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

BULLETIN 2193 August 18, 1975

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - D. J. P., INC. v. PATERSON.

D. J. P., Inc., t/a Fifth Avenue Inn,	)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
Board of Alcoholic Beverage Control for the City of Paterson,	)	
Respondent.	)	

La Sala and De Marco, Esqs., by William J. De Marco., Attorneys for Appellant
Joseph A. La Cava, Esq., by Ralph L. De Luccia, Jr., Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action by the respondent Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which, on December 12, 1974, found appellant guilty of two charges alleging that: (1) it permitted the sale of alcoholic beverages to two minors on August 17, 1974, in violation of Rule 1 of State Regulation No. 20; and (2) on the same date, it sold alcoholic beverages to a person who was apparently intoxicated, in violation of the same rule and regulation. In consequence of its findings, appellant's plenary retail consumption license was suspended for sixty days. The effective date of such suspension was stayed by the Director of this Division by order of December 19, 1974, pending the determination of this appeal.

In its petition of appeal, appellant contends that the finding by the Board was based upon improper evidence adduced before it, and that such evidence was insufficient upon which a finding of guilt could be predicated. The Board denied these contentions, averring that its determination was a proper exercise of its discretionary power.

A de novo appeal was heard in this Division with full opportunity afforded the parties to introduce evidence and cross-examine witnesses in accordance with Rule 6 of State Regulation No. 15. Additionally, transcripts of the proceedings before the Board were accepted into evidence pursuant to Rule 8 of State Regulation No. 15.

An examination of the transcript of the proceedings before the Board reveals the following: Paterson police Detective George Brejack testified that, on August 18, 1974, he investigated an automobile fatality in which one Patrick Brownlee was the victim. That investigation revealed that the victim was a passenger in a vehicle driven by one of the alleged minors involved in the present charge, a Richard S-- who was a patron in appellant's premises and another alleged minor, Keith K-- who accompanied him on that evening, were, as indicated on driver's licenses produced, both age seventeen.

The Board heard testimony of Anthony DeFeo, another young man who accompanied Richard and Keith in appellant's premises. Keith and the victim, Patrick Brownlee were already in the premises when the witness and Richard arrived, about midnight of August 17th. Patrick had indicated to Anthony that he had arrived about 9:30 p.m.; he was then drinking mixed drinks. Later in the evening, nearly to closing hour, Patrick was described as "I would say he was drunk. We had to carry him over to the car". He had fallen on the ground and "didn't say anything". In consequence thereof, Patrick was placed in the passenger side of his car and Richard undertook to drive him home. It was during that drive, that the fatal accident occurred.

Appellant's bartender, Raymond Serville, testified that he visited appellant's premises on August 17, 1974 for the purpose of meeting Patrick (he was not the bartender at that time). He arrived about 9:30 p.m. followed by Patrick fifteen minutes later. He was in Patrick's company for the full evening until 2:45 a.m. the following morning. During that period Patrick consumed merely five "beers". He affirmed that Patrick's two friends, Richard and Anthony, were with him the entire evening. He denied that Patrick became intoxicated on this occasion.

James Giostra testified that he is the husband of the "owner" (presumably the holder of the stock of the licensee corporation) and was in the premises on the evening in question. He knew Patrick and denied he was "drunk" when he left the premises. Patrick was in the premises from ten o'clock to two-thirty in the morning.

At the hearing in this Division, testimony was elicited of the two alleged minors, Richard S-- and Keith K--, who testified that they were born in Paterson and Clifton, respectively, on February 25, and March 1, 1957. At the time of the incident they were both seventeen years of age.

I.

With respect to the first charge, in which it was alleged that appellant sold alcoholic beverages to the minors, Richard and Keith, the testimony in support thereof is miniscule. The testimony of Detective Brejack concerning the charge as it pertained to Keith consisted of one line: "...(Keith) told me he had been drinking in the Fifth Avenue Bar. That's all...."

Anthony testified in response to the question:

"Q Did you ever see a drink in his hand? (referring to Keith).

A When? At the time that I was there?

Q I am talking about when you were there and you saw (Keith). Did you ever see him have a drink or see the bartender serve him a drink?

A When I was there? No."

At the hearing in this Division, both minors sought refuge from testifying on other than their age and place of birth, basing their refusals upon constitutional immunity.

The totality of the testimony is barren of any reference to an alcoholic beverage having been served to or consumed by Keith. It may well have been that Keith was drinking an alcoholic beverage, but such conclusion may be reached by implication only. The proof thereof by any credible evidence falls far short of that necessary upon which a conclusion may legitimately be based.

Testimony concerning the service upon or consumption of alcoholic beverage by Richard is more conclusive. Detective Brejack's investigation resulted in his testimony that Richard and Keith "had been drinking in the Fifth Avenue Tavern" and a statement he obtained from Richard was "that they had been drinking to when the bar was about to close at 3 o'clock". This hearsay statement was later clothed with credibility by the statement under oath of Anthony when he admitted that he and Richard had been drinking beer. His language was as follows "...We stayed in the bar (at appellant's premises) from about 11:30 p.m. till about 2 A.m. during which time we were drinking and talking with Pat."

Although Anthony had denied, on direct examination, that Richard had been drinking, he admitted Richard was 'lightheaded' and further admitted that to be his own condition at 2:45 a.m. His denial was in response to a question as to whether he had seen a drink in Richard's hand or had seen the bartender serve Richard. It was not a categoric denial that Richard had been drinking. Such

testimony was an apparent attempt to discredit his statement given to the police shortly after the fatal accident, which statement he affirmed under oath.

The Board, having had the benefit of evaluating the testimony of the witnesses before it and determining the credibility of the respective witnesses determined that Richard had, in fact, consumed alcoholic beverages on the appellant's premises. I find no reason to recommend otherwise.

II.

The companion charge that appellant served an apparently intoxicated person has likewise been amply established. Anthony's testimony of Patrick's condition which he found when he returned to the premises later on in the evening revealed Patrick to have consumed such quantities of alcoholic beverage as to render him almost comatose. He fell out of the car in a state bordering on unconsciousness.

When Anthony and Richard returned to the subject premises to join Patrick they found him holding head in hands and staring down at the bar; and his outward appearance had changed at that point. His condition was so apparently unsound to his companions that he was escorted to the car for what became the fatal ride.

Appellant's contention that Patrick, an eighteen year old boy permitted to drink intoxicating liquor from 9:30 p.m. to 2:45 a.m. was not "apparently intoxicated", is absurd.

The ultimate question presented by the record in this appeal, therefore, is one of fact. Notwithstanding the de novo character of this appeal, the Director in his determination of the issues, should affirm where there is competent evidence in the record to support the conclusion of the local issuing authority. Vajtauer v. Commissioner of Immigration, 273 U.S. 103.106. Pilon v. Paterson, 112 N.J. Super. 436 (App. Div. 1970). The primary responsibility, in the first instance, for enforcement of laws pertaining to retail licensees rests upon the municipality. Benedetti v. Trenton, 35 N.J. Super 30 (App. Div. 1955); Rahah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super 598 (App. Div. 1955).

The Director's function on appeal is not to substitute his personal judgement for that of the local issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his own personal views. Fanwood v. Rocco, 59 N.J. Super. 306 (App. Div. 1960).

The dispositive issue then is whether the evidence herein justifies the action of the Board; and whether the charge

was established by affirmatively satisfactory evidence. A finding of guilt must be established by a fair preponderance of the credible evidence. It should not be based upon mere suspicion, no matter how reasonably inferable such suspicion may be. Re Doyle, Bulletin 469, Item 2. Doubtful questions of fact must be resolved in appellant's favor. Club Zanzibar Corp. v. Paterson, Bulletin 1408, Item 1; Wasserman v. Newark, Bulletin 1590, Item 1; Luisi v. Orange, Bulletin 1814, Item 3.

Thus, after carefully examining all of the evidence herein, I find that the second charge has been proven by a fair preponderance of the credible evidence; in fact, substantial evidence, and I recommend that the action of the Board be affirmed respecting its finding on that charge.

As to the first charge, I find there was insufficient evidence before the Board upon which it could conclude that a sale to minor Keith had taken place. However, consumption of alcoholic beverages by minor Richard in appellant's premises was established by a fair preponderance of the credible evidence. Hence, it is recommended that the action of the Board so finding be affirmed.

In view of my recommended findings, and based upon the present penalty schedule adopted by the Director as it would apply herein, I further recommend that the penalty imposed by the Board, i.e., suspension of license for sixty days, be modified to suspension of license for fifty-five days.

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, appellant contends that the hearer based his findings on hearsay evidence contained in the transcript of the testimony taken at the hearing before the Board; and that he made certain findings of fact which were contrary to the evidence. I find neither of these allegations supported by the record.

Hearsay evidence is admissible in administrative hearings, as long as "the ultimate determination is based upon legal evidence." I find that the hearer based his findings upon legal evidence.

With respect to its contention that certain findings of fact "were contrary to the testimony", appellant does not refer to such specific findings of fact in the record, as alleged, to support this allegation. This bare allegation is frivolous and lacks substance.

Finally, appellant complains about the recommended modified penalty, as being unduly harsh. The modification recommended by the Hearer was from the sixty days suspension imposed by the Board to fifty-five days, because he found "insufficient evidence" to support a finding that a sale was made to one of the minors.

From the nature of the established charges, I do not feel that the recommended penalty is so harsh and oppressive as to warrant further modification. Local issuing authorities are given considerable latitude in the imposition of penalties. The statute contemplates individual treatment of offenses and offenders, and, in the absence of arbitrary, discriminatory, oppressive or otherwise palpably unjust treatment, neither the Director nor the Courts should interfere. De Febb v. Davis (App. Div. 1962), not officially reported, recorded in Bulletin 1482, Item 1; In re Larsen, 17 N.J. Super. 564, 573 and cases therein cited.

The power of the Director to reduce or modify a penalty imposed by a municipal issuing authority has always been sparingly exercised, and only with the greatest caution. E.A.V. Liquors & Bar, Inc. v. Paterson, Bulletin 1702, Item 1; Chancery Lane, Inc. v. Trenton, Bulletin 1673, Item 1; see also Benedetti v. Trenton, Bulletin 1040, Item 1 and Nordco, Inc. v. State, 43 N.J. Super. 277.

Under the facts and circumstances herein, I find that there was no abuse of discretion on the part of the Board; and I find that the modified penalty of suspension of license for fifty-five days, as recommended by the Hearer is reasonable.

Having carefuly considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions taken with respect thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 10th day of June 1975,

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

ORDERED that my order dated December 19, 1974 staying the suspension heretofore imposed by the Board, pending the determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-257, issued by the Board of Alcoholic Beverage Control for the City of Paterson to D.J.P., Inc., t/a Fifth AvenueInn, for premises 138 Fifth Avenue, Paterson, be and the same is hereby suspended for the balance of its term, i.e., midnight, June 30, 1975, commencing at 3:00 a.m. on Thursday, June 19, 1975; and it is further

ORDERED that any renewal of the said license that may be granted be and the same is hereby suspended until 3:00 a.m. Wednesday, August 13, 1975.

Leonard D. Ronco
Director

2. APPELLATE DECISIONS - DUSENBERRY and CARLSON v. JERSEY CITY.

William Dusenberry and Michael Carlson, Appellants, v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent.	On Appeal CONCLUSIONS and ORDER

Robert C. Auriemma, Esq., Attorney for Appellants
Dennis L. McGill, Esq., by Bernard Abrams, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Municipal Board of Alcoholic Beverage Control (hereinafter Board) which, on November 25, 1974, found appellants guilty of two charges alleging that on May 25, 1974, they (1) sold alcoholic beverages to a minor, in violation of Rule 1 of State Regulation No. 20; and (2) permitted an employee to serve alcoholic beverages in their licensed premises without proper identification, in violation of Chapter 4, Section 4-23, of the Municipal Code of Ordinances. Appellants' license was, thereupon, suspended for twenty-five days.

Appellants' petition of appeal contends that, at the hearing before the Board, improper testimony was admitted upon which a finding was predicated and that the Board failed to advise appellants of their right to have subpoenas ad testificandum issued.

The answer to the petition filed by the Board contained a general averment that the proceedings held were in compliance with the statute (N.J.S.A. 33:1-1 et seq.) and the State Division regulations. In a separate defense, the Board contended that appellants had entered a plea of non vult to the second charge, for which a remission of five days from the suspension imposed had been accorded.

Upon the filing of the notice and petition of appeal an order was entered by the Director on November 22, 1974, staying the said suspension pending the determination of this appeal.

It is noted, for record purposes, that, at the time of the alleged infractions, the appellants were a partnership consisting of William Dusenberry and Joseph Perrenod. Thereafter, and prior to the filing of this appeal, the partnership was altered by the replacement of Perrenod with present co-appellant Michael Carlson.

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

Anthony Ottaino, a Jersey City Police Officer, testified that, on May 25, 1974, he was on radio-car duty, accompanied by Patrolman Martin Newcombe. Approaching the intersection of Zabriskie and Terrace Streets, he observed four young people, one of whom was carrying what appeared to be bottles of beer. Engaging the youths in conversation he was dissatisfied with their explanation of the origin of their possession of the beer, and as appellants' tavern was directly across the street, he entered the premises, alone, and inquired of the bartender if a sale had been made to the young people who were then visible through an open doorway.

Upon receiving an affirmative response from the bartender, the officer returned to the youths, then in custody of his police colleague, dismissed two females and returned to the tavern, accompanied by the two male youths and his fellow officer. He ascertained the age of the minor who had been in possession of the beer as seventeen.

The bartender readily admitted the sale and, when asked to produce an identification certificate as required of bartenders under local ordinance, admitted he possessed none. The officer requested the support of his sergeant who arrived shortly thereafter. Thereupon, the minor, later identified as Louis N[illegible], was taken to the police station.

Police Officer Martin Newcombe substantially corroborated the testimony of Officer Ottaino.

The alleged minor Louis, testified that he was born on October 7, 1956, and was seventeen years of age on May 24, 1974. He recounted his activities prior to entering appellants' premises as follows: He had joined a friend and two girls at a nearby park; his friend was then carrying two cans of beer. Desiring more, he visited appellants' tavern which he had done on prior occasions. On this evening he ordered, paid for and received two six-packs of Miller beer bottles. He rejoined his friends who were waiting for him on the corner, at which time he was accosted by the police.

Returning to the premises with the police, he stated that the bartender readily admitted selling the beer to him. He gave his age and date of birth; he and his male companion were then escorted to the local police station.

It was stipulated that the purchased containers of beer were, in fact, alcoholic beverages.

The then-member of appellants' partnership, Joseph Perrenod, testified that, on the day in question, he began tending bar in the morning, and that, by early evening, his relief bartender did not appear. He became ill, and as he lived nearby, decided to retire to his home for relief from his illness.

As the regular evening bartender did not appear, he solicited the aid of a patron, Robert Killeen, to manage the premises in his absence, and to tend the bar. Later in the evening, while at home, he received a telephone call informing him of the incident.

Robert Killeen testified that he arrived at appellants' premises late in the afternoon of that day and, as Perrenod became ill, agreed to "watch the place for awhile". During that period, three "kids came in" one of whom was known to him to be over the age of eighteen years; and to that person, whose name he did not know, he sold the subject beer.

When the officer asked him if he had sold the beer to Louis, he had replied affirmatively in that one of the three who had come in with the older boy had been Louis. He denied having sold beer to Louis, but was not sure if Louis carried any of the beer out of the premises.

Robert Kyle, a patron in the premises on the evening of the incident, testified that, during his visit of twenty minutes, he recalled seeing Louis there in the company of others, one of whom was a tall boy obviously over eighteen years of age. He paid little heed to who paid for the beer or who carried it out. He was then ten or twelve yards away from the point of the said transaction when he made his observation.

William Dusenberry, an appellant herein, testified that, when the alleged infraction occurred, he was in Florida and thereafter appeared at the hearing before the Board without counsel. He denied understanding the nature of a plea of non vult and insisted that he admitted only with respect to the charge that the bartender did not possess the permit certificate. However, he disputed the need for such certificate at the time of the incident. He admitted the name of his bartender did not appear on the required employee information form (NJABC-E 141).

I

A sale of alcoholic beverages was established by a clear preponderance of the believable evidence. The appellants' defense that the sale was made to a person well over the minimum age was negated by the bartender's admission that, according to his recollection, that same individual had been once called upon for proof of age.

The arrival of the police on the heels of the sale, coupled with the obvious absence of any other persons nearby, leads to my conviction that the description of an adult-looking purchaser of the beer is pure fabrication. The patron's testimony was far too vague to be corroborative of that of the bartender. Although he related a sale having taken place, he had no recollection of the arrival of the police, and the ensuing incident.

The issue presented being strictly factual, the evaluation of the credibility of witnesses is of paramount importance. Evidence, 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).

I, therefore, find that the evidence presented clearly substantiates the action of the Board respecting the charge relating to sale of alcoholic beverages to a minor. Rule 1 of State Regulation No. 20. Accordingly, I recommend that the action of the Board with respect thereto be affirmed.

II

The charge relating to appellants having permitted an employee to so act without a required identification card in violation of the local ordinance (Chapter 4, Sec. 4-23) was defended by the introduction into evidence of a sample form, issued by the Department of Police, Jersey City. This is entitled "Licensee and Employee's Certificate"; on its reverse side is informational material which sets forth a time allowance as follows:

> "...It shall be the duty of every licensee within twenty-four hours after engaging any agent, bartender, waiter or any other employee in connection with the business of said licensee to require said agent, bartender, waiter or other employee to present to said licensee said card of identification above referred to for the purpose of filing said card on the licensed premises...."

The face of such card carries a place for a fixed number and a photograph of the employee. Such card was furnished by the Department of Public Safety for the purpose of noticing licensees of the requirement for police approval or registry of all employees within the retail alcoholic beverage establishments.

The defense that there is a provision for a twenty-four hour delay in the filing of such cards is without merit, in the absence of a clear showing that application therefor was properly made by the employee. The card offered in defense must be read pari materia with the applicable ordinance.

Further, the current Jersey City Municipal Code provides (Sec. 4-23 and Sec. 4-24) that an identification card, supplied by the Board, must be available for inspection in licensed premises for each employee, and that such cards shall be updated annually. In addition, "No licensee shall engage any agent, bartender, waiter or other employee in connection with the business of the licensee until or unless such person has conformed to the requirements of this Article."

Investigation has disclosed that the card exhibited by appellant, and marked into evidence, has been long out of use; and for more than a decade a new form of such card is in general circulation. The current card carries no extension of twenty-four hours within which to notify the Board, as permitted by the previous card, similar to that offered into evidence.

Consequently, the defense offered, i.e., that the appellants enjoyed a twenty-four hour grace period before having to notify the Board of the hiring of the bartender is without merit, and is rejected. I, therefore, recommend affirmance of the action of the Board with respect to this charge.

Thus, I find that appellants have failed to sustain their burden of establishing that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that the action of the Board be affirmed, the appeal be dismissed, and the order of the Director staying the suspension heretofore imposed be vacated.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, 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 5th day of June 1975,

ORDERED that the action of respondent, Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby affirmed; and the appeal filed herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated November 22, 1974, staying the action of the Board pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-145, issued by the Municipal Board of Alcoholic Beverage Control of

the City of Jersey City to William Dusenberry and Michael Carlson, for premises 198 Zabriskie Street and 69 Terrace Avenue, Jersey City, be and the same is hereby suspended for the balance of its term, i.e., until midnight June 30, 1975, commencing 2:00 a.m. on Thursday, June 19, 1975; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. on Monday, July 14, 1975.

Leonard D. Ronco
Director

3. DISCIPLINARY PROCEEDINGS - POSSESSION OF MISLABELED BOTTLES - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against Joseph Verrilli t/a Oasis Bar 1000 First Avenue Asbury Park, N.J., Holder of Plenary Retail Consumption License C-57, issued by the City Council of the City of Asbury Park.	CONCLUSIONS AND ORDER

Pappa, Manna & Kreisman, Esqs., by Ira E. Kreisman, Esq., Attorneys for Licensee
David S. Piltzer, 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 charge dated September 11, 1974:

> "On August 9, 1974, you possessed, had custody of and allowed, permitted and suffered in and upon your licensed premises, an alcoholic beverage in a bottle which bore a label which did not truly describe its contents, viz.,
>
> One 4/5 quart bottle labeled 'Old Bushmill's Blended Irish Whisky, 86 proof';
>
> in violation of Rule 27 of State Regulation No. 20."

On November 13, 1974, an additional charge was preferred which related to August 9, 1974, as follows:

"On August 9, 1974, you possessed, had custody of and allowed, permitted and suffered in and upon your licensed premises, alcoholic beverages in bottles which bore labels which did not truly describe their contents, viz.,

One quart bottle labeled 'Blk. & White Buchanan's Blended Scotch Whisky'
One 4/5 qt. bottle labeled 'Harvey's Special Blended Scotch Whisky, 86 proof'
One quart bottle labeled 'Wolfschmidt's Vodka, 80 proof'
One 4/5 quart bottle labeled 'Old Taylor Kent Straight Bourbon Whiskey, 86 proof'
One 4/5 quart bottle labeled 'Continental Charter Oak Straight Bourbon Whiskey, 86 proof'."

The licensee similarly pleaded "not guilty" to this additional charge.

In the course of his regular assignments as inspector of this Division, ABC agent H visited the licensed premises on August 9, 1974 and tested eighty-four bottles of the open stock of distilled alcoholic beverages. He seized six bottles mentioned in the said charges, after his preliminary tests disclosed that the contents of the said bottles were low in proof, and thus, did not correspond with their labels. The bottles were thereupon sealed in the presence of the licensee who signed an acknowledgment and received the receipt for the said bottles.

In a conversation at that time with the licensee, Jack Verrilli, he admitted that these bottles were from open stock; that some were from old stock "...and he was trying to rotate his old stock to use them up."

Of these bottles which were taken from the back bar, four had pouring spouts on them and two had caps. The witness took comparison bottles for five of the six bottles, because the licensee did not have a full comparison bottle of "Old Bushmill's".

After the bottles were sealed the witness placed them in a box, put them in his car and, subsequently, submitted them to the Division chemist for analyses.

Penelope A. Moore, a qualified chemist employed by this Division, who has analyzed the contents of between 4,000 and 5,000 bottles in this Division during the past three years, analyzed the said bottles on behalf of the Division. Her analysis of the seized bottle of Old Bushmill's Irish Whiskey

which set forth 86 proof on its label verified that it actually showed a proof of 83.5. In her opinion, the contents thereof were not genuine because they were in low in proof, the total color was low, and the organic solids were low. She concluded that, based upon an analysis of five separate sealed bottles of this brand, the low proof was inconsistent with the possibility of evaporation; therefore, the said contents had been diluted.

This witness also testified with respect to the other five bottles and found that they, too, were not genuine because the proof readings were low, the total color readings were high, and the solids were high. In her opinion, based upon analysis with comparison of this bottle with other samples, she concluded that the contents of these bottles were not genuine. Thus, the following seized bottles have labels which did not truly describe their contents: Black and White Buchanan's Blended Scotch Whiskey 86.8 proof actually had a proof reading of 80; Harvey's Special Blended Scotch Whiskey 86 proof had an actual proof reading of 75.8; Wolfschmidt's Vodka 80 proof had an actual proof reading of 72.3; Old Taylor Kent Straight Bourbon Whiskey 86 proof had an actual proof reading of 82.3; Continental Charter Oak Straight Bourbon Whiskey 86 proof had an actual proof reading, on analysis, of 65.2.

She was asked whether, in her opinion, the fact that there were foreign substances in the bottle labeled Bushmill's Blended Irish Whiskey would have any effect upon her analysis. She replied that, while there might be a negligible effect on the color, neither the alcoholic content nor the proof would be affected. She also explained that while it is acceptable under Federal government regulations to have an area of variations of 1/2 proof, the Federal regulations do consider acceptable a slightly higher proof on imported bottles.

Joseph Verrilli, the licensee, gave the following account: In March 1974, he purchased the inventory of his brother's tavern, which was then located in Bradley Beach, and, under a special permit, transported the liquor to his premises. He kept this liquor on the shelves and started to rotate them, "tried to move them". The open stock of liquor had been checked on a previous inspection by a Division agent in May or June 1974. He denied tampering or requesting anyone else to tamper with any of the open stock of liquor.

On cross examination, he stated that he has in his employ two barmaids, both of whom are still presently employed in the premises. They were not asked to testify by the licensee.

This is a disciplinary proceeding and such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). The guiding rule in these matters is that the finding must be based on competent legal evidence, and must be grounded on a reasonable certainty as to the

probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

We are presented with the unrefuted testimony of the experienced Division chemist, who testified that the bottles which were detained by the Division investigator were fully analyzed and found not be genuine; that is, that they bore labels which did not truly describe their contents. Faced with such expert testimony, the licensee did not produce any competent expert testimony to contradict the same.

The licensee maintains that he did not tamper with the bottles; that he did not request anybody to tamper with the contents thereof; and that, in fact, the open stock was tested by a Division investigator sometime in May or early June, which was just two or three months prior to the current tests made by Agent H.

However, it should be noted that the two barmaids who were employed during this period and are still employed by the licensee were not called to testify by the licensee in his behalf, as to whether any tampering occurred during this period.

The failure to call witnesses who may have relevant testimony and who were available to testify creates an adverse inference, that is, if they were called, their testimony would have been unfavorable to the licensee. Yacker v. Weiner, 109 N.J. Super. 351, aff'd. 114 N.J. Super. 526 (App. Div. 1970).

Furthermore, the firmly established rule in these matters is that the licensee is responsible for any alcoholic beverages not truly labeled, found upon his licensed premises. As the court stated in Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156, at p. 159:

> "...We find nothing within the Alcoholic Beverage Control Act, R. S. 33:1-1, et. seq., to indicate an intent that the holder of a retail consumption license must have knowledge that he possesses illicit beverages in order to make him amenable to disciplinary action. Our courts have consistently held that such knowledge is not an essential ingredient to conviction for possession under statutes similar to the one under consideration." See also Panda v. Driscoll, 135 N.J.L. 164. (E. & A.).

See also Re Ayrer, Bulletin 1709, Item 7; The Chateau Corporation Bulletin 1943, Item 8.

Finally, while the licensee appeared to be sincere in denying knowledge of the alleged violations, out courts have consistently held that knowledge on the part of the licensee is not a prerequisite to a finding of guilt. Re Sussex Lanes,

Bulletin 1915, Item 5; In re Gutman, 21 N.J. Super. 579 (App. Div. 1952).

After careful consideration and examination of the evidence, I conclude that the charges herein have been established by a fair preponderance of the credible evidence.

It is, accordingly, recommended that the licensee be found guilty thereof.

The licensee has no prior adjudicated record. It is further recommended that the license be suspended on these charges for thirty (30) days.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument were filed by the licensee and written answering argument to the said exceptions, were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In his exceptions, licensee contends that the Division failed to establish the non-genuineness of one of the bottles of alcoholic beverages, viz., the Old Bushmill's Blended Irish Whisky. The record reveals, however, that the non-genuineness of the said alcoholic beverage was clearly established through the testimony of the Division chemist, who fully qualified as an expert. On the other hand, the licensee failed to produce any expert witness to challenge or refute such testimony. Thus, this contention is devoid of substance.

Licensee further takes exception to the recommended penalty of thirty days suspension of license. This penalty is consistent with Division precedents, and is based on the non-genuineness of six bottles of alcoholic beverages.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Hearer's report, the exceptions filed with respect thereto and the answer to the said exceptions, I concur in the finding and recommendations of the Hearer, and adopt them as my conclusions herein. I, therefore, find the licensee guilty as charged, and shall suspend the said license for a period of thirty days.

Accordingly, it is, on this 6th day of June 1975,

ORDERED that Plenary Retail Consumption License C-57, issued by the City Council of the City of Asbury Park to Joseph Verrilli, t/a Oasis Bar for premises 1000 First Avenue, Asbury Park, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1975,

commencing at 2:00 a.m. on Wednesday, June 18, 1975; and it is further

ORDERED that any renewal of the said license that may be granted be, and the same is hereby suspended until 2:00 a.m. on Friday, July 18, 1975.

Leonard D. Ronco
Director

4. STATE LICENSES - NEW APPLICATIONS FILED.

HUDSON COUNTY BEER DISTRIBUTORS
132-134 68th Street
Guttenberg, New Jersey

Application filed July 31, 1975 for person-to-person transfer of State Beverage Distributor's License SBD-102 from Frank G. Mauro Jr. and Elsie T. Mauro, t/a North Hudson Beverage and Distributing Company.

Otto Di Roma Importers Ltd., Inc.
2032 S. Juniper Street
Philadelphia, Pennsylvania
Application filed August 7, 1975 for limited wholesale license.

Hudson County Beer Distributors
730 Irving Place
Secaucus, New Jersey
Application filed August 7, 1975 for person-to-person transfer of State Beverage Distributor's License SBD-10 from Town Beverage.

Leonard D. Ronco
Director