. 33:1-66, the J & R Distributors, represented by Joseph C. Mugno, a partner, appeared and sought return of the money deposited under the aforesaid stipulation. No one appeared on behalf of Peter Shpiruk to assert his claim for return of the money deposited under the aforesaid stipulation.

Report of ABC agents and the Division file were admitted into evidence with the consent of the parties present; the Division file contained the affidavit of mailing, affidavit of publication, notice of hearing, inventory and an analysis of the alcoholic content of the beverages seized which disclosed alcoholic content above 1½%. There was included a certification by the Director that no license or permit for the sale of alcoholic beverages was ever issued for said premises or to Peter Shpiruk or to any other person at the said premises.

The reports of the ABC agents disclosed the following: On February 2, 1972 Agents S and C entered the restaurant of claimant, sat at a counter, ordered food and wine and paid with "marked" money. While eating, the agents observed that wine was purchased and served to other patrons. Members of the Paterson Police Department aided the agents in making seizure of a quantity of alcoholic beverages and the cash, along with the personal property of the claimant, J & R Distributors, as well as the furnishings and fixtures in the restaurant.

The seized alcoholic beverages are illicit because they were intended for sale without a license in violation of N.J.S.A. 33:1-1(i). Such illicit alcoholic beverages and the personal property with cash seized constitute unlawful property and are subject to forfeiture. N.J.S.A. 33:1-2,66.

Joseph C. Mugno, appearing on behalf of J & R Distributors gave the following account: He and Peter Reda are the owners of a juke box and pinball machine, placed in the restaurant at 26 Cianci Street, Paterson. About two years before the seizure, the owner of the restaurant, Peter Shpiruk called them for the machines and they made two visits to the premises prior to the installation. Thereafter, periodic visits were made bi-weekly about noon of the day and before luncheon activity commenced. They never saw alcoholic beverages served and saw no alcoholic beverages in the premises.

Peter A. Reda, a partner of Mugno, testified that subsequent to the installation he had occasion to visit the premises to repair the machines and on the four or five visits that occasioned he never saw alcoholic beverages served or knew there were alcoholic beverages on the premises.

In furtherance of the claim made by vending equipment operators, the Director has recently promulgated a policy imposing on such claimants the obligation of making personal, periodic and meaningful inspections and they may not rely on the presumed inspection of other persons or agencies, including those of law enforcement. See Seizure Case No. 12,252, Bulletin 1919, Item 5.

The character of the unlicensed premises is that of a restaurant specializing in "pizza" that contains a usual counter where patrons sit to eat. The machines are about eight feet away from the counter and the witnesses on behalf of the vending machine operator never ate or stayed in the premises longer than necessary to empty the machines or make repairs. In the absence of any evidence that the sale of alcoholic beverages could have been seen or should have been seen by the usual observant servicemen, I conclude that claimant J & R Distributors were truly innocent of any knowledge of the illicit sale of alcoholic beverages in the establishment. Seizure Case No. 12,253, Bulletin 1902, Item 3.

Accordingly, it is, on this 16th day of February 1973,

DETERMINED and ORDERED that the claim of Joseph C. Mugno and Peter A. Reda, partners t/a J & R Distributors be and the same is hereby recongnized, and that the cash in the sum of $200.00, deposited by Joseph Mugno on behalf of the said claimant, under the aforementioned stipulation be and the same shall be returned to them; and it is further

DETERMINED and ORDERED that the miscellaneous personal property, fixtures, furnishings, equipment and foodstuffs, and the alcoholic beverages, as set forth in Schedule "A", constitute unlawful property; and the sum of $700.00 deposited by Peter Shpiruk on behalf of the Pampa Tipico Restaurant, under the aforesaid stipulation, and the cash in the sum of $58.25, be and the same are hereby forfeited to be accounted for in accordance with law; and it is further

DETERMINED and ORDERED that the alcoholic beverages be and the same shall be retained for the use of hospitals and State, county and municipal institutions, or destroyed, in whole, or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

Robert E. Bower,
Director

SCHEDULE "A"

23 - containers of alcoholic beverages
Miscellaneous personal property, furnishings, fixtures, equipment and foodstuffs
$58.25 - cash

Robert E. Bower
Director