

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

BULLETIN 1889

December 16, 1969

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2. APPELLATE DECISIONS - CZUBAK v. FRANKLIN AND CLARE'S FOOD MARKET, INC.

Nos. 3276, 3356, 3438 )  
 Walter Czubak, t/a Walter's )  
 Liquor Store, )  
 )  
 Appellant, )  
 v. )  
 Mayor and Council of the Borough )  
 of Franklin, and Clare's Food )  
 Market, Inc., )  
 Respondents. )

On Appeal

SUPPLEMENTAL CONCLUSIONS and ORDER

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 Leonard Adler, Esq., Attorney for Appellant  
 Emanuel A. Honig, Esq., Attorney for Respondent Mayor and Council  
 Shanley & Fisher, Esqs., by Harold H. Fisher, Esq., Attorneys  
 for Respondent Clare's Food Market, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Supplemental Hearer's Report

This hearing was held pursuant to an order of the Director in response to a petition submitted by respondent Clare's Food Market, Inc. (hereinafter Clare's) for the sole purpose of permitting additional evidence to be presented on its behalf in a matter heretofore determined by the Director.

Conclusions and Order dated June 17, 1968 disclose that the Mayor and Council of the Borough of Franklin granted an application for renewal of Clare's plenary retail consumption license for 1967-68 for premises to be constructed on Munsonhurst Road (also known as Route 517). An appeal from the said renewal was filed and, after hearing in the matter, the Director ordered reversal of the action of the respondent issuing authority because Clare's had theretofore disposed of all its right, title and interest in the site sought for the license and thus lost possession of, or its right to possession of, all interest in the premises for which the license was desired. Czubak v. Franklin et al., Bulletin 1808, Item 3. The Hearer's report dated May 17, 1968, hereinbefore submitted in this case and adopted by the Director on June 17, 1968, shall become part of the report herein.

Respondent Clare's original petition for rehearing alleges that the Director erred in concluding that Clare's did not have a right to possession of the site for which the license was sought. Clare's also contends that the action of respondent issuing authority was taken as the result of a letter dated June 7, 1967 to it from Deputy Director Saum. The letter referred to merely outlined the necessary procedure for renewing a license where premises were not constructed during the licensing year and in no manner whatsoever referred to the statutory requirements to be met prior to renewal of said license.

Subsequent to the filing of the petition a supplemental petition for rehearing was filed containing an affidavit of Harold H. Fisher (Clare's attorney), which affidavit reiterated in substance the contention in the original petition that Clare's still had a right to possession of the property to which the transfer of its license had previously been approved. Copies of correspondence

from Consolidated Supermarkets, Inc. are made part of the affidavit. One of the letters, dated July 6, 1966, reads as follows:

"Clare's Food Market, Inc.  
310 Union Avenue  
Rutherford, New Jersey

Gentlemen:

Your deed to property on Munsonhurst Road, Franklin, is this day received. This deed requires us to pay the bond and mortgage made by you unto Jerry and Rita Rozanski which originally was in the sum of \$56,800.00 and which remains unpaid.

You may remain in possession of the lands and premises with full privileges and enjoyment of use or right to build or improve until your name is cancelled from the said bond and mortgage.

Yours truly,  
CONSOLIDATED SUPERMARKETS, INC.  
(sd) Milton Krasner  
Milton Krasner  
President"

The other letter dated July 11, 1968 reads as follows:

"Mr. Harold Fisher  
570 Broad Street  
Newark, New Jersey

Re: Clare's Food Market to Rozanski

Dear Mr. Fisher:

According to our books and records, the bond and mortgage from Clare to Rozanski has a balance due of \$28,400.00.

Yours very truly,  
CONSOLIDATED SUPERMARKETS, INC.  
(sd) Joseph E. Greenblatt  
Joseph E. Greenblatt  
Controller"

Before any testimony was taken herein, the following statement was made on the record:

"MR. FISHER: I might say this, that Mr. Adler served a subpoena duces tecum for certain papers, letters, documents and so forth. I have them. There is a letter, or at least I have a copy of a letter dated July of 1967, I think it is -- '68. No, '66. I believe Mr. Adler wanted that. The question arises whether this particular piece of paper is the true original. The witness will explain how this error occurred. It is not a true original. This was merely in the witness' mind a restatement of what there was, an understanding, a copy which had been sent to me and I did not check anything else. I turned it in as evidence of what it states. I will state now that --

"THE HEARER: You are not relying on it then?

"MR. FISHER: Not this letter, not this letter as such. I am going to rely on the witness' own oral testimony as to what the understanding was between Clare's Food Market and the Consolidated with respect to the use of 517.

"THE HEARER: There was nothing on the record to indicate any such thing, was there?

"MR. FISHER: That's right."

Thomas J. Clare (secretary-treasurer of Clare's) testified that, when the property in question was conveyed to Consolidated Supermarkets from Clare's in the summer of 1966, "we [Clare's] left in good faith and in good graces. And at the time we left Clare's Food Market was the possessor, was on record as the owner of the liquor license in Franklin, and we continued that way. We had an agreement with them [Consolidated], sir, that we would possess the license, that we would continue to renew it until such time as the property could be developed and that the building would be available for it." When interrogated by the Hearer whether or not he meant Clare's was holding the license in question for some other corporation, Mr. Clare stated: "My parent corporation, Clare's Food Market, sir, was always the possessor of the license from the time that the town initially transferred it, which was in I think '63 or '64."

It appears from Mr. Clare's testimony that, when the hearing on the renewal application was held by the respondent Mayor and Council, and although Milton Krasner and Joseph E. Greenblatt (president and controller, respectively, of Consolidated Supermarkets, Inc.) testified at said hearing, no officer of Clare's appeared at the hearing held thereon. According to the record herein, Mr. Clare's recollection was spotty with reference to the application for renewal or with reference to the liquor license itself. He stated that he could not remember appearing at the offices of Consolidated Supermarkets on July 6, 1966, when the premises to which the license had theretofore been issued was conveyed to Consolidated. He further stated that, after the conveyance of the land in question, he had no intention of investing any moneys to develop the property as he had expected that development, if any, would be done by Consolidated Supermarkets. To his knowledge, he at no time appeared at any of the hearings before the respondent Mayor and Council, nor did any other officer; the matter was left to Mr. Rudenstein (the attorney who represented both Consolidated and Clare's).

Mr. Clare also testified that he did not know that at the hearing on June 29, 1967 before the Mayor and Council, Mr. Rudenstein, speaking on behalf of Consolidated, had testified, "We have taken over the right, title and interest of Clare's Food Market in and to the property on Munsonhurst Road including their liquor license." He agreed that Mr. Rudenstein was also Clare's representative at the aforesaid hearing. He (Mr. Clare) further testified that Clare's never exercised any control over the site on Route 517 since July 6, 1966, when it had been conveyed to Consolidated Supermarkets.

When questioned whether he, on behalf of Clare's, had signed and subscribed to the deed conveying the property to Consolidated Supermarkets, he stated, "If you have it there, I must have signed it, sir." He could not recollect whether or not he read the deed before signing the same. When the attorney for the Mayor and Council attempted to refresh Mr. Clare's memory with reference to the matter under consideration, the witness could not recall attending a luncheon meeting at a restaurant with representatives of the Mayor and Council, nor did he recall the presence of Mr. Greenblatt (controller of Consolidated Supermarkets) at any of the conferences. Mr. Clare further stated that there was no written agreement which provided that Clare's had the right to occupy any building that might subsequently be erected on the premises on Munsonhurst Road (Route 517).

William J. Hodas (Mayor of the Borough of Franklin) testified that he was a member of the Common Council for six years and member of the Council when the liquor license in

question was transferred to Clare's which subsequently became effective June 27, 1966. Mayor Hodas' testimony disclosed that at that time no building had been erected on the site and former Mayor Berghofer's concern "stirred Clare to come forth to the municipality and present to us their intent of whether they were going to build or not." Several meetings were held with various public officials to try to develop the area purchased by Clare's but the problem of water was an important factor in that particular area. It was found too costly for the municipality to extend water lines into the area. Mayor Hodas further stated that he was always under the impression, and he was sure the Council was, that "Clare's and Consolidated are one entity. Never known to me or never in my thoughts that one was separate from the other." Therefore he was satisfied that Clare's had possessory rights in the land.

A letter dated March 10, 1967, from Consolidated Supermarkets and signed by Joseph E. Greenblatt, as Controller, to Emanuel A. Honig (attorney for the respondent Mayor and Council), reads in part:

"As you also have stated, we have a problem with the renewal of our liquor license. After evaluating the situation, we feel that in order to prevent criticism of the Borough and ourselves by the State of New Jersey for not exercising our license, we should attempt to establish a temporary liquor store on our property as soon as possible. I would appreciate very much your obtaining the necessary approval on this for us."

The above letter is not ambiguous in any manner whatsoever. It states specifically that Consolidated Supermarkets considered itself the holder of the license in question although no application for a person-to-person transfer from Clare's had been filed or obtained.

Clare's contends that, since it was the original mortgagor in the mortgage on the property it conveyed to Consolidated, it retained possessory rights in the said property. Although Clare's may be secondarily liable on the mortgage after foreclosure proceedings in the matter, it has no possessory rights in said property at this time or when it applied for the renewal of the liquor license. Thus I cannot accept this contention.

Under the circumstances I am satisfied that there is insufficient proof to establish that Clare's did have possession of, or any right to possession, or any interest in, the property on Munsonhurst Road (also known as Route 517) which the statute required when it applied for renewal of its license. R.S. 33:1-21.13.

Accordingly, I recommend a reaffirmance of the Director's previous determination that respondent Mayor and Council lacked jurisdiction in this matter and thus its action in renewing the license should be reversed and that the said license be cancelled and declared null and void.

#### Supplemental Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's report and written argument thereto were filed by both respondents and the appellant filed an answering

brief. Additionally, oral argument was held before me by attorneys for the appellant and both respondents.

I have carefully considered the entire record herein, particularly that portion pertaining to the supplemental hearing held pursuant to my order of August 30, 1968. As a result, I find that, at the time the respondent issuing authority approved renewal of the license of Clare's Food Market, Inc. (Clare's) for the 1967-68 licensing year, the licensee had sufficient possessory interest in the proposed licensed premises to overcome the jurisdictional issue upon which the Hearer predicated his recommended reversal of the municipal action. The evidence shows that Clare's and Consolidated Supermarkets, Inc. (Consolidated) were at such time affiliated, or at least cooperating corporations; they had had common stockholders and management personnel; they were not hostile corporations making conflicting possessory claims, and the proposed licensed premises were to be located at a site to which Clare's was not a complete stranger.

The transfer from Clare's to Consolidated of title to the land upon which the proposed licensed building was to be constructed was accompanied by a verbal arrangement whereby Clare's was permitted by the grantee to continue to have a right to occupy, presumably by lease or otherwise, such proposed building. Thomas J. Clare testified at the supplemental hearing that Clare's would continue to hold the license "until such time as the property could be developed and that the building would be available" for the license; that Clare's "had the right to operate a business there, a liquor business there, if and when Consolidated developed the property;" that Clare's "had the right to occupy" the premises to be developed by Consolidated. No testimony was presented to controvert these assertions.

I find that Clare's and Consolidated had a verbal understanding that, if Consolidated constructed a shopping center at the proposed site, Clare's would occupy part of it to conduct a licensed business. In the event Consolidated did not construct a shopping center at such site but, instead, constructed a shopping center at the Route #23 site in the Borough, which appeared more likely at the time, Clare's agreed to consent to transfer its license to Consolidated and to the Route #23 location. There was thus not a "complete absence" of "some right to possession of premises" which deprived the issuing authority of jurisdiction to renew the license, particularly where the proposed licensed premises here involved the future construction of a building on then vacant land. See Kleinberg v. Newark, Bulletin 1049, Item 1. The verbal understanding in question satisfies the possessory requirement.

As to the original issue raised, namely, whether Consolidated was the true party in interest in the license rather than Clare's, I find that the statement of S. Rudenstein, apparently attorney for Clare's and Consolidated as contained in the minutes of the special meeting held by the respondent issuing authority on June 29, 1967 (which minutes were introduced herein) in which he represented that Consolidated had taken over the right, title and interest of Clare's Food Market liquor license, at most referred to an executory contract interest wherein Clare's agreed to transfer its license to Consolidated at some time in the future. Similarly, the letter of March 10, 1967 from Consolidated to the municipality mentioning "renewal of our license" was a referral to the license which Consolidated anticipated eventually being transferred to it from Clare's. In any event, this letter was not binding on Clare's.

An executory interest arising from a licensee's agreement to transfer its license to another in the future does not constitute such an interest in a license to prohibit the renewal thereof in the name of the licensee. Cf. Packard-Bamberger & Co., Inc. v. Borough of Oakland, 87 N.J. Super. 92 (App.Div. 1965). A licensee may not permit another to exercise the rights or privileges of its license (R.S. 33:1-26) or to hold a beneficial interest in its license or licensed business (Florence Methodist Church v. Florence Township, 38 N.J. Super. 85 (App.Div. 1955)). However, the evidence herein does not establish either of these situations. Clare's was not a "front" for Consolidated.

Under the circumstances, I conclude that the appellant has not sustained the burden of establishing that the action of the respondent issuing authority in renewing the license in question for the 1967-68 licensing year was erroneous and should be reversed. Rule 6 of State Regulation No. 15. I therefore will not accept the Hearer's recommended reversal of the municipal action but, instead, shall affirm the renewal and vacate my Conclusions and Order of June 17, 1968. Since at the oral argument herein all parties agreed that the issues in the two other appeals pending before the Division -- one from renewal of Clare's license for the 1968-69 licensing year (#3356), the other from renewal of Clare's license for the 1969-70 current licensing year (#3438) -- are the same as those involved in the original action, my conclusions herein are equally applicable to and dispositive of both said appeals.

Accordingly, it is, on this 29th day of October 1969,

ORDERED that my Conclusions and Order entered in this matter on June 17, 1968 be and the same are hereby vacated; and it is further

ORDERED that the action of respondent Mayor and Council of the Borough of Franklin, whereby it approved the renewal of the license to Clare's Food Market, t/a Shop-Rite, for the 1967-68, 1968-69 and 1969-70 licensing years be and the same is hereby affirmed and the appeals from such action are hereby dismissed.

Joseph M. Keegan,  
Director.

3. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (INDECENT ENTERTAINMENT) - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 55 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against Lafayette Bar, Inc. 137 and rear of 139-141 Mulberry St. Newark, New Jersey Holder of Plenary Retail Consumption License C-744 issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark

CONCLUSIONS AND ORDER

Emanuel N. Silberner, Esq., Attorney for Licensee Edward F. Ambrose, Esq., Appearing for the Division

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on May 9-10, 1969, it permitted lewdness and immoral activity (indecent entertainment) on the licensed premises, in violation of Rule 5 of State Regulation No. 20.

Reports of investigation disclose that on the dates alleged, a female go-go dancer, in bikini costume so abbreviated as to be almost topless and bottomless, engaged in bodily motions simulating sexual intercourse, removed from the top of her costume and fondled one breast, and lowered the bottom half of her costume fully to expose her buttocks and pubic hair.

Licensee has a previous record of suspension of license by the Director for twenty-five days effective June 1, 1959 for sale to intoxicated persons and foul language, for twenty days effective June 28, 1960 for possession of alcoholic beverages not truly labeled, for thirty-five days effective January 25, 1965 for sale to intoxicated persons and foul language, and for thirty days effective October 17, 1966 for permitting solicitation of the purchase of drinks. Re Lafayette Bar, Inc., Bulletin 1705, Item 5.

The prior record of suspensions for dissimilar violations occurring in 1959 and 1960 more than five years ago disregarded, the license will be suspended for forty-five days (Re George F. Nevious, Inc., Bulletin 1868, Item 5), to which will be added ten days by reason of the record of two suspensions for dissimilar violations in 1965 and 1966 within the past five years (Re Tunnel Hill Corporation, Bulletin 1877, Item 4), or a total of fifty-five days, with remission of five days for the plea entered, leaving a net suspension of fifty days.

Accordingly, it is, on this 31st day of October, 1969,

ORDERED that Plenary Retail Consumption License C-744, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Lafayette Bar, Inc. for premises 137 and rear of 139-141 Mulberry Street, Newark, be and the same is hereby suspended for fifty (50) days, commencing at 2:00 a.m. Monday, November 10, 1969, and terminating at 2:00 a.m. Tuesday, December 30, 1969.

Joseph M. Keegan, Director.

4. DISCIPLINARY PROCEEDINGS - SALE TO INTOXICATED PERSON - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS

In the Matter of Disciplinary Proceedings against  
 Augie's Tavern, Inc.  
 640 - 61st Street  
 West New York, New Jersey  
 Holder of Plenary Retail Consumption License C-30, issued by the Board of Commissioners of the Town of West New York

CONCLUSIONS AND ORDER

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 Raymond A. Brown, Esq., by Irving Vogelmann, Esq., Attorney for Licensee Edward F. Ambrose, Esq., Appearing for the Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

" On Wednesday, April 2, 1969, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person actually or apparently intoxicated and allowed, permitted and suffered the consumption of such beverage by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20."

The Division's presentation was developed through the testimony of two ABC agents who were specifically assigned to investigate alleged ABC violations at the subject premises.

ABC Agent C, in the company of fellow agent N, visited the premises on Wednesday, April 2, 1969, entering at about 11:15 a.m. This tavern is a typical neighborhood facility which contains a juke box, cigarette machine and a pool table in the rear, and the rear room which contains a public telephone booth and storage area. John Orlando (the bartender on duty) was serving approximately fifteen patrons.

At about 12:20 p.m. a male (later identified as George Irving Lewis) staggered into the premises through the side entrance and, with considerable difficulty in walking, reached the bar. The agent observed that his eyes were bloodshot, that he staggered, and his incoherent and mumbling speech indicated immediately to this agent that this man was intoxicated. Before seating himself at the bar he leaned heavily on the bar and ordered a drink of beer. The bartender refused either to sell or serve him, telling him that he already had enough to drink. The bartender then inquired if he had finished the quart of whiskey which he had sold him earlier that morning. Lewis responded in a mumbling, incoherent, slurring manner, the exact words of which the agent could not make out. At this point Orlando informed Lewis that he had received a telephone call for him earlier that morning and a man left a number for him to call. When Lewis continued to mumble incoherently, Orlando asked another patron who was seated alongside Lewis whether he would make the call for Lewis because Lewis was too drunk to make the call himself. The patron went to the rear of the tavern, made the call and then, upon returning, informed the bartender that the call was with reference to a

part-time job which was being offered to Lewis. Orlando then tried to explain the call to Lewis but, seeing that Lewis was unable to comprehend, stated, "Well, I'll tell him tomorrow when he is sober."

Lewis then sat down with some difficulty at the bar, put his head down on the bar, and was holding his head. Shortly thereafter he got up and staggered toward the rear of the bar where were seated some other patrons. In the walk to them he bumped into the bar stools located along the left wall, and also bumped into a portion of the right-hand wall in the vicinity of the men's room. As he was proceeding to that portion, the agent made the following comment to the bartender, "That guy", referring to Mr. Lewis, "has a package on", whereupon Orlando responded, "Yes", he did; that he had received his check yesterday, "and he is always drunk for the next day or two."

A few minutes thereafter, Lewis staggered back to his original seat, swaying from side to side and bumping into the bar stools on his return. When he returned, he continued to mumble to himself; then, in a slurred manner, he directed the bartender to give several persons a drink. The bartender did so and then approached Lewis for payment. Lewis then asked for a shot of whiskey and a beer, and this was served to him. A shot of Seagram 7 whiskey was served and a glass of Budweiser beer. Lewis then fumbled into his pocket, drew out a five-dollar bill which was placed on the bar; the bartender took the money, rang up \$2.80 and returned \$2.20 which he placed in front of Lewis. Lewis waited several minutes and took a sip of the glass of beer. The agents thereupon fully convinced that this man was intoxicated identified themselves to the bartender and seized the two drinks from Lewis. The contents were immediately poured into sample bottles by the agents. Orlando signed the labels and the date on the bottles in which these alcoholic beverages were poured. The said samples were submitted to the Division chemist for analysis and his report, certified by the Director, which was admitted into evidence, shows that they are alcoholic beverages, fit for beverage purposes.

The witness apprized Orlando of the violation he had committed by serving an apparent intoxicated person. Orlando acknowledge that he knew Lewis was drunk and that "he should not have served him any alcoholic beverages."

They then questioned Lewis to determine where he lived but Lewis was unable to give them his full name and address because of his intoxicated condition. At this point the bartender said that Lewis did not drive any vehicle, that he lived down the street, and that he would be "all right."

On cross examination this witness stated that, while the television was playing, he had no difficulty in making his observations and hearing the conversations as hereinabove set forth. He also stated that he eventually ascertained the name and address of Lewis with the help of the bartender, since Lewis had no adequate identification on him and could not coherently respond to interrogation by this agent.

ABC Agent N substantially corroborated the testimony of ABC Agent C and described in even greater detail the great difficulty that Lewis had in walking, and in his efforts to seat himself at the bar. He also stated that, in the conversation with respect to the telephone call, Lewis was so intoxicated that he

could not comprehend what was told him about the said telephone call. It was the opinion of this agent that this man was definitely intoxicated at the time he entered the tavern and at the time he was served the alcoholic beverages by the bartender.

He added that, as a matter of routine, Lewis was questioned as to whether he was driving an automobile and where he lived because the agents did not want him to drive in that condition, but Lewis was "not making any sense. He was half mumbling, this and that. I couldn't make head or tails out of it; a few words, but ... well, he was intoxicated."

On cross examination he asserted that he and his fellow agent identified themselves only after Lewis took a sip of beer. Lewis did not drink any of the whiskey that was placed in front of him. Finally, he repeated that, at the time of the confrontation, the bartender admitted that he realized that Lewis was drunk and that he should not have served him an alcoholic beverage.

August J. Orlando (president of the corporate licensee) presented several photographs of the tavern and stated that John Orlando (the bartender) is his brother.

John Orlando gave the following account: He remembers the agents entering the tavern and ordering drinks on the morning of April 2. At about 11:30 a.m. Lewis entered, seated himself at the bar, ordered a glass of beer and sat down. He was served the beer but he did not drink it. He did not appear to him to be drunk and spoke in his "natural" way. The witness then told Lewis that there had been a telephone call for him and asked him to dial the number. He asked another patron to dial the number for him because he recalled that once before he had to dial a number for Lewis. Shortly afterwards, a patron identified as Frank Haynes entered the premises and seated himself at the bar. Lewis walked over to them, got into a conversation and told this witness to give Frank and his party a drink. Lewis then returned to his seat in a normal manner and did not stagger. He ordered a drink of Seagram's, which he did not touch. He then ordered a bottle of whiskey for a woman known as Mattie and paid him for it. The opinion of this witness was that Lewis was not intoxicated at the time.

On cross examination the witness stated that Lewis was a regular daily patron at these premises and comes in and out all day long. He does not characterize him as a heavy drinker. He stated that he first entered the premises on that date at 9:30 a.m., had a glass of beer and then was sold a bottle of whiskey. He took the whiskey with him and returned to the premises at about 11:30 a.m. At that time he appeared to be sober and ordered a beer. He questioned Lewis about the bottle of whiskey and Lewis told him that he had taken the whiskey home but that he had not consumed any of it. The reason he asked him about the bottle was that he knows he always buys a bottle of whiskey for a woman known as Mattie when he receives his monthly check. He was then asked:

"Q Did you hear them testify at the last hearing that they heard you say to Lewis, 'Did you finish that quart of Seagram's' --

A Yes.

Q -- 'you bought here this morning?'

A Yes. And then he went and got half a pint for this Mattie."

He could not explain how the agents got that information. He specifically denied stating to the agents, "This guy sure has a package on" and in fact said that statement was probably made by the agent because he didn't say it. He insisted that, when the agents told him that Lewis was drunk, all that he replied was that "he is not intoxicated."

The witness then testified:

"The Hearer: What do you mean when you said, 'He got his check. We don't see him for another month.'  
 The Witness: See, that money doesn't last him a long time. He is too free with his money. I don't see him for another month. Once in a while --  
 The Hearer: Didn't you just say that he came in every day?  
 The Witness: Yes.  
 The Hearer: Well, did you tell the agents that you didn't see him for a month after?  
 The Witness: I didn't tell the agents anything.  
 The Hearer: Well, you did tell him that he got his check yesterday, right?  
 The Witness: Yes. That's all. That's all."

The witness further insisted that, after the agents seized the beverages, they took the glasses of beer and the whiskey out of the premises to their car, and emptied them in the sample bottles. They then returned to the premises. But he denied knowing why they had confiscated the alcoholic beverages.

Frank Hynes (a patron) testified that he knew Lewis for about six years and saw him in the premises on the date in question. He engaged him in conversation and he appeared to be normal, "Like I said, normal for Irving, yes, Irving Lewis." In fact he was sober. On cross examination he acknowledged that he is presently employed and is a regular daily patron of these premises. He then testified:

"Q Did he appear to be staggering?  
 A Not to me, sir.  
 Q Not to you. And you say that he always appeared to you to be cold sober?  
 A Sober.  
 Q Sober. Well, did he appear that he may have had some drinks that morning?  
 A Well, by twelve o'clock I figure he must have had one or two beers anyway."

Finally he acknowledge that he was in the premises only about ten minutes on this day.

George I. Lewis testified that he first entered the premises on the date charged herein at about 9 a.m. and had a glass of beer. He then left the tavern, went home, ate breakfast, returned to the tavern some time between 11 a.m. and 12 noon. Seating himself at the bar, he ordered a glass of beer and played the juke box. He then noticed Haynes enter the tavern and went over to speak to him and, after some minutes, returned to his seat and ordered drink for Haynes and his companion. He then ordered a drink of Seagram's whiskey and a beer for himself. After paying for the drinks, his drinks were confiscated by the ABC agents.

On cross examination he developed his narrative to the following extent: When he returned to the tavern he bought a bottle of whiskey; then left the tavern, gave that bottle of whiskey to his friend Mattie; this was at 9:30 a.m. Then he

returned to the tavern, had a glass of beer and bought another bottle of whiskey. Returning to the tavern at 11:30 a.m., he seated himself at the bar and continued in the manner as hereinabove referred to. He denied that he was drunk. With respect to his confrontation with the agents he testified:

"The Hearer: ... Well, when they asked you for your identification, didn't you ask them why they wanted the identification or who they were?

The Witness: I didn't ask them any questions.

The Hearer: They took your glass of whiskey and you didn't ask him why they were taking your whiskey?

The Witness: No, sir.

The Hearer: Why didn't you?

The Witness: I don't know. I didn't ask them no questions. I just figured -- I thought they was kidding me at first, somebody.

The Hearer: Well, after you found out that they weren't kidding, why didn't you ask him why they took your whiskey from you?

The Witness: I didn't ask."

And further:

"The Hearer: Now, how many bottles of whiskey did you buy that day?

The Witness: How many bottles of whiskey did I buy?

The Hearer: Yes.

The Witness: Two."

He then continued to state that, after he bought the bottle of whiskey for Mattie, he returned to the tavern, ordered a glass of beer and then bought another bottle of Seagram's which he took home, but he insists that he did not drink any of that whiskey before returning to the tavern. Finally he insisted that the agents never informed him that he was drunk.

Miriam A. McGredie testified that she has known Lewis for some twenty-five years and frequently sees him at this tavern where she is a daily patron. On the date charged herein, she entered the premises at about 12:30p.m. and noted that one of the agents was behind the bar. Lewis had no beer in front of him; in fact, he had a glass of soda. She asserted that he was not drunk, that his speech was normal and that he walked in a normal manner. When the agent told Lewis that he had better finish his drink and go home, the only drink he had in front of him was the soda.

Agent C, called in rebuttal, denied that the bartender had ever told him that Lewis was not drunk. The agent reiterated that the bartender admitted that Lewis was intoxicated and should not have been served alcoholic beverages. He further stated that he did not see Mrs. McGredie in the tavern on that date. He further testified that, having listened to Lewis as he testified at this hearing, his speech at this time was substantially different from that at the premises when his speech was slurred. He was convinced that Lewis was definitely intoxicated. Finally he stated that, in accordance with usual practice, the seized drinks were poured in the sample bottles behind the bar, and not outside the premises.

Agent N testified substantially to the same effect on rebuttal.

In adjudicating this matter we are 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. Division 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.

Since there is obviously a sharp conflict in the testimony herein, it becomes necessary to evaluate the testimony after observing the demeanor of the witnesses and giving weight to such testimony as is found credible. Testimony, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself. It 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). 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, sed. 1042.

From my evaluation of the testimony herein, I am persuaded that the Division's witnesses gave a forthright and accurate recital of the facts in support of the said charge. The agents pursued this investigation upon a specific assignment, and there is no suggestion in the record that they had any preconceived prejudice against the licensee. Their account of what transpired and their observations were forthright, credible and consistent under searching cross examination.

On the other hand, I find the testimony of the licensee's witnesses to be conflicting, inconsistent and indeed incredible. A mere reading of the items delineated hereinabove is reflective of such inconsistencies. Just a few examples may be pointed out. For instance, Orlando on direct examination stated that he had sold one bottle of whiskey to Lewis earlier that morning. Lewis, on the other hand, admitted under my examination of him that he had actually purchased two bottles of whiskey that morning. Further, Orlando testified that the contents of the seized drinks were removed from the premises and poured into sample bottles outside of the premises. This is most remarkable and incredible in view of the established practice by ABC agents of routinely pouring the contents of seized drinks in sample bottles in the premises, as they indeed testified they did.

Also, while the subject of the telephone call received by Lewis may be tangential, it nevertheless manifests the inability of Lewis to make a telephone call because of his intoxicated condition. I am persuaded that the reason the patron made the call for him was that he was not able to do so because of his insobriety and, as the agents testified, Orlando informed them that the message would be given to Lewis at a later date when he was sober. In this connection it is well to observe that Orlando admitted telling the agents that Lewis had received his pay the previous day. This is significant because that conversation is relevant only with respect to Lewis' sobriety at that time.

The agents also stated that they were unable to make any sense from Lewis' conversation with them or even to obtain his full name because of his inebriated condition.

With respect to Mrs. McGredie, who stated that Lewis had a glass of soda and had no beer served to him (contrary to the testimony of the licensee's witnesses to that effect), I am convinced, in line with the agents' testimony, that she was not even present in the premises at the time herein charged.

In a memorandum submitted in summation, the attorney for the licensee asserts that the bartender and Lewis cooperated with the agents during their interrogation, and at no time did Lewis create any disturbance in the tavern. Since the licensee is not being charged with hindering the investigation or creating a disturbance, such assertions are irrelevant to the central issue, namely, whether there was a sale and service to a person actually or apparently intoxicated.

As the then Commissioner Burnett remarked in Re Pasukonis, Bulletin 173, Item 12:

"Serving alcoholic beverages to customers who have all too apparently consumed their 'quota' is a very poor way of building up the liquor business to a respected and high plane.... Conscientious licensees evince as much disgust at the practice of serving a 'drunk', who may later stagger out into the public street, as do the general public who witness such a pitiable spectacle.

"... To permit such practices to continue without adequately deterring punishment invites disaster."

And, as the court stated in Rappaport v. Nichols, 31 N.J. 188, at p. 202 (Sup.Ct. 1959):

"... Regulation No. 20, Rule 1, provided that no licensee shall permit any ... person 'actually or apparently intoxicated'"

to be served or to consume any alcoholic beverages and that the restrictions "were not narrowly intended to benefit ... intoxicated persons alone but were wisely intended for the protection of members of the general public as well."

After carefully considering the testimony with respect to the charge, and the memorandum in summation submitted on behalf of the licensee, the conclusion is inescapable that the charge has been established by a fair preponderance of the believable evidence, indeed by substantial evidence, and I recommend that the licensee be found guilty of the charge.

Licensee has a previous record of suspension of license by the municipal issuing authority for thirty-five days effective July 22, 1956 for sale during prohibited hours and possession of raffle tickets; and by the Director for twenty-five days effective February 25, 1963 and again for one hundred fifteen days effective September 3, 1968, both for permitting acceptance of numbers bets. Re Augie's Tavern, Inc., Bulletin 1819, Item 2.

It is recommended that the prior record of suspensions for dissimilar violations in 1956 and 1963 occurring more than five years ago be disregarded, but the suspension for dissimilar violation occurring in 1968 within the past five years considered, it is further recommended that the license be suspended for twenty-five days. Re Rutka's Tavern, Inc., Bulletin 1731, Item 5.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the memorandum of counsel for the licensee submitted in summation, and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

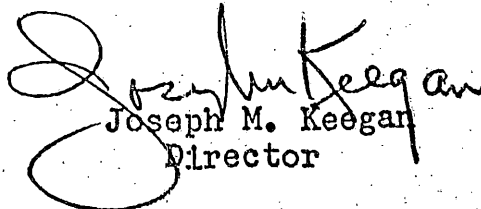
Accordingly, it is, on this 31st day of October, 1969,

ORDERED that Plenary Retail Consumption License C-30, issued by the Board of Commissioners of the Town of West New York to Augie's Tavern, Inc. for premises 640 - 61st Street, West New York, be and the same is hereby suspended for twenty-five (25) days, commencing at 3:00 a.m. Monday, November 10, 1969, and terminating at 3:00 a.m. Friday, December 5, 1969.

Joseph M. Keegan,  
Director.

5. STATE LICENSES - NEW APPLICATIONS FILED.

Trenton Spirits Ltd.  
Mc Cay Building Rt. 130 & Butts Avenue  
Bordentown, New Jersey  
Application filed December 12, 1969  
for warehouse receipts license.

  
Joseph M. Keegan  
Director