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

BULLETIN 1646 December 2, 1965

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ITEM

STATE OF NEW JERSEY
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DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS BETS) - SALE IN VIOLATION OF STATE REGULATION NO. 38 - SALE TO MINORS - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 110 DAYS - NO REMISSION FOR CONFESSIVE PLEA ENTERED AT HEARING.

In the Matter of Disciplinary Proceedings against Elsie Rosenberger Arahill t/a Driver's Rest 778 Jersey Avenue Jersey City, N. J., Holder of Plenary Retail Consumption License C-491, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City	CONCLUSIONS and ORDER

Anthony P. Peduto, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

At the hearing herein, licensee pleaded non vult to charges alleging that on June 12 and 18, 1965, she (1) and (2) permitted acceptance of numbers bets on the licensed premises, in violation of Rules 6 and 7 of State Regulation No. 20, (3) on each occasion sold six cans of beer for off-premises consumption during prohibited hours, in violation of Rule 1 of State Regulation No. 38, and (4) on June 18, 1965, sold drinks of beer to two minors, ages 16 and 18, in violation of Rule 1 of State Regulation No. 20.

Licensee has a previous record of suspension of license (then held as Elsie Rosenberger for premises 766 Jersey Avenue, Jersey City) by the municipal issuing authority for five days effective February 8, 1943, for sale during prohibited hours, and by the Director for thirty days effective June 19, 1956, for sale to minors and sale in violation of State Regulation No. 38. Re Arahill, Bulletin 1124, Item 3.

The prior record of suspension of license for similar violation in 1943 occurring more than ten years ago disregarded but the prior record of suspension for similar violations in 1956 commencing more than five but less than ten years ago considered, the license will be suspended on the first and second charges for sixty days (Re Rubino, Bulletin 1631, Item 2), on the third charge for twenty days (Re Green Door Bar, Inc., Bulletin 1636, Item 9), and on the fourth charge for thirty days (cf. Re Alex L. Saldarini Post etc., Bulletin 1403, Item 9; Re Meehan, Bulletin 1609, Item 7; Re Woodland Grove, Inc., Bulletin 1626, Item 4), or a total of one hundred ten days, without remission for the confessive plea untimely entered at the hearing (Re Cambar, Inc., Bulletin 1620, Item 7).

Accordingly, it is, on this 6th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-491, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Elsie Rosenberger Arahill, t/a Driver's Rest, for premises 778 Jersey Avenue, Jersey City, be and the same is hereby suspended for one hundred ten (110) days, commencing at 2:00 a.m. Wednesday, October 13, 1965, and terminating at 2:00 a.m. Monday, January 31, 1966.

JOSEPH P. LORDI,
DIRECTOR

2. APPELLATE DECISIONS - FOOD CIRCUS SUPERMARKETS, INC. v. RARITAN TOWNSHIP (MONMOUTH).

Food Circus Supermarkets, Inc.,)
Appellant,)
v.) On Appeal
Township Committee of the Township of Raritan (Monmouth County),) CONCLUSIONS and ORDER
Respondent.)

Abramoff & Apy, Esqs., by Chester Apy, Esq., Attorneys for Appellant.
Philip J. Blanda, Jr., Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Appellant appeals from denial by respondent (hereinafter Committee) of appellant's application for renewal of a plenary retail distribution license. The Committee's determination is set forth in a resolution adopted June 28, 1965, which reads as follows:

> "Whereas, by resolution adopted June 26, 1962, the Township Committee of the Township of Raritan granted an application to Food Circus Super Markets, Inc. for Plenary Retail Distribution License D-2, subject to the special condition that the license shall not be issued unless and until the proposed premises were first duly completed in keeping with the filed and approved plans and specifications, and
>
> "Whereas, the Township Committee of the Township of Raritan on June 27, 1963 and June 29, 1964 did adopt similar resolutions granting this application to provide Food Circus Super Markets, Inc. sufficient time to erect the building as filed on their plans and specifications, and
>
> "Whereas, to date, Food Circus Super Markets, Inc. have not complied with the special condition set forth in the abovementioned resolutions granting their application.

"Now, therefore, be it resolved by the Township Committee of the Township of Raritan that the application filed by Food Circus Super Markets, Inc. for the calendar year 1965-66 be and the same is hereby denied."

Appellant contends in its petition of appeal that the Committee's action was erroneous and should be reversed for the following reasons:

1. In reliance upon the Committee's previous grant of license, appellant purchased certain lands upon which it "commenced construction of a supermarket in accordance with the plans and specifications on file with the Township Clerk;"

2. The Committee renewed appellant's license for the years 1963-64 and 1964-65 subject to special condition that the building shall be completed in accordance with the said plans and specifications;

3. Appellant's failure to complete the building was due to "reasons beyond control" of appellant;

4. The Committee's action in denying renewal was improper; and

5. The Committee encouraged another to apply for this outstanding license and will approve the issuance of such license to the other applicant.

The Committee's answer admits the jurisdictional allegations of the petition and generally denies the substantive allegations contained therein. It asserts that appellant was not acting in good faith, did not have a valid building permit, and manifested no intention of completing its building "now or within a reasonable time;" that its bad faith and non-action were "not in the best interests of the Township of Raritan or its citizens." It admits that another applicant has made application for the said license.

This is an appeal de novo, with full opportunity for counsel to be heard, to present evidence under oath and cross-examine witnesses. Rule 6 of State Regulation No. 15 Reed v. South Toms River et al., Bulletin 1628, Item 2.

The following picture was reflected by the testimony adduced at this plenary appeal de novo hearing: In the latter part of 1961 appellant entered into negotiations with the Family Circle Stores which operates a large retail complex on the north side of Highway 36, Raritan Township (Monmouth County) for the leasing to it of twenty thousand feet of space wherein it intended to operate a supermarket and adjoining package liquor store. Appellant filed an application with the Committee for the issuance of a plenary retail distribution license upon the completion of a building in accordance with plans and specifications filed with the Committee. Appellant represented to the Committee that the shopping center would involve an expenditure of somewhere between a million-and-a-half and two million dollars, and that the Township would greatly benefit from such ratable. Based upon such representation the Committee, on June 26, 1962, issued the said license subject to the special condition.

When Family Circle notified appellant that it would be unable to consummate the proposed lease, appellant on May 10, 1962, purchased fourteen acres of adjoining land for a total

contract price of $75,000, of which $25,000 was paid at the closing of title. However, in May of 1962 the Shop-Rite food chain (a major competitor) opened a facility nearby and appellant considered it inadvisable to commence construction at that time. Nevertheless its license was renewed by the Committee for the year 1962-63.

In 1963 the State Highway Department undertook to widen the highway immediately adjacent to appellant's property and appellant, therefore, did not commence construction during that year. Thereafter it applied for and obtained renewal of its license for 1963-64. Shortly before June 30, 1964 (the expiration date of the fiscal period) appellant undertook some work on the foundation of the building and, again, a renewal license was granted for 1964-65.

Joseph Azzolina (president of the corporate appellant) testified that he had a conference with representatives of the Foodtown supermarket chain, of which he was a member, and Twin County Grocery, Inc., a buying corporation, which had theretofore granted him a franchise for the operation of a supermarket at the location. The conference resulted in a recommendation that construction of the supermarket be withheld until the Spring of 1966 because major competitors had expanded their operations in this area and it would be economically impractical to build the supermarket at that time. It was speculated that, although the population increase in the area to be served had not been as rapid as anticipated, perhaps by the Spring of 1966 an increase in residential population might make such construction feasible. In the meantime appellant applied for renewal of its license for the 1965-66 period, which application was denied by the Committee for the reasons set forth in the aforementioned resolution.

Azzolina further testified that he had a conversation with Mayor Olinsky, who informed him that appellant's application for renewal license would not be granted. He then offered to construct a portion of the building which would house only the liquor store. This would have to be done by submitting new plans and specifications and receiving the approval of the zoning board for a variance. The Mayor informed him that this was unsatisfactory to the Committee as it was not in accordance with the prior representations.

Azzolina asserted that appellant has expended a considerable sum of money to date, namely, approximately $100,000 inclusive of the mortgage, in reliance upon the prior action of the Committee.

In further support of its case appellant produced the general manager of Foodtown, who corroborated Azzolina's testimony with respect to the impracticability of constructing the supermarket and liquor store at this time. Appellant also produced the accountant for Foodtown, who stated that, on the basis of his experience with supermarket operations, it would not be economically feasible to build the supermarket until at least the Spring of 1966. According to his estimate, the area is a "borderline" area and, with anticipated population growth, it may be practical to undertake such construction in six months to a year, i.e., presumably sometime in 1966. On cross-examination he added, "You can estimate it and it looks -- in our opinion we had discussed this very point and we are quite sure that by next Spring he should be ready to have a successful market."

James G. McAdam (the building inspector for the municipality) testified that a variance had been granted for a building of eighteen or nineteen thousand square feet; that a variance would have to be applied for in order to construct a liquor store of approximately two thousand square feet, but that such land use would not be permitted at the contemplated site under the existing zoning ordinances. In any event, no application has been made for such variance and, indeed, the prior building permit has already expired.

Marvin Olinsky (the Mayor of this municipality) testified that he informed Azzolina that the Committee had been "misled, had been made fools of; that when the original application had been approved it was for immediate construction of a ratable for the Township of Raritan and that with each subsequent renewal Mr. Azzolina knew that we were not happy with the delay and with each subsequent renewal Mr. Azzolina promised that the following year he would build, and we felt that we could not and would not go along any longer." He added that Azzolina's reason for not constructing the building as promised was that "he had run into some monetary problems." Finally the Mayor stated that it was unlikely that there would be any substantial increase in population during the coming year and, if that is the reason for appellant's delaying construction, the Mayor felt this facility will probably never be built; that, "if he continues as he has in the past, four years can pass again. I see no reason for the license to be tied up in that length of time."

Before proceeding to the consideration of the merits of this controversy, some well-settled applicable principles are worthy of repetition. A liquor license is a temporary permit or privilege to conduct a business otherwise illegal. Mazza v. Cavicchia, 15 N.J. 498, 505 (1954). Whether or not it is to be renewed rests in the sound discretion of the local issuing authority and the Director should not interfere unless the evidence indicates a manifest abuse of that discretion. 279 Club, Inc. v. Newark, 73 N.J. Super. 15, 21 (App.Div. 1962). As was said in Zicherman v. Driscoll, 133 N.J.L. 586, 587 (Sup.Ct. 1946):

> "The primary question presented is the right of a holder of a plenary retail consumption license to a renewal of that license for a subsequent term
>
> "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 ... and no person is entitled as a matter of law to a liquor license .... 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 action of the constituted authorities. 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 this case the Committee was confronted with a non-user of a license for a period of three years. A protracted non-user might, in a given case, cause the municipal issuing authority to determine against a renewal. Re Tarantola, Bulletin 570, Item 5. No renewal need be issued where no business has been conducted for a protracted period of time and where convincing evidence in justification of the non-user is not adduced. Hall v. Mt. Ephraim, Bulletin 786, Item 2; see Kalman and Prickett v. Southampton and Div. of Alcoholic Beverage Control (App.Div. 1963), not officially reported, reprinted in Bulletin 1527, Item 1.

Using these principles as a guide, it is incontrovertible that the Committee, in its judgment, decided that the third plenary retail distribution license permitted under its limiting ordinance should be issued to an active operator in the best interests of the community. The evidence shows that appellant represented to the Committee at the time of its first application in 1962 that it intended to build a facility of eighteen thousand square feet in the Family Circle Stores, which would be primarily a supermarket. By its letter dated August 29, 1961, it further represented that the total shopping center would bring an additional ratable of a million-and-a-half to two million dollars to the Township. In that letter it also stated that "In order to assure a successful operation we ask that you consider us for a license to operate a retail liquor package store in our proposed food market."

The conclusion is inescapable that the Committee acted upon such representation (that the construction would commence within a reasonable time) in granting the first application for license. The supermarket and liquor store were not built. Nor have they been built to this day. In fact, in his testimony before me Azzolina stated that he would not commence construction until the Spring of 1966, if conditions at that time were favorable. This means that, based on the estimated time required for construction of the supermarket and the liquor store, he could not commence operations until well after the end of the 1965-66 licensing year. The practical effect, therefore, of granting renewal of this license would merely be to put appellant in a position where it would be required to make another application for renewal for the 1966-67 licensing year without actually having operated under its 1965-66 grant.

Appellant argues that its failure to construct was due to factors beyond its control. This is contradicted by the testimony of Azzolina, who frankly advanced reasons based on business judgment which prompted the decision not to build. During several of these years major competitors entered the area. In 1965 appellant heeded the advice of representatives of the parent company to the effect that it would be financially unsafe to commence operations until there was a populational increase sufficient to support a successful operation. As expressed by appellant's accountant, such growth would likely take place in about six months to a year. In addition, Mayor Olinsky insists that the reason given to him by Azzolina was that he had certain "monetary problems."

I am persuaded that the reasons for appellant's failure to construct its building and to use its license were based primarily upon its own business judgment. The test here is not whether appellant's financial condition or the presence of competition or populational factors justified its failure to construct its building, but whether the public good justified denial of renewal of the license in view of appellant's failure to exercise the privilege conferred thereby. The Committee

might well have concluded from the failure to use the license that the necessity for it no longer existed. The ultimate test in the establishment and issuance of such license is whether the public good requires it. Blanck v. Magnolia, 38 N.J. 484, 491 (1962).

Appellant raises the additional argument that it has a vested interest by reason of the prior grant of license to it, and that it will suffer a financial loss because of the Committee's action, citing Lakewood Tp. v. Brandt, 38 N.J. Super. 462. The simple answer to this is that appellant has not used its license nor has it constructed premises for its use. It should be noted also that appellant's primary business is that of a supermarket and, as testified to by the general manager of the Foodtown chain, a supermaket can operate successfully without a liquor department. There is no reason why appellant cannot in the future, when it considers conditions desirable, construct and operate a supermarket and thus have the full benefit of and take advantage of its capital investment.

R.S. 33:1-26 provides that "All licenses shall be for a term of 1 year from July 1 in each year." Under this statutory imperative, the Committee was required to re-examine applications for renewal. A renewal license is in the same category as an original license. Zicherman v. Driscoll, supra.

The evidence is convincing that the Committee, in considering appellant's application, felt that appellant had failed to comply with the special condition that it construct a building suitable for its operation, although given ample and reasonable time within which to do so. It evidently was persuaded that appellant had not convincingly established valid justification for the said non-compliance and for its non-use of the said license.

Finally, the Committee was of the conviction that there was a present need for another active plenary retail distribution license and that the best interests of the community would be served by such issuance to another applicant, presumably equally qualified.

Nothing has been presented at this hearing to indicate or suggest that any member of the Committee has been improperly motivated.

Based on the record taken in its entirety, it cannot be said that the Committee's action was unreasonable, arbitrary or capricious. On the contrary, I find that the Committee's action was a reasonable, circumspect and proper exercise of its discretion. Thus appellant has failed to sustain its burden of establishing that there was an abuse of discretion by respondent. Rule 6 of State Regulation No. 15.

For the reasons aforesaid, it is recommended that an order be entered affirming respondent's action and dismissing the appeal.

Conclusions and Order

No exceptions to the Hearer's Report were filed within time, pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the record herein, including the transcript of the testimony, the exhibits, the oral argument

of counsel 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 5th day of October, 1965,

ORDERED that the action of respondent be and the same is hereby affirmed and that the appeal filed herein be and the same is hereby dismissed.

JOSEPH P. LORDI,
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE TO INTOXICATED PERSON - LICENSE SUSPENDED FOR 20 DAYS.

In the Matter of Disciplinary Proceedings against	)
Paul's Shore Liquors, Inc. t/a Asbury Shore Lounge* 429-33 Cookman Avenue Asbury Park, N. J.,	) CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-1, issued by the City Council of the City of Asbury Park.	)

Edwin J. Fox, Esq., Attorney for Licensee
Edward F. Ambrose, 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 charge:

"On March 13, 1965, 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 beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20."

The Division offered the testimony of three of its agents to substantiate the charge.

Agent S testified that he arrived in the vicinity of the licensed premises on March 13, 1965 at about 9:30 p.m. accompanied by Agents O and B. Agents O and B entered therein about 9:30 p.m., and he entered the licensed premises, which contains a "circular-type bar" for servicing its patrons in one room, at 9:50 p.m. Alongside the barroom is situated a room containing tables and chairs and a pool table. He sat at the bar directly across from where Agents O and B were seated. The patronage of five males and nine females was scattered along the bar. Tending bar was

*(for 1964-65; t/a Chez'[illegible] Cocktail Lounge for 1965-66)

Margaret Hogan, who was a stockholder, an officer and a director of the licensee corporation.

His attention was directed to a Harold Brash (hereinafter Brash) who was seated next to a couple across the bar to the left of Agent B. He appeared to be intoxicated and was talking loudly to the male seated next to him and on "two different occasions he stood up and leaned on the man, put his arm around him, talking to him. I noticed at times he tried to put his arm around the man and missed and his hand slipped down the man's back. As he was motioning with his hand he tipped over his drink a couple of times and the person's drink who was sitting next to him. I don't know whether the people became embarrassed about him being there, but they got up and left about ten p.m." He noted that Brash consumed a part of a drink that was in front of him.

After the couple left, Brash walked to where a woman was seated at the end of the bar. On the way he staggered and hit the wall. He had difficulty finding the stool and sitting next to the woman. He heard the woman say to Brash, "'Get away from me. Don't bother me.'" Thereupon he walked towards the front of the bar, about one-half the distance he walked previously. He staggered and held on to the bar. He picked up a package and fumbled for the change on the bar. He then walked as far as the front door, a distance of about twenty-five feet. He staggered on his way to the door. As he was going through the door, Miss Hogan reminded Brash not to forget his coat which was at the pool table. He turned around and staggered again. As he was going around the bar he stumbled and grabbed hold of the bar. He staggered near the pool table and had difficulty putting on his coat. He returned to the bar and requested Miss Hogan to serve him a drink. She replied, "'No, you had enough,'" and "'It is my business to know what your capacity is because that is what the ABC book says,'" and walked away to serve other patrons. At this point he was talking loudly, challenging patrons to shoot pool. The challenge was ignored. His face was flushed, he couldn't be understood clearly because his speech was thick and slurred.

When Miss Hogan came near him again he asked for another drink. This time she served him a drink of whiskey and a glass of water and accepted payment therefor.

Brash consumed a portion of the whiskey, whereupon Agent S came up to him and seized the remaining portion thereof and identified himself to Brash and Miss Hogan. The agent then held Brash's arm and assisted him in walking to the pool table for questioning. Brash sat down at the pool table because he had trouble standing.

Upon questioning, Miss Hogan admitted informing Brash that he had enough and that it was her business to know his capacity. Further, she admitted that Brash appeared to be intoxicated.

The chemical analysis of the unconsumed portion of the drink seized by Agent S indicated that it was an alcoholic beverage.

Under vigorous cross examination, the testimony of Agent S did not vary in the material and major aspects of the factual question involved in the instant proceeding. The witness did admit that Brash was holding a package in one hand while he was attempting to put his coat on.

Agent B testified that he and Agents O and S arrived at the vicinity of the licensed premises on March 13, 1965, at about 9:30 p.m. He and Agent O entered therein immediately and sat at

the right-hand side of the bar about midway between the front and rear. Miss Margaret Hogan was tending bar. He sat on a stool next to Harold Brash. He noted Brash was talking in a loud voice to a couple seated next to him, bragging about his prowess at shooting pool. His speech was thick and slurred. He put his arm around the male patron, his face six inches from the male's face. He spilled a part of his drink and a part of the male's drink. He turned to the agent at one time and babbled incoherently. It was the agent's opinion that Brash was intoxicated. The couple left at about 10 p.m. Brash babbled along and appeared to be talking to himself.

Brash got off his seat to talk to a female patron seated at the end of the bar about twenty-five feet away. He walked in an erratic and shuffling manner. He had difficulty in seating himself on the chair next to the female. In returning he bumped against chairs. He had difficulty in picking up change from the top of the bar. He picked up a package and walked to the front entrance. He shuffled and his head bobbed and he was weaving. When he arrived at the door, Miss Hogan called to him not to forget his coat. She reminded him that the coat was near the pool table. In walking to the pool table he almost fell down and had to hold on to the bar. He still held a package in his hand and had difficulty in putting on his coat. He walked back to the bar and, when he requested Miss Hogan to give him a drink, she responded, "'You had enough.... I am supposed to know your capacity. The ABC book says it.'" Miss Hogan then walked away. When she returned he again said, "'Give me a drink.'" Thereupon Miss Hogan poured him a whiskey drink and a glass of water and took payment therefor. At this point Agent S went over and confiscated the drink.

In response to the question, "Did you hear any of the agents ask her anything with respect to the man's condition of sobriety or intoxication", Miss Hogan admitted that he appeared to be intoxicated.

Cross examination proved to be mainly corroborative of the witness' testimony on direct examination.

It was stipulated that the testimony of Agent O on direct examination would be the same as Agent B's on direct examination, leaving licensee's attorney with full right of cross examination.

In rebuttal the licensee called as the first witness Miss Margaret Schimmelbusch. She stated that she entered the licensed premises on March 13, 1965, at about 8:30 or 9 p.m., accompanied by a Maxine Reilly, and sat at the bar when she arrived. Brash was seated at the bar across from where the witness sat. She remained in the premises until after the Division agents departed. When she arrived she noted that Brash (whom she had seen in the licensed premises on prior occasions) had a glass of beer in front of him. She also took note that Brash had a "shot" during the course of shooting pool. It was her opinion that Brash was not intoxicated when he left the premises. He did not stagger, nor was he exceptionally loud or boisterous. He has a naturally husky voice. His face was not flushed, he has a naturally ruddy complexion. She did not see him spill any drinks. She heard Miss Hogan say that heshould go home and eat his steak.

On cross examination she stated that she did not hear Miss Hogan call him back for his coat, nor did she see him walk towards the pool table to get his coat or try it on.

Harold Brash testified that he resided in the immediate neighborhood of the tavern. He is engaged in electro-plating six days a week. On Saturday, March 13, 1965, he went to work as usual in the morning and returned home after work at about 5:30 p.m. He had a sandwich and then went to the licensed premises between 7:30 and 8 p.m. that evening. He drank no alcoholic beverages that day until he entered the licensed premises. His work necessitates that he come in contact with various acids which he sometimes breathes in, it sometimes affects the joints in his body and his gait. He explained, "My right leg, my knee has been broken, and I have a little arthritis or some such thing in that knee. I may have a limp or something. I don't notice it so much but it does hurt." His eyes could be blood-shot, and possibly his face could be flushed. This Hearer noted that the witness' fingers had some brownish tint which appeared to be nicotine markings, and some light scarring on his hands and fingers. There did not appear to be any swelling or deformity except for a slight deformity of the right hand. He explained that, until he limbers his hands, there is loss of gripping power.

When he arrived at the licensed premises Jean Sabathe was tending bar. He had a beer and played a game of pool. He "had 3, 2 or 3 glasses of beer and 2 shots of whiskey, whatever the amount is I don't know." The third shot of whiskey was the one the agent took away from him. He didn't recall whether or not he had any of that drink. He played several games of pool, including one between 9:30 and 10 p.m. which he won quite handily. He was talking to a couple named Bert and Helen. Bert was a little hard of hearing, and he might have raised his voice in talking with him. The juke box was playing almost all of the time. He did not stumble, stagger, kick stools or weave. He denied trying to put his hand on Bert's back and missing it completely. He didn't recall having any difficulty in putting on his coat. The package was a brown paper bag which contained a steak and french fries and was not tied with a string. He did not stagger or weave in going over to the pool table with the agents after one of them took his drink. He walked there unassisted. Further, he denied he was intoxicated. He insisted he had full control of his faculties -- mind, body and extremities. He denied that Miss Hogan refused to serve him because he had enough to drink. Miss Hogan did request him to go home before the steak got cold. Concerning the female seated at the end of the bar, she had been his girl friend and, at the time, they weren't on friendly terms. She merely refused his overture to make peace.

On cross examination Brash admitted having been intoxicated prior to March 13, 1965. He stated he was sober between 9:30 and 10:30 on the night of March 13, 1965. He was a patron of the licensed premises, "Maybe once a week; maybe not that often." In response to the question, "Mr. Brash, I am going to ask you this question: Since you stated on direct examination that you did not stumble, did not stagger, that you did not bump into anything, then on that particular date I would take it from that you were not suffering any ill or adverse effects from you employment. Is that true?" Mr. Brash answered as follows: "I was so. I was suffering no more than I ever do, just normal, just normally do." He admitted having four beers and two and one-half glasses of whiskey between 7:30 p.m. and 9:30 p.m. He denied that Miss Hogan ever called him back into the premises after starting to leave. He did not recall walking towards the door until he actually departed from the premises. He put his coat on after Detective Burke spoke with him. (Detective Burke had

responded to a telephone call made by one of the agents to the Asbury Park Police Department after Brash refused to identify himself to the agents.) He stated that Miss Hogan did not refuse to serve him. She did suggest that he should leave because his steak was going to be ruined. Finally he stated that he left shortly after Detective Burke departed from the premises. At this time he put on his coat and Miss Hogan brought in the steak from the kitchen and handed it to the witness across the bar.

It was stipulated that the testimony of Maxine Reilly (who was seated with Margaret Schimmelbusch in the licensed premises) would be the same as given by Miss Schimmelbusch. The witness added that Brash did not try to seat himself next to his lady friend at the end of the bar because the seat was occupied by a female patron.

Jean Sabathe testified that he was, and still is, employed as a bartender by the licensee. On March 13, 1965, Brash entered the licensed premises at about 7:40 p.m. The witness served him one six-ounce glass of beer before he went off duty at 8 p.m. He remained in the licensed premises until approximately 9:20 p.m. During this time Brash appeared to be acting normal, he did not act peculiarly, he did not stagger and did not talk any louder than usual. The juke box was playing almost continuously.

On cross examination the witness stated that it was his opinion that Brash was not intoxicated.

Marilyn Trygar testified that she was a shareholder, officer and director of the licensee corporation and tended bar and performed other duties at the licensed premises. She entered the licensed premises on March 13, 1965, at approximately 9 p.m. and sat at the end of the bar. When she came in Brash was playing pool. She observed Brash walking, he did not stagger or weave; he did not appear to be intoxicated.

Miss Margaret Hogan testified that she was a shareholder, officer and director of the licensee corporation and that, when she arrived at the licensed premises on Saturday, March 13, 1965, at about 7:45 p.m., Jean Sabathe was tending bar and Brash was seated at the bar with a glass of beer in front of him. At Brash's request she prepared a steak for him and wrapped it in a brown paper bag with no string tied around it. Brash played pool and lingered in the licensed premises. The steak was returned to the oven twice to prevent it from getting cold. She urged Brash to leave numerous times that night because his former girl friend came into the licensed premises and she did not want any commotion on a Saturday night. Further, she did not want the steak to get cold. She left the steak at the bar where Brash had his last drink when the agent took him to the area of the pool table for questioning.

Miss Hogan served Brash two glasses of beer and three drinks of whiskey, including the drink that was taken by the agent. It was her opinion that Brash was not intoxicated either actually or apparently. She understood him; his speech was not slurred or thick, he did not stagger. He did not spill any drinks. She denied refusing him a drink and stating that he should leave because she is supposed to know his capacity because the ABC regulations state so. She denied refusing to serve him a drink because he had too much to drink. Bert was hard of hearing, he had to be spoken to in a louder than normal tone. She denied admitting to the agents that she shouldn't have served Brash because he was intoxicated. As to the coat incident, the testimony of Miss Hogan on direct examination was as follows:

"Q Did you see when Mr. Brash was leaving? When this incident occurred and they took Mr. Brash in to the pool table did you see Mr. Brash putting his coat on prior or after?
A When he was leaving?
Q Yes, his jacket or coat, whatever it was.
A When he put his coat on he put his coat on. He was leaving, I told him his coat was over near the pool table. It was on the right-hand side of the bar.
Q Had it been moved?
A Yes.
Q Who moved it?
A He moved it himself. It was over completely around the bar and in back. There are some hooks there. He hung it there.
Q In the room where the pool table is?
A Right. That coat too, he had the coat on two or three times off and on. When he was leaving he came over, he had put his coat on, he had the steak in his hand, he had his coat on, and he had taken it off again.
Q Then he asked for the drink. Is this your best recollection of it?
A That is my best recollection of that."

It is apparent that this proceeding presents a purely factual question. Hence I have related the testimony adduced in behalf of the Division and adduced in behalf of the licensee which is essential and necessary to resolve the factual question herein presented.

It is a basic principle of law that disciplinary proceedings against liquor licensees are civil in nature and not criminal, and require proof by a preponderance of the believable evidence. In re Schneider, 12 N.J. Super. 449 (App.Div. 1951); 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).

Since this is strictly a factual situation, the credibility of witnesses must be weighed. Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App.Div. 1961).

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

Although all of the witnesses testifying in behalf of the licensee (including Brash) denied that Brash was actually or apparently intoxicated, the testimony of the agents clearly established the observable manifestations of intoxication; their description of Brash's speech, gait and deportment leads inevitably to the finding of apparent intoxication. I am imperatively persuaded that their version had a substantial ring of truth with respect to Brash's condition. Brash admitted to drinking three beers and two shots in a period of approximately three hours. As was stated in Freud v. Davis, supra, experience indicates that such witnesses do not exaggerate their estimates.

A fair evaluation of the evidence clearly preponderates in favor of a finding of guilt, and I so recommend.

The licensee has no prior adjudicated record of suspension of license. I further recommend that the license be suspended for twenty days. Re Ed's Tavern, Bulletin 1627, Item 9.

Conclusions and Order

No exceptions to the Hearer's report were filed within the time limited by Rule 6 of State Regulation No. 16.

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 his recommendations.

Accordingly, it is, on this 5th day of October 1965,

ORDERED that Plenary Retail Consumption License C-1, issued by the City Council of the City of Asbury Park to Paul's Shore Liquors, Inc., t/a Chez'l Cocktail Lounge, for premises 429-33 Cookman Avenue, Asbury Park, be and the same is hereby suspended for twenty (20) days, commencing at 3 a.m. Tuesday, October 12, 1965, and terminating at 3 a.m. Monday, November 1, 1965.

JOSEPH P. LORDI,
DIRECTOR

4. DISQUALIFICATION REMOVAL PROCEEDINGS - LOTTERY, BOOKMAKING AND POOL SELLING - ORDER REMOVING DISQUALIFICATION - DEFERRED EFFECTIVE DATE.

In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to R.S. 33:1-31.2	)	CONCLUSIONS AND ORDER
Case No. 1906	)	

BY THE DIRECTOR:

Petitioner's criminal record discloses that between 1934 and 1953 he was convicted in another state eight times for violation of its gaming laws (setting up and maintaining an illegal lottery, bookmaking and pool selling), as a result thereof he was committed to a county jail on four occasions to serve terms ranging between thirty days and one year, placed on probation on three occasions and fined various sums between $50.00 and $500.00.

It further appears that petitioner was convicted in a magistrate's court on February 25, 1937 for illegal lottery and disorderly conduct (fined $250.00) and on June 20, 1955 for a motor vehicle violation (fined $78.00). Since the crimes of which petitioner was convicted as aforesaid between 1934 and 1953 involve the element of moral turpitude, he was thereby rendered ineligible to be engaged in the alcoholic beverage industry in this State R.S. 33:1-25, 26.

Petitioner's convictions in the magistrate's court are not convictions of crime.

Records of this Division disclose that the petitioner was employed in licensed premises between April and December 1964; that on April 14, 1965 he filed an application with the Division to remove his disqualification; that on the same day he was notified that a hearing on his application would be held on May 6, 1965; that he failed to appear at such hearing; that on May 12, 1965 petitioner was advised by certified mail that, by reason of his failure to appear for the hearing, his application had been dismissed; that, in the opinion of the Director, he had been convicted of crimes involving moral turpitude and was precluded from engaging in the alcoholic beverage industry in this State until his disqualification had been removed, and that any licensee who employed him subjected himself to a suspension or revocation of his license; that between May and September, 1965 petitioner was employed in another licensed premises and that upon the request of petitioner a hearing on his application was rescheduled for September 29, 1965.

At the hearing held herein, petitioner (51 years old) verified aforesaid facts and further testified that he is married and living with his wife and four children; that for the past four years he has lived in New Jersey and prior thereto in a neighboring state for fifteen years; that between 1955 and 1964 he operated a luncheonette (5 years) and was employed as a manager of a coffee shop (4 years); that he failed to appear for his hearing on May 6, 1965 because he did not receive notice thereof; that he, however, received aforesaid certified mail and that he, nevertheless, accepted employment thereafter in licensed premises as hereinabove outlined because he had to earn a living.

Petitioner further testified that he is asking for the removal of his disqualification to be free to engage in the alcoholic beverage industry in this State and that, ever since his last conviction in 1953, he has not been convicted of any crime.

Petitioner produced three character witnesses (a municipal councilman, an assistant director of Public Safety, and a licensed insurance broker) who testified that they have known petitioner for more than five years last past and that, in their opinion, he is now an honest, law-abiding person with a good reputation.

The Police Department of the municipality wherein the petitioner resides reports that there are no complaints or investigations presently pending against petitioner.

Although more than five years have elapsed since petitioner's last conviction, I would ordinarily be inclined to dismiss the petition because petitioner, despite the aforesaid letter of May 12, 1965 advising him of his ineligibility, continued to be associated with the alcoholic beverage industry in this State. I am, however, favorably influenced by the testimony of his character witnesses, his present attitude and the fact that he has not been convicted of any crime in the past twelve years.

Considering all of the aforesaid facts and circumstances, I shall grant petitioner's application but shall withhold relief until six months after September 29, 1965 (the date of the within hearing). Re Case No. 1701, Bulletin 1470, Item 7.

Accordingly, it is, on this 18th day of October 1965,

ORDERED that petitioner's statutory disqualification because of the convictions described herein be and the same is hereby removed, in accordance with the provisions of R.S. 33:1-31.2, effective March 29, 1966 provided, however, that petitioner shall not in the interim become associated with the alcoholic beverage industry in this State in any manner whatsoever.

JOSEPH P. LORDI

5. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - SALE OF DRINKS FOR OFF-PREMISES CONSUMPTION - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
BERNADINE & EDWARD FURMAN t/a OCEAN FRONT BAR 1056-1058 Ocean Avenue Sea Bright, N.J.	) CONCLUSIONS AND ORDER
Holders of Plenary Retail Consumption License C-2, issued by the Mayor and Council of the Borough of Sea Bright.	)

Howard Isherwood, Esq., Attorney for Licensees.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensees plead non vult to charges alleging that on Sunday, September 26, 1965, they (1) sold two 6-packs of beer for off-premises consumption, in violation of Rule 1 of State Regulation No. 38, and (2) sold a mixed drink of an alcoholic beverage in a paper cup for consumption off the licensed premises, in violation of R.S. 33:1-2.

Licensees have a previous record of a "suspended sentence" by the municipal issuing authority on July 21, 1960, for sale of alcoholic beverages on credit in violation of local regulation.

The prior record of dissimilar violation disregarded because occurring more than five years ago, the license will be suspended on the first charge for fifteen days (Re Sandford, Bulletin 1639, Item 7) and on the second charge for five days (Re DeWald, Bulletin 1533, Item 11) or a total of twenty days, with remission of five days for the plea entered, leaving a net suspension of fifteen days.

Accordingly, it is, on this 18th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-2, issued by the Mayor and Council of the Borough of Sea Bright to Bernadine and Edward Furman, t/a Ocean Front Bar, for premises 1056-1058 Ocean Avenue, Sea Bright, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Monday, October 25, 1965, and terminating at 2:00 a.m. Tuesday, November 9, 1965.

Joseph H. Lordi
Director