STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
P.O. BOX 2039
U.S. ROUTE 1-9 (SOUTHBOUND), NEWARK, N. J. 07114

BULLETIN 2287 June 20, 1978

TABLE OF CONTENTS

ITEM

1. COURT DECISIONS - C. SCHMIDT & SONS, INC., and C. SCHMIDT & SONS, INC. OF NEW JERSEY and WILLIAM H. P., INC. of N. J. v. DIRECTOR OF DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

2. APPELLATE DECISIONS - M.J.S., INC. v. EDGEWATER.

3. DISCIPLINARY PROCEEDINGS (Seaside Heights) - POSSESSION AND SALE OF CONTROLLED DANGEROUS SUBSTANCES ON LICENSED PREMISES - PRIOR SIMILAR AND DISSIMILAR VIOLATIONS - LICENSE SUSPENDED FOR 65 DAYS.

4. APPELLATE DECISIONS - D & R TIERNEY'S TAVERN CORP. v. JERSEY CITY.

5. STATE LICENSES - NEW APPLICATIONS FILED.

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
P.O. BOX 2039
U.S. ROUTE 1-9 (SOUTHBOUND), NEWARK, N. J. 07114

BULLETIN 2287 June 20, 1978

1. COURT DECISIONS - C. SCHMIDT & SONS, INC., and C. SCHMIDT & SONS, INC. OF NEW JERSEY and WILLIAM H. P., INC. OF N. J. v. DIRECTOR OF DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST

C. SCHMIDT & SONS, INC., and C. SCHMIDT & SONS, INC. OF NEW JERSEY — Docket No. A-442-76

---

IN THE MATTER OF THE APPLICATION OF

WILLIAM H. P., INC. OF N. J. — Docket No. A-2484-76

---

Argued April 3, 1978 - Decided April 18, 1978.

Before Judges Michels, Pressler and Bilder.

On appeal from Division of Alcoholic Beverage Control.

Mr. Arnold M. Mellk argued the cause for all appellants (Messrs. Greenberg & Mellk, attorneys).

Mr. Leonard A. Peduto, Jr., Deputy Attorney General, argued the cause for the respondent Division of Alcoholic Beverage Control (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. William F. Hyland, former Attorney General of New Jersey, and Ms. Erminie L. Conley, Deputy Attorney General, of counsel).

The opinion of the court was delivered by

PRESSLER, J.A.D.

(Appeal from the Director's decision in Re C. Schmidt & Sons, Inc., and C. Schmidt & Sons, Inc. of New Jersey, Bulletin 2259, Item 3 and William H. P., Inc. of N. J., Bulletin 2259, Item 4. Director Affirmed in part, and reversed and remanded in part. Opinion not approved for publication by Court Committee on Opinions).

2. APPELLATE DECISIONS - M.J.S., INC. v. EDGEWATER.

| | |
|---|---|
| M.J.S., Inc., t/a Xandars,<br><br>Appellant,<br><br>v.<br><br>Borough Council of the Borough of Edgewater,<br><br>Respondent. | ON APPEAL<br><br>CONCLUSIONS AND ORDER |

Stanley S. Traymore, Esq., Attorney for Appellant.
Astranig Aslanian, Jr., 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 respondent, Borough Council of the Borough of Edgewater, (hereinafter Council) which, on June 21, 1977, adopted a Resolution renewing appellant's Plenary Retail Consumption License, C-7 for premises 1416 River Road, Edgewater, with the following special conditions attached thereto:

A. Live music and entertainment be limited to Friday and Saturday Evenings.

B. That the Licensee shall notify the Police Chief in advance of having live entertainment or music on the above evenings.

C. All live music must cease at 1:30 A.M.

In its Petition of Appeal, appellant contends that the imposition of these special conditions are arbitrary and unreasonable. The Council in its Answer denies this contention and avers that the conditions were necessary to prevent the licensed premises from becoming a nuisance.

Upon the filing of the within appeal, the Director, by Order dated July 29, 1977, stayed the impositions of the special conditions pending the determination of the appeal.

A <u>de novo</u> appeal was held in this Division, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses, pursuant to Rule 6 of State Regulation No. 15.

Herbert J. Gold testified for appellant as its manager and the son of the owner of all of the capital stock of the corporate licensee.

He described how neighbors had objected before the Mayor and Council about the noisy departure of patrons from midnight to three a.m. The banging of car doors was particularly disturbing to them, but no charges were ever made against the licensed premises. He admitted that there was an occasion when a back door of the premises was accidently left open with the resultant effect of noise excaping from the interior. There were a few isolated instances when the patrons had been troublesome on departure, but he insisted that the management had kept noise and disturbance to a minimal level.

Gold calculated that, the interior size of the establishment approximates thirty-five by eighty feet, the peak quantity of patrons reached one hundred and sixty persons, and the age of the clientele is nineteen to thirty-two years. He admitted that the most annoying condition attached to the license was the prohibition against live music and entertainment on Wednesdays, which had been a popular gathering night for his patrons.

The Council produced the testimony of its Clerk, Charles Susskind, who related that he had received numerous complaints from neighbors in the area surrounding appellant's premises. He explained that, after midnight, the Borough has only a three-man police force consisting of a sergeant and two policemen in patrol cars. He estimated that ninety-five percent of the calls concerning the appellant's premises occurred on evenings when live entertainment was being provided. The appellant's premises is the only establishment with live entertainment located in a residential area in the Borough.

One of the nearby residents, Fritz Latowsky, testified that his complaints are typical of those of the neighbors; i.e., his privacy is invaded; the noise is excessive, particularly when patrons leave the premises; patrons are boisterous and profane; patron drinking continues outside; his property and garden are being destroyed; and patrons use the street on which he lives as a "public bathroom".

Latowsky further asserted that the particular difficulties he described occur solely on the nights when live music is provided by appellant. He and his neighbors realize that on Friday and Saturday evenings there must be latitude extended to appellant to accomodate its patronage, but a continuation of such disturbances during the week, when sleep is necessary, is vigorously asserted as objectionable.

It was stipulated between counsel that the testimony of Borough councilmen and two other neighbors produced by the Council would be cumulative and supportive of the testimony of Latowsky.

The sole and central issue in this matter is: Are the conditions imposed by the Board reasonable and necessary? Appellant insists that, since it withdrew objections to all of the conditions except for the ban against live music and entertainment on Wednesdays, such restriction is unreasonable.

The Alcoholic Beverage Law (N.J.S.A. 33:1-32) permits a local issuing authority to impose any special condition to any license deemed necessary and proper to accomplish the objects of the law. Where such conditions are imposed, the Director determines on appeal, whether these special conditions were arbitrary unreasonable or mistaken. Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423, 426 (App. Div. 1958); Essnjay, Inc. v. Perth Amboy, Bulletin 2222, Item 1.

As long as conditions imposed relate to the subject license (Balaniz v. East Newark, Bulletin 156, Item 1); are made concurrent with the issuance on renewal of the license (Alanwood Holding Co. v. Atlantic City, et als, Bulletin 1963, Item 1); and are reasonably required to serve the best interests of the community (Borko v. Mansfield Twp., Bulletin 1894, Item 3), the imposition of such conditions will be affirmed by the Director. A's Inn, Inc. v. Deal, Bulletin 2139, Item 3.

It has been consistently held in this Division that, a licensee is required to maintain order both inside and outside of the licensed premises. Cf. Bd. of Commissioner's, Bayonne v. B & L Tavern, Inc., 42 N.J. 131 (1964); Kaplan and Buzak v. Englewood, Bulletin 1745 Item 1; R.O.P.E. Inc. v. Fort Lee, Bulletin 1966, Item 1.

Appellant alleges that the imposition of such special condition; i.e., the prohibition against live entertainment and music on Wednesday nights, would result in an economic hardship. An issuing authority is not obliged to consider whether the financial interest of any licensee will be promoted or harmed in its determination whether to grant a liquor license application where the public interest may be adversely affected. See Paulison Liquors, Inc. v. Clifton, Bulletin 2162 Item 3. and cases cited therein. It is a well-established principle that in any conflict between a licensee's financial concern and the public interest, the latter must prevail. Smith v. Bosco, 66 N.J. Super. 165 (App. Div. 1961).

The proofs amply substantiate that the large numbers of patrons particularly young people, entering and leaving a popular establishment caused numerous problems to the police and the surrounding neighbors.

Appellant has no legal right to be secure in practicing a policy designed to maximize its income from its business. To the contrary, as the court has held in Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super 246, 255, (App. Div. 1953): "Restrictive liquor regulations may, and oftimes do, result in individual hardships. However, where larger social interests justify a restrictive policy, private individual interests must give way."

The Director's function on appeal is not to substitute his personal judgment for that of the municipal issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his own personal view. Fanwood v. Rocco, 59 N.J. Super. 306 (App. Div.), aff'd 33 N.J. 404 (1960). Cf. the following lanquage in Lyons Farms Tavern v. Mun. Bd. of Alcoholic Beverage, Newark, 55 N.J. 292, 309 (1970):

> "Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue in these cases: Did the decision of the local board represent a reasonable exercise of discretion on the basis of evidence presented? If it did that ends the matter of review both by the Director and by the courts."

It is clear from all of the evidence presented that, the Council made its judgment in the best interest of the public without a drastic termination of the license privilege.

I find that appellant has not met its burden of establishing that the action complained of was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15. Consequently, I recommend that the action of the Council be affirmed, the order staying the special conditions be vacated, and the appeal herein be dismissed.

## Conclusions and Order

Written Exceptions to the Hearer's Report were filed by appellant pursuant to Rule 14 of State Regulation No. 15.

In its Exceptions, the appellant attributes error to two findings of fact by the Hearer: (1) that appellant has the only licensed premises with live entertainment in a residential area, and (2) that the local police were summoned to respond to problems caused by patrons entering or leaving appellant's licensed premises.

The Borough Clerk of the Borough of Edgewater testified, in essence, to both of the aforesaid facts at the hearing in this Division. He noted that the only other establishment in the Borough of Edgewater with live entertainment was a licensed facility on a boat anchored in the Hudson River, located at least 500 to 700 feet from the nearest house.

The clerk also recounted various complaints he received which resulted in fire and police calls and inspections, plus numerous parking summons issued near appellant's premises. Thus, I find these exceptions to be lacking in merit. In addition, the record, in its entirety, amply supports the findings and recommendations of the Hearer.

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

Accordingly, it is, on this 3rd day of February, 1978,

ORDERED that the action of the Borough Council of the Borough of Edgewater be and the same is hereby affirmed, and the appeal herein be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - POSSESSION AND SALE OF CONTROLLED DANGEROUS SUBSTANCES ON LICENSED PREMISES - PRIOR SIMILAR AND DISSIMILAR VIOLATIONS - LICENSE SUSPENDED FOR 65 DAYS.

| | |
|---|---|
| In the Matter of Disciplinary Proceedings against<br><br>R & C Willis, Inc.<br>t/a The Rusty Nail<br>407-09 Boulevard<br>Seaside Heights, N.J. 08751<br><br>Holder of Plenary Retail Consumption License C-17, issued by the Mayor and Borough Council of the Borough of Seaside Heights. | CONCLUSIONS<br>and<br>ORDER |

Sim, Sinn, Gunning, Serpentelli and Fitzsimmons, Esqs., by Steven A. Pardes, Esq., Attorneys for Licensee.
Leonard A. Peduto, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

The licensee pleaded "not guilty" to the following charges:

1. On October 28, 1976, you allowed, permitted and suffered in and upon your licensed premises unlawful activity pertaining to controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substance Act (N.J.S.A. 24:21-1 et seq.); viz., in that on the aforesaid date, you, through Robert Willis, a person employed on your licensed premises, participated in, allowed, permitted and suffered the possession and distribution of marijuana in and upon your licensed premises; in violation of Rule 4 of State Regulation No. 20.

2. On October 28, 1976, you allowed, permitted and suffered in and upon your licensed premises unlawful activity pertaining to controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substance Act (N.J.S.A. 24:21-1 et seq.); viz., in that on the aforesaid date, you, through

> Robert Willis, a person employed on your licensed premises, made offers to and arrangements with customers or patrons on your licensed premises to obtain and procure for and/or sell to these customers or patrons marijuana in and upon your licensed premises; in violation of Rule 4 of State Regulation No. 20.

Thomas Sandlin of the Lakewood Police Department, assigned to work under the direction of the Ocean County Narcotics Bureau as an undercover agent, testified on behalf of the Division. He was assigned to the Rusty Nail, which was the "target" of his investigation. He was to frequent the bar, become familiar with everyone and attempt to purchase narcotics or other controlled dangerous substances. He became acquainted with Robert Edward Willis, a bartender and son of the stockholders of subject corporate licensee, by talking to him as he tended bar and shooting pool with him when he was not working.

On October 28, 1976, Sandlin entered the tavern and observed Willis and another person, then referred to merely as Tom, later identified as Thomas La Torre, engaged in conversation. A plastic bag containing what appeared to be marijuana was on the bar counter, in full view. Sandlin querried Willis and was told that it was a quarter pound of Mexican marijuana and was for sale for $75.00.

Sandlin expressed a desire to purchase a quarter pound of Columbian marijuana instead. Willis stated that he could obtain it at a cost of $140.00, whereupon Sandlin took the requested amount from his pocket and gave it to Willis, who advised him to check back with him later on that night.

Sandlin remained in the premises, and after a game of pool with Tom, he inquired whether or not Willis wanted to sell him the bag of Mexican marijuana. After a brief conversation with Tom, Willis threw the bag to Sandlin, who then paid him $75.00 and left the tavern.

As directed, Sandlin returned later in the evening but did not obtain the Columbian marijuana. He returned the following evening (October 29) as well, and was told that he (Willis) could obtain a quarter pound of Columbian "Gold" (a higher grade Columbian marijuana) for $160.00. Sandlin paid the additional $20.00 and agreed to return on Saturday. After several contacts at his home and at the tavern, delivery was made by Willis to Sandlin on November 3, 1976 at Willis' residence in Bricktown.

Shantilal Petal, a Senior Forensic Chemist in the employ of the Ocean County Sheriff's Department, testified that the two samples turned over to him for analysis did contain marijuana. The Laboratory reports were admitted in evidence.

Thomas La Torre testified on behalf of the licensee that he was a school friend of Robert Willis and was present at the tavern the day the sale is alleged to have been made. He denied seeing a bag containing what might be marijuana on the counter between Willis and himself. He denied that any money (other than the cost of a drink) passed between Willis and Sandlin. He had no recollection of playing pool with Sandlin. He does not recall Willis throwing anything over the bar to Sandlin. Lastly, he admits that there was a "stranger" in the tavern that day, but could not identify Sandlin as that person.

Richard Willis, who was incarcerated in the Ocean County Jail at the time of the hearing, having pleaded guilty to distributing marijuana, testified upon his release.

His testimony, in essence, is a denial of the various substantive aspects testified to by Agent Sandlin.

In addition, he testified about a prior incident which occurred at the tavern, also involving marijuana. A customer lit a marijuana "joint", which Willis seized at once and destroyed, and ordered the customer out of the establishment.

Willis also admitted to having pleaded guilty in Ocean County Court to one charge of selling marijuana to Sandlin, and to a second charge of selling hashish to Sandlin. Both sales are alleged to have been consummated at Willis' home.

Willis stressed from the stand, and later licensee's attorney reitereated in his summation, that he (Willis) would do nothing that would in any way jeopardize his parent's liquor license, as it was the family's sole livelihood and would, upon their retirement, become his, in the normal course.

In adjudicating matters of this kind, we are guided by the firmly 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).

In appraising the factual picture presented and having had the opportunity to observe the demeanor of the witnesses, as they testified, their credibility has been assessed. Testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The general rule in these cases is that the finding must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I have had the opportunity to observe the demeanor of the witnesses as they testitied and have been able to evaluate and assess such testimony. I am persuaded that the testimony of Narcotics Agent Sandlin is both credible and forthright.

On the other hand, I find the testimony of Robert Willis to be incredible. His and his family's personal and financial interest in the outcome is obvious. Inasmuch as licensee relies upon Willis' statement concerning the action claimed to have been taken by him at the time of the prior marijuana incident that transpired in the subject premises, I quote the Hearer's Report which was adopted by the Director in his conclusions and order in a prior Division proceeding. Re R & C Willis, Inc., t/a The Rusty Nail, Bulletin 2231, Item 2.

> Robert Willis would have us believe that, although Keith was a regular patron whom he knew and who presumably was aware or should have been aware of the repugnance to marijuana smoking of the licensee, offered a smoke to Willis. Willis asserts that such offer incensed him to the extent that he took Keith's marijuana cigarette away from him and ordered him out of the premises. He threw the recently lit marijuana cigarette in the ash tray and did not notice whether Keith actually exited from the premises.
>
> Both agents explained that Keith urged that the "joint" be passed to Willis; at no time did they hear Keith being ordered to leave the premises. Willis admitted that the alleged incident with Keith took place in close proximity to the agents.
>
> It is illogical that Willis would have been so affirmative in his militancy against marijuana smoking, yet have disregarded the apparently obvious sharing of such smoking by the agents and the other patrons directly in front of him. Little credence can be attached to such self-serving declarations by Willis.

I am also mindful, in evaluating Willis' credibility, of his recent guilty plea to the charges of sale from his home, of marijuana and hashish to Sandlin.

I am unimpressed by the testimony of Thomas La Torre, who was in the tavern with Willis, and who was the person in front of whom the plastic package of marijuana is alleged to

have been openly reposing upon the bar, when the agent entered on October 28, 1976.

Most of the testimony of Thomas La Torre was to the effect that "I did not see it occur", not that it did not, in fact, occur. On the other hand, the testimony of the agent was of a positive nature. The fact that a witness did not see an occurrence does not mean that it did not take place. The positive testimony of the agent whose express purpose in being in the licensed premises was to make observations of and, if possible, purchase narcotics or controlled dangerous substances, has a much stronger impact.

In State v. Jones, 105 N.J. Super. 493, 503-504 (Essex Cty. Ct. 1969), the court in commenting upon such testimony cites 4 Jones on Evidence (5th Ed. 1958) Sec. 985, pp. 1856-1857, as follows:

> Testimony is affirmative or positive if it consists of statements as to what witness has heard or seen; it is negative if the witness states that he did not hear or did not see the phenomenon in question. This being the distinction between testimony which is affirmative and testimony which is negative, it is an established rule that, where the one form of statement is opposed to the other, the affirmative testimony must be deemed to outweigh that which is merely negative.
>
> In other words, "the testimony of a credible witness, that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place." The reason for this rule is that the witness who testifies to a negative may have forgotten which actually occurred while it is impossible to remember what never existed.
>
> Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively.

See also, Honey v. Brown, 22 N.J. 433, 438 (1956); Rapp v. Public Service Coord. Transport, Inc., 15 N.J. Super. 305, 311 (App. Div. 1951), aff'd 9 N.J. 11 (1952).

I conclude that a fair evaluation of the evidence and the legal principles applicable thereto, clearly and reasonably

preponderates in favor of a finding of guilt on the said charges for the reasons hereinabove set forth. I, therefore, recommend that the licensee be adjudged "guilty" of the said charges. However, for purposes of ascertaining and imposing penalty, I find the charges merge.

Precedent penalty for sale of marijuana by an employee is thirty days, which I recommend, to which should be added an additional thirty days by reason of a similar violation which occurred within the past two years, and an additional five days by reason of a prior dissimilar violation which occurred within the past five years. In sum, I recommend a suspension of the said license for sixty-five (65) days.

## Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the licensee, and written answers thereto were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In its Exceptions, the licensee asserts that, in three instances, the Hearer's analysis of credibility of witnesses was erroneous or improper.

I find ample support in the record for the Hearer's negative evaluation of the testimony of a witness for the licensee, Thomas Latorre. This witness was not in the licensed premises for 15-20 minutes; could not identify the Lakewood police officer, although both were present together for approximately one hour; did not recall playing a game of pool with the police officer, although both the officer and Willis testified to same; could not remember if Willis served a drink to the officer; and in general, exhibited a total lack of competent recollection of the occurrences at the licensed premises on October 28, 1976. The application of the principles of State v. Jones, 105 N.J. Super 493 (Essex Cty. Ct. 1969) by the Hearer was appropriate.

The interjection of facts and conclusions of a prior disciplinary proceeding against the subject licensee in this matter did not constitute an abdication by the Hearer of his fact finding functions, as asserted by the licensee in its Exceptions. This testimony is of little weight in the ultimate determination on the charges, with sufficient evidence clearly apparent on the record as a whole, to support the recommended findings.

This is indicated by the fact that the testimony concerning the prior disciplinary proceeding in this Division was limited to specific areas of examination of the same witness in both matters, and solely for rebuttal. The obvious financial interest of the licensee's witness, Robert Willis, and his pleas of guilty to charges arising from sales of controlled dangerous substances to the Lakewood police officer were important and relevant factors considered by the Hearer in

evaluating the credibility of Robert Willis.

Lastly, the licensee argues that the Hearer failed to give adequate consideration to the inconsistencies in the testimony of the principal witness for the Division, Lakewood police officer Thomas Sandlin. The Hearer correctly resolved the issues of credibility of all witnesses herein, and said conclusions are supported by my review of the record in its entirety. Thus, I find the Exceptions of the licensee to be without merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report, the Exceptions to the said Report and the Answer filed thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 3rd day of February, 1978,

ORDERED that Plenary Retail Consumption License C-17, issued by the Mayor and Borough Council of the Borough of Seaside Heights for premises at 407-409 Boulevard, Seaside Heights, be and the same is hereby suspended for sixty-five (65) days commencing 3:00 A.M., Wednesday, February 15, 1978 and terminating 3:00 A.M. Friday, April 21, 1978.

JOSEPH H. LERNER
DIRECTOR

4. APPELLATE DECISIONS - D & R TIERNEY'S TAVERN CORP. v. JERSEY CITY.

| | |
|---|---|
| #4119<br>D & R Tierney's Tavern Corp.<br>t/a Tierney's Tavern,<br>Appellant,<br>v.<br>Municipal Board of Alcoholic Beverage Control of the City of Jersey City,<br>Respondent. | ON APPEAL<br>CONCLUSIONS<br>and<br>ORDER |

Francis J. O'Dea, Esq., Attorney for Appellant.
Louis P. Caroselli, Esq., by Bernard Abrams, Esq., Attorneys 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 Municipal Board of Alcoholic Beverage Control of the City of Jersey City (Board) which, on May 26, 1977, found the appellant, holder of Plenary Retail Consumption License C-477, for premises 135 Ocean Avenue, Jersey City, guilty on two charges alleging that: (1) on January 11, 1977, it permitted a bartender to be employed on the licensed premises without having secured a valid employee's permit, in violation of local ordinance; and (2) on the same date, it failed to have a required listing of all employees, known as an E-141 form, available for inspection on the licensed premises, in violation of Rule 16(e) of State Regulation No. 20. In consequence of the finding of guilt on both charges, the license was suspended for fifteen days.

Appellant in its Petition of Appeal contends that the action of the Board was arbitrary and unreasonable and that the penalty imposed was excessive and unduly harsh. In its Answer, the Board denies both contentions.

Upon filing of the within appeal, an Order was entered by the Director, dated June 9, 1977, staying the effective dates of the suspension pending the determination of this appeal.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, at which the parties were permitted to introduce evidence and to cross-examine witnesses.

At the outset of the hearing, counsel requested an

opportunity to develop a stipulation relating to proposed proffers of evidence and their admissibility. A conference was called for that purpose.

The resulting stipulation exceeded its intended scope and developed into a means by which the appeal could be terminated. Counsel for the Board consented to a reduction of the penalty imposed respecting the ordinance violation from a ten days suspension to a five days suspension. Counsel for appellant agreed to dismiss its appeal upon entry by the Director of an Order imposing a suspension of five days on the failure to possess the required E-141 form, making a total suspension of ten days.

Therefore, I recommend that an Order be entered accepting the stipulation of settlement and dismissing the appeal.

As to penalty, the appellant renews its previous request that the Director permit the payment of a fine, in compromise, in lieu of the suspension aforesaid, to which request counsel for the Board indicated its consent. Said matter is within the Director's sole discretion and is not part of the stipulation seeking to terminate the appeal. Thus, I make no recommendation therein.

## Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, and the Hearer's Report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

This licensee was permitted the opportunity of paying a fine in lieu of suspension, for a prior violation of a local "hours" ordinance, in August, 1977. I hereby deny appellant's application to pay a fine, in compromise, in lieu of suspension of license, because said request is in such close proximity to the prior proceeding.

Accordingly, it is, on this 2nd day of February, 1978,

ORDERED that the action of the respondent, Municipal Board of Alcoholic Beverage Control of the City of Jersey City, as amended by the stipulation in this Division, be and the same is hereby affirmed, and the appeal herein be and is hereby dismissed; and it is further

ORDERED that my Order, dated June 9, 1977, staying the suspension imposed by the Board pending the determination of the within appeal, be and the same is hereby vacated; and it is further

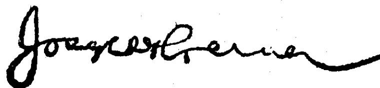
ORDERED that Plenary Retail Consumption License C-477 issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to D & R Tierney's Tavern Corp., t/a Tierney's Tavern for premises at 135 Ocean Avenue, Jersey City, be and the same is hereby suspended for ten (10) days commencing at 2:00 a.m. Wednesday, February 15, 1978 and terminating at 2:00 a.m. Saturday, February 25, 1978.

Joseph H. Lerner
Director

5. STATE LICENSES - NEW APPLICATIONS FILED.

Raritan Beverages Inc.
424 Route 206S, Hillsborough Township
S. Somerville, New Jersey
Application filed June 15, 1978 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-1 from The W. H. Cawley Company, Roycefield Road, Hillsborough Township, New Jersey.

Marilyn Nadel
2051 Wood Road
Scotch Plains, New Jersey
Application filed June 16, 1978 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-30 from Myron S. Lehman, Assignee for the Benefit of Creditors for Union Soda Distributors of New Jersey Inc., 561 Route 22 West, Hillside, New Jersey.



Joseph H. Lerner
Director