

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. ROUTES 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2364

August 18, 1980

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - SORACE AND PFEUFER v. FAIRVIEW.
2. DISCIPLINARY PROCEEDINGS (Bayonne) - ALLOWED, PERMITTED AND SUFFERED BOOKMAKING AND LOTTERY UPON LICENSED PREMISES - ALSO PLEADED NON VULT TO CONDUCTING A RAFFLE - LICENSE SUSPENDED FOR 105 DAYS.
3. STATE LICENSES - NEW APPLICATIONS FILED.

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1. APPELLATE DECISIONS - SORACE AND PFEUFER v. FAIRVIEW.

#4336	}	ON APPEAL
Edward Sorace and Paul Pfeufer,		
Appellants,	}	CONCLUSIONS
v.		
Mayor and Borough Council of the	}	AND
Borough of Fairview,		
Respondent.	}	ORDER

David Hoffman, Esq., Attorney for Appellant.
James D. Muirhead, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Jack Berman, Administrative Law Judge

Dated: October 9, 1979 - Received: October 10, 1979

BY THE DIRECTOR:

Written Exceptions to the Initial Decision Below were filed by the respondent, and written Answers were submitted thereto by the appellant, pursuant to N.J.A.C. 13:2-17.14.

The 45 day time period within which the Division could act pursuant to N.J.S.A. 52:14B-10(c) has been extended by the Office of Administrative Law until December 31, 1979, at the request of the Director.

Having reviewed the facts and circumstances herein, I shall reject the Initial Decision of the Administrative Law Judge and affirm the action of the Mayor and Council, which revoked appellant's license by Resolution dated May 8, 1978.

Despite the improper use or inference attendant to the use of the term "surrender" in the Initial Decision, I am satisfied and find that the appellants did "delicense" or "eliminate" the premises at 11 Anderson Avenue, Fairview from the scope of their license at or about 4:00 p.m., June 30, 1978. This was done through delivery of the indicia of the license, alleged removal of alcoholic beverages, removal of signs and communication with the Borough Clerk.

However, the record adequately supports a finding by a preponderance of the credible evidence, that the appellants knowingly aided and abetted the alterations of the subject premises to facilitate what was known to them to contemplate illegal activity concerning gambling, indecent activities and sales of alcoholic beverages without a license; in apparent violation of the Alcoholic Beverage Act, N.J.S.A. 33:1-1 et seq., and the laws of the State of New Jersey. These alterations occurred during the time when the premises were licensed.

In fact, it appears, from the record, that the appellants still retained a possessory right to the premises after 4:00 p.m. on June 30, 1978, since the illegal activity thereafter was apparently authorized or conducted pursuant to a sublease from the appellants.

The appellants were charged with a violation of N.J.A.C. 13:2-23.5, among others. This regulation prohibits not only the use of the "licensed premises" for illegal activity or enterprise, but also prohibits the ". . . business to be used in furtherance or aid of or accessible to any illegal activity or enterprise."

As explained by then Commissioner Hock in the amendment of this Regulation in 1949, this Regulation is applicable to illegal activity "off the licensed premises if the licensed premises or licensed business is used in furtherance or aid of or in connection with the illegal activity. Re State Regulation No. 20, Bulletin 831, Item 1.

Therefore, on two bases, the appellants herein are culpable, within an administrative framework, for the illegal activities, sub judice. Having participated in the intention to use the location for illegal activities and making alterations therein, during the time the premises were licensed, the appellants made the licensed business and premises accessible to an illegal enterprise or activity. And, when the premises were technically "delicensed", they still had a license in effect and permitted the licensed business (facilities retained all the characteristics of a liquor licensed premises, except signs) to be used in furtherance of, or aid of, or in connection with illegal activity "off the licensed premises."

Having carefully considered the entire record herein including the transcripts of the testimony, the

exhibits, the legal memoranda of the parties, the Initial Decision Below, the written Exceptions filed by respondent, and written Answers submitted thereto by the appellants, I reject the Initial Decision of the Administrative Law Judge.

I find that the testimony of the witnesses for the respondent and other proofs submitted therein, partially set forth in the Initial Decision, are forthright, concise, and credible. I adopt those factual findings.

The testimony of the only appellant to testify, Paul Pfeufer, is not worthy of belief. He asserts that he entered an oral sublease with a man he doesn't know or whose credentials he did not desire to investigate, and made alterations without inquiry as to purpose. His partner Edward Sorace was on the licensed premises during the illegal activity, but did not testify. The denial of knowledge of gambling activity lacks the ring of truth.

Parenthetically, I note that the subject license has not been renewed for the 1979-80 license term. Pursuant to N.J.A.C. 13:2-10 a decision on the renewal application should have been made within ninety days after the expiration of the term, to wit, by September 28, 1979. Absent same, the application is deemed denied and an appeal within the time period set forth in N.J.S.A. 33:1-22 is appropriate. Thus, this license appears to have lapsed and expired. However, such a finding is not necessary herein.

Accordingly, it is, on this 26th day of December, 1979,

ORDERED that the action of the Mayor and Council of the Borough of Fairview be and the same is hereby affirmed, and the appeal be and is hereby dismissed; and it is further

ORDERED that my Order of May 23, 1979, staying the revocation of appellants' license pending determination of the appeal, be and is hereby vacated; and it is further

ORDERED that, assuming for the purposes of this appeal that Plenary Retail Consumption License No. 0218-33-004-002 does exist, said license be and the same is hereby revoked, effective immediately.

JOSEPH H. LERNER
DIRECTOR

APPENDIX

Initial Decision Below

In the Matter of:)

EDWARD SORACE & PAUL PFEUFER t/a)
ORPHAN ANNIE'S vs. M & C, BOROUGH)
OF FAIRVIEW)

INITIAL DECISION

OAL DKT. NO. ABC 1559-79

Appearances:

David Hoffman, Esq., for the Appellants,
Edward Sorace & Paul Pfeufer t/a Orphan Annie's

James D. Muirhead, Esq., for the Respondent
Mayor and Council, Borough of Fairview

BEFORE THE HONORABLE JACK BERMAN, A.L.J.:

On May 8, 1978, the Mayor and Council of the Borough of Fairview (Respondent) passed a resolution revoking the Plenary Retail Consumption License #0218-33-004-002 of Orphan Annie's Tavern owned by Paul Pfeufer and Edward Sorace (Appellants) formerly located at 11 Anderson Avenue in the Borough of Fairview having found Appellants guilty after hearing held before Respondent on March 15, 1979 and March 29, 1979 of the following charges:

1. Violation of N.J.A.C. 13:2-23.27 (N.J.S.A. 33:1-39 Reg. #20-16) (N.J.S.A. 33:1-21 and N.J.S.A. 33:1-31) to wit, allowing, permitting or suffering the sale, delivery and consumption of alcoholic beverages in or upon the licensed premises in violation thereof, and
2. On June 30, 1978, allowing, permitting and suffering the premises to be accessible to illegal activity and enterprise in violation of N.J.A.C. 13:2-23.5, and
3. On June 30, 1978, and July 1, 1978, allowing, permitting and suffering lewdness or immoral activity in violation of N.J.A.C. 13:2-23.6 and state and local law on topless dancing, and
4. The tavern is no longer located at 11 Anderson Avenue, Fairview and no transfer has been applied for since July 1978.

On May 23, 1978, the Appellants filed a Notice and Petition of Appeal with the Division of Alcoholic Beverage Control (Division), pursuant to N.J.A.C. 13:2-17.1, seeking to have the resolution of the Respondent overruled.

In its Petition of Appeal, Appellants contended that a prior Appeal had been taken by the Appellants against the Respondent, Appeal number 4244, wherein the Borough of Fairview refused to renew Appellants' license and that said decision was reversed by the Director of the Alcoholic Beverage Control. The Respondent was ordered to renew Appellants' license. On or about February 21, 1979 the Respondent formerly preferred charges against the Appellants for specified violation of N.J.A.C. A hearing took place on two separate occasions during the month of March, 1979, before Respondent, resulting in a Resolution dated May 8, 1979, wherein the Respondent revoked Appellants' Plenary Retail Consumption license. On or about the month of July, 1978, the Fairview Police Department arrested the Appellants and caused them to be charged with various violations of the Alcoholic Beverage Control Regulations and with the indictable offense of maintaining a gambling resort. These charges were forwarded to the office of the Bergen County Prosecutor by the Borough of Fairview. The office of the Bergen County Prosecutor administratively dismissed and otherwise discharged and exonerated the Appellants from any liability with regard to the charges. The Respondent then delayed until the month of March 1979, despite requests from Appellants' attorney, in bringing disciplinary proceedings with regard to Appellants' license. Appellants claim the actions by the Respondent were arbitrary and capricious and against the weight of the credible evidence and that the Appellants were denied a full, fair and impartial hearing before the Respondent in that the Borough attorney, James Deer, Esq. was in a conflict of interest position at a time when he was ruling on the admissibility of evidence at a hearing held in the matter.

On May 23, 1979 the Director ordered that Respondent's order of revocation be stayed pending the determination of the appeal pursuant to N.J.S.A. 33:1-31.

A hearing de novo with regard to the May 9, 1979 Resolution was held on August 17, 1979 and August 29, 1979 pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

The Respondent offered four witnesses at the hearing and placed into evidence the transcripts of the proceedings heard by the Respondent on March 15, 1979 and March 29, 1979.

The first witness for the Respondent was Donald Maxwell who is a Detective Sergeant with the Fairview Police Department.

He testified that he, together with other police officers, arrived 2:30 a.m. on July 1, 1978, at Orphan Annie's Tavern and observed the following:

1. Blackjack card table with chips, cards, card tray and cash box on the table.
2. Girl dancing naked from the waist up.
3. Numerous patrons sitting around the bar area drinking beer and what seemed to him to be mixed alcoholic beverages.
4. Edward Sorace, one of the owners of Orphan Annie's Tavern and one of the Appellants herein, was present.

Sgt. Maxwell stated that he took statements from two go-go girls and patrons who were present. These statements were typed by him at police headquarters in Fairview during the early morning hours of July 1, 1978. He stated that he had learned that the owners of Orphan Annie's Tavern turned in their liquor license prior to his official visit to the premises at 2:30 a.m. on July 1, 1978.

He testified that he did not see any gambling at the premises and noticed that no signs outside of the tavern read Orphan Annie's Tavern although on prior occasions he stated there was a sign that did read Orphan Annie's Tavern. He stated that he did not see anyone serving alcoholic beverages but did notice a female behind the bar.

The second witness for Respondent was John G. Tomaras who is employed by the Borough of Fairview as Borough Clerk and has served in that capacity for 12 years.

He testified that the Respondent had held a hearing without inviting Appellants' participation in June 1978, determining at that hearing, not to renew Appellants' liquor license when it became due for renewal on July 1, 1978. He stated that he informed the Appellants of that determination. He stated that he was informed on July 1, 1978 that Appellants had turned in their license at 4:00 p.m. on June 30, 1978. He also testified that the Division of Alcoholic Beverage Control of the State of New Jersey had ordered Appellants' license to be continued beyond July 1, 1978. He stated that he had received a letter from Appellants that they were seeking to relocate at a different location but that he never received a person to person, place to place application. He also stated that he received a letter prior to July 1, 1978 from Appellants that they were contemplating leasing their premises to the Park Line Athletic Club.

Through a reading of the transcripts of March 14 and March 29, 1979 of the hearing held by and before Respondent, particularly the testimony of Paul Pfeufer, one of the Appellants herein, we find that Appellants did turn in their liquor license at 4:00 p.m. on June 30, 1978 to the Fairview Police Department and then proceeded

to remove signs outside the licensed premises and also removed the property including all their liquor from the premises. Mr. Pfeufer stated that it was Appellants intent at that time, to apply for a place to place transfer so that they could transfer the license to another location in Fairview. There is no testimony in the record that an application for such a transfer was filed.

The third witness for Respondent was Nicholas Salemme, who testified that he is a police officer employed by the Police Department of the Borough of Fairview. He stated he was on duty on June 30, 1978 when, pursuant to a directive received from his superiors, he accompanied a superior officer to Orphan Annie's Tavern around 11:45 p.m. When he arrived at Orphan Annie's Tavern he observed (1) 15 people around the bar, and (2) drinks on the bar.

The patrons were ordered by the police to leave the premises as the premises were not licensed and advised a Mr. Daibes (an employee of Appellants) that the premises were to remain locked. On July 1, 1978 at or about 2:30 a.m. he returned to Orphan Annie's Tavern where he observed:

1. A nude female (naked from the waist up) dancing.
2. Blackjack table with chips and cards on it.
3. Patrons drinking beer.
4. People with beer bottles in their hands.
5. Liquor bottles behind the bar.

The Respondent's final witness was Beshara Daibes who had been employed by Appellants as their bartender. He testified that the Appellants stated to him that on June 30, 1978 that they were closing down as they had given their license back to the town. He stated that the Appellants had told him that there was going to be gambling in the bar and that they had nothing to do with the bar anymore. He stated that he saw persons playing blackjack in the early morning hours of July 1, 1978. He stated that Eddie Sorace, one of the Appellants, was present then.

He stated that he had accompanied Mr. Sorace at about 4:00 p.m. on June 30, 1978 to Police Headquarters in Fairview when Mr. Sorace turned in the Appellants' liquor license.

He testified that when the police came into the subject premises at 11:30-11:45 p.m. on June 30, 1978 alcohol that was there was that which "had always been there".

He stated a partition had been built during the week of June 30, 1978. He was told by one of the Appellants, Paul Pfeufer, that the partition was for go-go dancers.

The parties rested at the close of Respondent's case.

Therefore, from a review of the record, THE COURT FINDS that:

1. Appellants were the holders of Plenary Retail Consumption License No. 0218-33-004-002 for premises located at 11 Anderson Avenue, Fairview, New Jersey.

2. Appellants surrendered their Plenary Retail Consumption License No. 0218-33-004-002 to the Fairview Police Department on or about 4:00 p.m. of June 30, 1978.

3. The premises located at 11 Anderson Avenue, Fairview, New Jersey was an unlicensed premise at all time subsequent to 4:00 p.m. June 30, 1978.

4. All the alleged illegal activities that Respondent after hearing found Appellants guilty of and revoked Appellants' license for, occurred subsequent to 4:00 p.m. June 30, 1978.

The primary responsibility to enforce the law pertaining to retail licenses rests with the municipality, N.J.S.A. 33:1-24, which has the power to conduct disciplinary proceedings to suspend or revoke retail licenses, N.J.S.A. 33:1-31. It is clear that the license must be in full force and effect at the time the alleged incidents took place. This is not altered by N.J.S.A. 33:1-31 which states "The surrender of a license shall not bar proceedings to revoke such license". Nor does N.J.A.C. 13:2-19.1 which states "Disciplinary proceedings shall not be barred or abated by the expiration, transfer, surrender, renewal or extension of the license or permit" vary this conclusion. The cited Statute and Code pertains to activities occurring at a time a license is in effect so that disciplinary proceedings would not be barred by its subsequent transfer, surrender or expiration. In the instant case this Court has found that the premises were not licensed at the time the alleged illegal activities were committed.

Therefore, for the reasons heretofore stated, the COURT CONCLUDES that the determination of Respondent was arbitrary, capricious and unreasonable and did represent an abuse of its discretion. The Appellants have sustained the burden of proof imposed on it by N.J.A.C. 13:2-17.6. Therefore, it is ORDERED that the revocation imposed by the Respondent be hereby REVERSED.

This action cannot be effected prior to the effective date of this order which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

THE COURT HEREBY FILES with the Director of the Alcoholic Beverage Control its Initial Decision in the matter and the record in these proceedings.

- 2. DISCIPLINARY PROCEEDINGS - ALLOWED, PERMITTED AND SUFFERED BOOKMAKING AND LOTTERY UPON LICENSED PREMISES - ALSO PLEADED NON VULT TO CONDUCTING A RAFFLE - LICENSE SUSPENDED FOR 105 DAYS.

In the Matter of Disciplinary Proceedings against:

Joseph Luongo
t/a Luongo's Bar & Grill
781 Broadway
Bayonne, N.J. 07002

S-11,581
X-36,164-E

CONCLUSIONS
AND
ORDER

Holder of Plenary Retail Consumption Lic. 0901-33-083-001, issued by the Municipal Council of the City of Bayonne.

.....

Fitzpatrick & Fitzpatrick, Esqs., by Gerald Fitzpatrick, Esq., Attorneys for Licensee.
Mart Vaarsi, Esq., Deputy-Attorney General, Appearing for the Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded "not guilty" to the following charge:

On December 14, December 21, December 28, 1977, January 4 and January 5, 1978, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets on basketball games and the making and accepting of bets in a lottery, commonly known as the "numbers game"; and on the aforementioned dates, you possessed, had custody of and allowed, permitted and suffered in and upon your licensed premises, slips, tickets, records, documents, memoranda and other writings pertaining to the aforementioned gambling activity; in violation of Rules 6 and 7 of State Regulation No. 20 (now N.J.A.C. 13:2-23.7).

ABC Agent G. testified in support of the charge, that he entered the licensed premises on December 14, 1977 at

5:55 p.m., accompanied by Agents Mc. and V. A bartender, later identified as John Gallagher, was on duty.

Shortly thereafter, Pasqual (Patsy) Gallo, whom they met previously, entered the barroom and took a seat at the bar adjacent to the phone booth where the agents had positioned themselves.

Whenever the phone rang, Gallo answered it, usually making notations on the sports section of the New York Daily News, which contains listings of various sporting events nationwide, and the current betting odds. Agent G. was five feet from the phone booth and was able to observe it clearly. G. and the other agents engaged Gallo in sports talk and betting.

After ascertaining the odds on a particular basketball game, G. asked Mc. to lend him \$50.00 so that with the \$5.00 he had he could bet \$55.00 on the game, the odds being 55 to 50. Mc. responded affirmatively. Gallo, hearing this conversation between the agents, stated, "I'll trust you guys"; G. responded, "I hope I can trust you, if it wins when will I get paid?". Gallo answered, "Tomorrow, I'm here everynight."

Throughout the conversation, the bartender was within two to eight feet away from them. Mc. told the bartender that he had just loaned G. \$50.00 to bet on Indiana. G. then joined the conversation, asking how the bet looked to him and the bartender responded, "its a tough bet, as Indiana just traded a player."

After the arrangements for the basketball game bet were completed, G. asked Gallo if he took numbers bets and was answered in the affirmative. G. asked Mc. if he wanted to share a numbers bet, and it was agreed to bet \$4.00 "straight" on a particular number. The bartender stood directly in front of them, serving drinks, as the discussion related transpired. G. made a statement to the bartender regarding the numbers bet just placed, and the bartender responded that he hopes they win.

On December 21st, G. returned to the premises, accompanied by Mc. and a sergeant of the New Jersey State Police. John Gallagher the bartender was on duty. Gallo entered soon thereafter, and again began answering the phone, making notations on the sports section of the New York Daily News. The agents had a conversation with him regarding bets, in general, and the bet G. had placed and lost. The agents placed two new bets, after discussing it aloud. As before, it was done within earshot of the bartender. Additionally, they discussed the

bets just placed with him. Numbers bets were also placed that day by the agents and a patron known as "Lenny".

Agent G. inquired how he could place a bet by phone and Gallo told him to call the premises and use the name "Seja". He wrote the tavern's phone number and the name "Seja" on a beer coaster and gave it to him.

The agents returned on December 28th at 6:00 p.m. John was tending bar and Gallo entered shortly thereafter. There was a conversation relative to a raffle held at the tavern and Gallo returned the last bet by the agents because the sports event upon which they wagered resulted in a tie score.

Gallo cautioned the agents to be careful because there was a police officer sitting at the bar. Gallo did not remain in the tavern. He returned later and accepted sports and numbers bets from Agent G. After placing the bets, they discussed them with the bartender.

On January 4, 1978, when G. returned, accompanied by other agents, he was told by the bartender that the police had visited this facility on the weekend, and it was "warm". As a consequence, Gallo would not be there. The bartender stated that Gallo could be reached by phone and wrote the number upon a sheet of paper, handing it to G.

G. telephoned Gallo, and after a brief conversation was told by Gallo that he'd call him back with the odds. This occurred, and several wagers were placed by phone. Gallo instructed G. to give the money to the bartender and tell him to hold it for Gallo. The agents pooled their money then turned it over to John, stating that, "Patsy told us to give you the money to hold for the bets, the numbers and basketball bets."

Later, John answered the phone and after conversing with the caller stated, "Patsy says to buy you a drink."

After leaving the tavern, G. had the telephone number given to him by John checked; it was listed as being that of Josephine Salvatore of 243 Gates Avenue in Jersey City. It was later ascertained that she was employed as a barmaid in the licensed establishment.

The following evening the agents returned. The bar was being tended by Josephine Salvatore. G. asked her of Gallo's whereabouts stating that the previous evening John gave him a phone number to call in the event Gallo was not

there. The barmaid told him to wait, and proceeded to dial the same number. After a brief conversation she said that Gallo wanted to talk to him. Gallo advised him he'd call back with the odds on the various sporting events they discussed. Bets were eventually placed.

Agent G. engaged the barmaid in conversation and mentioned the bets. She responded, "Well, I have nothing to do with the gambling, the bets. Its between you and Patsy."

After the agents identified themselves, the licensee, Joseph Luongo, was summoned to the premises where the agents informed him of the offenses. Luongo denied any knowledge of the illegal activities being conducted at his establishment by Gallo with the assistance of the bartender and barmaid.

Agent Mc. testified in corroboration of Agent G., adding nothing of significance not already described by G.

Joseph Luongo, the licensee, testified in defense of the charges. He knew of Gallo for several years. He worked as a barber, but was reputed to be a bookmaker. He had owned and operated an amusement arcade type of business on the same street near the tavern. The arcade was later closed by the city, allegedly for receiving stolen goods.

Gallo began frequenting the tavern after the amusement arcade was closed. He received many calls at the bar and Luongo suspected that he was bookmaking in the premises. He ordered him out several times, but is most vague as to whether he forbade his return to the tavern.

Luongo went to the police and other city officials and discussed what had occurred, his suspicions and fear and that this could cause him license difficulties. There were several follow-up discussions. He fired the barmaid Josephine Salvatore when he suspected that she was involved with Gallo. He expressed fear of Gallo because, "some people are found dead on the street or car trunks". Apparently, no threats or warnings were made to him.

Lastly, he stated that he instructed his staff to be wary of Gallo and to order him out if he appeared to be engaged in this activity in the tavern, or used the telephone.

James P. McAllen, a former (now retired) Bayonne policeman assigned to the local ABC squad, corroborated Luongo's testimony relative to seeking out City (i.e. police) assistance in ridding the tavern of a possible bookmaking problem.

He indicated that Luongo was cooperative and of assistance to the police in its undercover investigation.

Detective Joseph Hojnacki of the Bayonne Gambling Squad, related that he met with Luongo on two occasions. Luongo voices his concern about Gallo's activities within his tavern and his desire to be rid of the man and the problem. Captain James Sisk, in charge of the Bayonne Vice Squad, gave similar testimony.

John Gallagher, the bartender on duty most of the evenings that the offenses were committed, denied hearing any of the comments addressed to him as well as his alleged responses. He acknowledged only general bar-talk regarding sports, odds and betting on these events. He corroborates Luongo's statements regarding Gallo, his use of the phones, etc., but states that these instructions were given after the instant proceedings had been initiated by the Division.

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The matter, sub judice, presents 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 the opportunity to observe the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony.

I am persuaded that the testimony of Agents G. and Mc. relative to the gambling activity engaged in upon the licensed premises on the dates mentioned in the charge, is factual, clear and credible. I am convinced too, of the active participation of the bartender (in holding the wager) and the barmaid (in contacting Gallo for the agents) in the illegal activities.

It is well-established that a licensee cannot escape the consequences of the occurrence of incidents, such as herein related, on the licensed premises. He is fully accountable for all violations committed or permitted by his agents, servants or employees. Knowledge on the part of the employer is not a prerequisite to a finding of guilt where an employee

participates in the misdeeds. N.J.A.C. 13:2-23.28. See In re Schneider, 12 N.J. Super 449 (App. Div. 1951). It has been further held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951); F. and A. Distributing Co. v. Division of Alcoholic Beverage Control, 36 N.J. 34 (1961).

Reporting the activities of the bookmaker to the police coupled with periodic follow-up inquiries does not clothe the licensee with immunity in the subject case. It is obvious that he did not use his best efforts in ridding the tavern of the illegal activity. He could have, for instance, flagged the bookmaker and prevented his entry into the barroom for any purpose. Instead, he permitted this individual entry and tolerated his presence. He afforded a vehicle and situs for Gallo's illegal activities with, at the least, reasonable cause to believe that illegal activity was occurring within the licensed premises. Under such circumstances the licensee has an affirmative duty to prevent the violative activity. The consequences of licensee's ill considered decision and/or laxness is obvious and must be borne by him.

After carefully considering and evaluating all of the evidence adduced herein and the legal principal applicable thereto, I conclude that the Division has proved its case by clear and convincing testimony and by a fair preponderance of the credible evidence. I, therefore, recommend that the licensee be found guilty of the charge.

I, therefore, recommend that the license be suspended for ninety (90) days on this charge and that there be added five (5) days by reason of the prior record of suspension for dissimilar violation within the past five years, or a total of ninety-five (95) days.

Additionally, licensee pleaded non vult to a charge that:

On December 7, December 14 and December 21, 1977 you allowed, permitted and suffered tickets and participation rights in a raffle, which was not licensed under the Raffles Licensing Law (N.J.S.A. 5:8-50 et. seq.), to be sold and offered for sale in and upon your licensed premises, and on said dates, you possessed, had custody of and allowed, permitted and suffered said tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20 (now N.J.A.C. 13:2-23.7).

I recommend that the license be suspended an additional fifteen (15) days, less a remission of five (5) days for entering the non vult plea, or a net suspension of ten (10) days on this charge.

In sum, I recommend that the license be suspended for a total of one hundred and five (105) days on the two charges.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the licensee pursuant to N.J.A.C. 13:2-19.6.

In his Exceptions, the licensee argues that the Hearer's recommendations and findings were against the weight of the evidence; that, as a matter of law, the testimony of the licensee's witnesses were not given proper evidential weight; and that, as a matter of law, the defense presented by the licensee was established.

No legal or factual support is provided for any of the aforesaid Exceptions. Factually and legally there is more than ample proofs that illegal gambling of a continuous commercial nature occurred on the licensed premises with the full knowledge and assent of the licensee's employees.

The Hearer correctly evaluated the extent of the corrective action testified to on behalf of the licensee. It does not constitute a defense to the gambling charge, but merely is offered in mitigation of penalty. Thus, I reject the Exceptions as without basis in law or fact. I find the licensee guilty of the charges.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's Report and the written Exceptions filed thereto by the licensee, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 28th day of December, 1979,

ORDERED that Plenary Retail Consumption License No. 0901-33-083-001 issued by the Municipal Council of the City of Bayonne to Joseph Luongo, t/a Luongo's Bar and Grill for premises 781 Broadway, Bayonne be and the same is hereby suspended for one hundred and five (105) days commencing 2:00 a.m. on Wednesday, January 9, 1980 and terminating 2:00 a.m. on Wednesday, April 23, 1980.

JOSEPH H. LERNER
DIRECTOR

3. STATE LICENSES - NEW APPLICATIONS FILED.

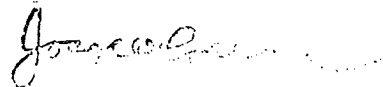
Suntory International Corp.
1211 Avenue of the Americas
New York, New York
Application filed August 8, 1980
for plenary wholesale license.

Tesei Home Beverage, Inc.
264 Second Avenue
Newark, New Jersey
Application filed August 8, 1980
for person-to-person transfer of
a state beverage distributor's
license from Joseph Tesei.

Frank V. Porcellini
t/a Lanoka Farms
615 Route #9
Lanoka Harbor, New Jersey
Application filed August 11, 1980
for place-to-place transfer of a
state beverage distributor's
license to include additional
space.

Kronenbourg USA Inc.
666 Steamboat Road
Greenwich, Ct.
Application filed August 12, 1980
for limited wholesale license.

Bristol Importers, Inc.
t/a John Lawrence Ltd.
Rear 115 W. Mt. Pleasant Avenue
Livingston, New Jersey
Application filed August 14, 1980
for person-to-person transfer of
of a limited wholesale license from
Ruth Orris.



Joseph H. Lerner
Director