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

BULLETIN 1658 February 8, 1966

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ITEM

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

BULLETIN 1658 February 8, 1966

1. COURT DECISIONS - JOA v. PINE BEACH and DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-248-64

ANDREW G. JOA and ADELE L. JOA,

Plaintiffs-Appellants,

vs.

BOROUGH OF PINE BEACH, a MUNICIPAL CORPORATION, and DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Defendants-Respondents.

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Argued December 13, 1965 -- Decided December 20, 1965

Before Judges Kilkenny, Gaulkin and Leonard.

Mr. Francis Tanner, Sr. argued the cause for plaintiffs (Messrs. Tanner & Tanner, attorneys).

Mr. Henry H. Wiley argued the cause for defendant Borough of Pine Beach (Messrs. Berry, Whitson & Berry, attorneys).

Mr. Avrom J. Gold, Deputy Attorney General, argued the cause for defendant Division of Alcoholic Beverage Control (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney; Mr. Samuel B. Helfand on the brief).

PER CURIAM.

(Appeal from Director's decision in Joa v. Pine Beach, Bulletin 1592, Item 3. Director's order affirmed without opinion.)

2. COURT DECISIONS - GLOUCESTER TOWNSHIP v. MATTEO and DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-216-64

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GLOUCESTER,

Appellant,

vs.

GEORGE W. MATTEO, SR., and DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DEPARTMENT OF LAW AND PUBLIC SAFETY, STATE OF NEW JERSEY,

Respondents.

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Argued December 6, 1965 -- Decided December 23, 1965

Before Judges Gaulkin, Labrecque and Brown.

Mr. Edwin T. Ferren III argued the cause for appellant (Messrs. Richman, Berry & Ferren, attorneys).

Mr. Sam Denstman argued the cause for respondent George W. Matteo, Sr. (Messrs. Simon, Jaffe & Denstman, attorneys; Mr. Sidney S. Jaffe on the brief).

Mr. Avrom J. Gold, Deputy Attorney General, argued the cause for Division of Alcoholic Beverage Control (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney; Mr. Samuel B. Helfand on the brief).

PER CURIAM.

(Appeal from the Director's decision in Matteo v. Gloucester, Bulletin 1591, Item 9. Director affirmed. Opinion not approved for publication by the Court Committee on opinions.)

3. COURT DECISIONS - STATE v. ZURAWSKI - COMPANION CASE TO ZURAWSKI v. LINDEN, BULLETIN 1617, ITEM 1.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-128-64

STATE OF NEW JERSEY, )

Plaintiff-Respondent, )

v. )

MERDIE ZURAWSKI, )

Defendant-Appellant. )

Zurawski - 89 N.J. Super. 488

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Argued September 20, 1965 -- Decided December 21, 1965

Before Judges Gaulkin, Labrecque and Brown.

Mr. Hyman Isaac argued the cause for appellant (Messrs. Reibel, Isaac & Tannenbaum, attorneys; Mr. Barry M. Epstein, on the brief).

Mr. Richard A. Koerner, Deputy Attorney General, argued the cause for respondent (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by BROWN, J.A.D.

Defendant, charged with bookmaking, appeals from the denial of his motion to suppress evidence seized by Linden police without a search warrant in the tavern of which he was the licensed owner. The question presented is whether a search of licensed premises and seizure of gambling paraphernalia therein, without a search warrant, is valid as against the tavern owner and whether it may be used to support a criminal prosecution against him

The order appealed from recites that the motion below was heard on a stipulation of facts. If so, the stipulation is not incorporated in the record before us. However the briefs seem to agree on the following facts. On May 12, 1964, shortly after 1:00 o'clock in the afternoon, three detectives of the local police department entered the tavern. One of them informed defendant that they were making an inspection on behalf of the municipal alcoholic beverage control board. They proceeded to search the place although they had no warrant. A lottery slip was discovered under a stack of towels in the pantry and then more slips were found beneath boxes stored on a shelf in the kitchen. All space involved was within the "licensed premises" as described in defendant's application for his plenary retail consumption license. He was arrested forthwith.

N.J.S.A. 33:1-35 provides in part:

"Investigations, inspections and searches of licensed premises may be made without search warrant by the director, his deputies, inspectors or investigators, by each other issuing authority and by any officer."

Defendant argues that this enabling statute "* * * was intended only to facilitate investigations and searches for the sole purpose of ferreting out violations of the Commissioner's rules with the end of suspension or revocation of the privileges of liquor licenses." Therefore, says defendant, the statutory power was misused here because the search was conducted "to uncover a violation of the criminal law" and thus his constitutional right of privacy was unlawfully invaded.

The Legislature has imposed upon the municipality the responsibility for enforcement of the law governing retail liquor licenses. N.J.S.A. 33:1-24. Concern for strict regulation at the municipal level is further reflected in the statute by this direction:

> "To the end that local police and other enforcing agencies shall enforce this chapter in the interest of economy and effective control, all officers shall use all due diligence to detect violations of this chapter and shall apprehend the offenders * * *." N.J.S.A. 33:1-71.

In order to qualify for a license, defendant signed and acknowledged a form containing the following:

> "The applicant consents that the licensed premises and all portions of the building containing same, including all rooms, cellars, out-buildings, passageways, closets, vaults, yards, attics, and every part of the structure of which the licensed premises are a part and all buildings used in connection therewith which are in his possession or under his control, may be inspected and searched without warrant at all hours by the Director of the Division of Alcoholic Beverage Control, the Director of the Division of Taxation, their duly authorized inspectors, investigators and agents and all other officers."

The unique position of a liquor licensee was outlined in Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962)

> "From the earliest history of our State, the sale of intoxicating liquor has been dealt with by the Legislature in an exceptional way. Because of its sui generis nature and significance, it is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other administrative agencies, cannot be indiscriminately applied." (p. 490).

In Guill v. Mayor and Council of City of Hoboken, 21 N.J. 574 (1956), the court paraphrased, with evident approval, the holding of Justice Collins in Hoboken v. Goodman, 68 N.J.L. 217 (Sup.Ct. 1902), in these words:

> "* * *the sale of intoxicating liquor at retail 'is not one of the privileges or immunities of citizenship protected by the United States Constitution or the Fourteenth amendment thereto,' but is rather a business subject to prohibition or regulation * * *." (p. 584).

The field of activity is such that entry into it "is not a privilege of a citizen of the state or a citizen of the United States." Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L. Ed. 620 (1890).

The Director's rules and regulations expressly prohibit possession in the licensed premises of lottery tickets such as were seized there in this case. State Regulation No. 20, Rule 6.

Defendant's standing is to be considered only with reference to the law and regulations governing the conduct of his special business. N.J.S.A. 33:1-35 does not expressly limit the use to be made of evidence obtained through its provisions. The language granting the search power should be "liberally construed", in accordance with the mandate of N.J.S.A. 33:1-73. In the light of such construction the search of licensed premises here involved must be upheld. To do otherwise would thwart the legislative policy for strict control of a business said to be "so prone to evils." Boller Beverages, Inc. v. Davis, 38 N.J. 138, 150 (1962).

Search without a warrant of premises licensed for the sale of intoxicating liquor has been upheld in other jurisdictions because of the special nature of the business. In Zukowski v. State, 167 Md. 549, 175 A. 595 (Ct.App. 1934) defendant licensee sought to suppress evidence seized during such a search and which supported an indictment against him for possession of liquor upon which no tax had been paid. Denial of the motion to suppress was affirmed. The court said:

> "The search * * * was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining a license. In thus authorizing the search he debarred himself from contending that it was unlawful." (175 A. at 597).

In Fischer v. State, 195 Md. 477, 74 A. 2d 34 (Ct.App. 1950) the seizure of evidence used to convict a tavern licensee for operating a horse race gambling establishment in the premises was validated on the same basis of express consent to search. Waiver of the right of privacy as to licensed premises was also recognized in Hines v. State, 362 S.W. 2d 652 (Tex.Ct.Crim.App. 1962); Oklahoma Alcoholic Beverage Con. Bd. v. McCulley, 377 P. 2d 568 (Okla.Sup.Ct. 1963) and Hurless v. Department of Liquor Control, 73 Abs. 161, 136 N.E. 2d 736 (Ohio Ct.App. 1955), appeal dismissed 164 Ohio St. 492, 132 N.E. 2d 107 (Sup.Ct. 1956).

We find nothing in the record to support defendant's contention that the search in question was excessive and oppressive.

Affirmed.

4. APPELLATE DECISIONS - MC CRATE v. HARRISON.

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| ROBERT MC CRATE, t/a DUBLIN HOUSE, Appellant, v. MAYOR AND COUNCIL OF THE TOWN OF HARRISON, Respondent. | ) | ON APPEAL CONCLUSIONS AND ORDER |

James R. Heaney, Esq., Attorney for Appellant.
Walter A. Michaelson, Esq., and Joseph P. DiSabato, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This appeal is from the action of respondent whereby on June 2, 1965, it suspended appellant's plenary retail consumption license for premises 613 North 4th Street, Harrison, for a period of three months effective June 13th, after appellant was found guilty of the following charge:

> "On or about March 4, 1965, you allowed, permitted and suffered in and upon the licensed premises a brawl, acts of violence, disturbance and unnecessary noise and you allowed, permitted and suffered the licensed place of business to be conducted in such a manner as to become a nuisance in violation of Rule 5, State Regulation No. 20."

Upon the filing of the appeal, an order dated June 10, 1965, was entered by the Director staying respondent's order of suspension until further order herein. R.S. 33:1-31.

Appellant in his petition of appeal alleges that the action of respondent was erroneous in that "it was illegal, arbitrary, unreasonable, capricious, discriminatory, based on purely partisan political considerations, based upon insufficient evidence, against the weight of the evidence and unduly harsh and severe."

Respondent's answer denies the allegations in appellant's petition of appeal and contends that its action "was based on proper and serious consideration of the evidence submitted, and the penalty thereon was proper and fair under the evidence."

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the attorneys for the respective parties to present testimony and cross examine witnesses.

Edward J. Austin testified that at 10 p.m. on March 4, 1965, as he entered appellant's licensed premises, he was met by John Gormley, who requested that he "help him to quiet down the tavern;" that he saw Thomas Doyle lying on the floor and, standing

beside Doyle, Kevin Hoey whose "face was all blood and his nose was busted;" that he (Austin) and Gormley took Hoey "over to his own tavern" which is "the Cozy Corner, across the road from the Dublin House;" that "ten minutes, or something, five minutes" later Hoey left the Cozy Corner and thereafter two police officers entered and inquired of the bartender concerning Hoey's whereabouts. Austin further testified that he neither saw the fight nor knew anything about what happened in appellant's premises.

Edward J. McCann testified that, when he arrived at appellant's premises at about 8 p.m. on the night in question, he saw Doyle seated at the bar; that some time thereafter, while engaged in conversation with a friend, he "heard an argument start and a fight started" between Doyle and Hoey; that "there was a lot of commotion and then the next thing I knew Tom Doyle was on the floor;" that he and another man, as well as John McGarrigle (the bartender, who had come from behind the bar) tried to separate them and he heard McGarrigle say to somebody "to call the cops;" that the fight lasted "Oh, a few minutes, maybe five minutes;" that Doyle's "nose was bleeding a little bit and his mouth and there was blood in his ear;" that Doyle appeared to be conscious as he said to Hoey, "Leave me alone;" that Hoey left before the police arrived.

McCann further testified that, so far as he could see, only fists were used in the fight; that he had no recollection of Hoey's return to appellant's premises as he (McCann) was helping to clean the blood from the floor and picking up some chairs; that as he left the tavern he noticed appellant come in.

When questioned concerning the argument, McCann testified that there were loud voices lasting "a couple of seconds" but he did not pay much attention and first became aware of the fight when he "heard the thud."

Samuel Foley testified that he visited appellant's establishment around 9:30 p.m. and sat at the short section of the L-shaped bar; that there were five or six people in the premises but he did not know any of them; that "about quarter to 10:00" he heard a commotion involving two men who he subsequently learned to be Doyle and Hoey and, when he turned around, the fight was already in progress; that Doyle fell to the floor and "three or four of the fellows tried to stop them;" that during the occurrence he (Foley) "saw about three guys laying on the floor at one time or another" who "must have got hit;" that "this went on about five minutes" before Hoey left; that thereafter "the bartender gave me a plastic bag full of ice to put on his [Doyle's] face, and as I started to do that Mr. Hoey came back in so I took the bag of ice and put it on the bar and went back where I was;" that Hoey "started beating Mr. Doyle again" while he was on the floor; that the bartender did not go to a telephone up to the time the police arrived.

Foley further testified that, after Hoey came into the premises on the second occasion, he (Foley) asked the bartender for change to make a telephone call to the police and he then went next door and induced the proprietor of a liquor store who was closing the place to permit him to use the telephone in order to call the police. The time he made the call was "10:00 o'clock right on the dot."

Kevin M. Hoey testified that he was uncertain as to the time he entered appellant's premises on March 4, 1965; that he sat at the bar two seats away from where Doyle was seated. He asked Doyle "for some money that he had owed me, rather politely, and he gave me $5 rather politely" but thereafter he and Doyle engaged

in not a loud but heated, incoherent conversation, including the use of dirty remarks and calling each other names. Hoey stated that he slapped Doyle "in the mouth" and then each apologized to the other and he offered to buy Doyle a drink. Hoey did not know whether or not the bartender was behind the bar at the time. He further testified that "about fifteen minutes after the argument, the slap, the apology. He got up and left. Now, I didn't pay any attention. But then later on when he was coming back from the back room or he might have been playing pool, he might have been in the bathroom, I don't know, but he hit me with a bottle;" that he then knocked Doyle down and started kicking him; that, although he did not recall whether he punched Doyle or pushed him down, he knew he kicked him; that he did not think he kicked him in the face but he did kick Doyle in the body and, although he didn't keep track of the time, he estimated "the fracas lasted about two minutes;" that a couple of men grabbed him and he hit another fellow but he did not know him as "my eyes were almost shut. I couldn't very well see anything except Mr. Doyle;" that he had no knowledge where the bartender was during the incident but remembered leaving with Austin and Gormley and going across the street to his wife's tavern. Furthermore, he testified that he had no recollection of coming back to appellant's premises.

Thomas Doyle testified that he visited appellant's premise at 9:15 p.m. on the date in question and, while there, Hoey and he engaged in conversation concerning money; that "I owed him some money, I borrowed some money off him, and I had change of a ten dollar bill in front of me and he says, 'Hey, you got more money on the bar than I've got in my pocket,' or words to that extent, so I gave him a five and it didn't seem to please him because he reached over and he picked up some more of the money. How much he picked up, I don't know. So when I protested he belted me in the mouth;" that Hoey walked away and he (Doyle) followed him "to try and get the rest of the money off him" when Hoey "belted me good this time;" that he neither remembered apologizing nor where the bartender was at this time; that he had no further recollection of what occurred in appellant's premises but all he recalled was "waking up in a cell in the Harrison jail the next morning;" that he was taken to West Hudson Hospital where he remained for a period of twelve days, being treated for "three fractured ribs, internal bleeding of the kidneys, laceration of the right eye, pneumonia and pleurisy." (These injuries were corroborated by the medical reports from West Hudson Hospital, marked as an exhibit herein.) After leaving the hospital Doyle had six loose teeth which were extracted. Doyle further testified that the bartender is his wife's nephew and that he had no recollection of ever striking Hoey with a bottle.

John McGarrigle, although admittedly disqualified to be employed on licensed premises, was acting as bartender on the night in question. He testified that "near 10:00 o'clock, I think" he observed Hoey standing at the bar near Doyle and then saw Doyle get slapped, after which Hoey apologized. He further testified that he "started pouring beers and Tommy got up --" and a fist fight started between Doyle and Hoey which lasted anywhere between two and five minutes; that "Doyle got knocked down and there was some blows exchanged, Tommy was getting the worst of it, and Kevin left;" that Hoey kicked Doyle as he lay on the floor, at which time he (McGarrigl came from behind the bar while others were attempting to stop the brawl; that a couple of the patrons were pushed to the floor and he "got pushed back;" that Hoey left but "about a minute and a half later"returned and, as Doyle lay on the floor, Hoey "smacked him a couple of times and then dragged him behind the bar" and left;

that at no time did he call the police or the hospital although he recalled "yelling" for somebody to call the police.

Police Sergeant Vincent Pagano testified that he arrived at appellant's premises after 10 p.m. and that the disturbance had ceased and he observed two police officers who had preceded him to the premises taking Doyle to the hospital. Although at previous times police had been dispatched to appellant's premises, the alleged dispute or disturbance had ended and no formal complaints were made.

William Fallon, Acting Captain of the Detective Bureau, testified that the police records indicated that at times police are sent to the area in which appellant's premises is located but that he has no personal knowledge of any fights occurring in appellant's establishment.

Appellant testified that on March 4th he received a telephone call that there was a fight in his tavern and, when he arrived there immediately after the police, the disturbance was over. He further testified that, with the exception of the matter now under consideration, he was never charged with any violation of the Alcoholic Beverage Law. Appellant contends that respondent was influenced by political considerations as the penalty imposed was excessive. In order to substantiate his contention with reference to the penalty, appellant's attorney questioned the Town Clerk in an attempt to show that other licensed premises were given lesser penalties by respondent for serious offenses.

I have carefully examined the testimony of the witnesses who were present when the alleged occurrences took place, and I was particularly impressed with the testimony of Samuel Foley. He testified that he had been in appellant's premises on only one occasion prior to the date in question, approximately four or five years ago, and did not know any of the patrons or the bartender. The other witnesses consisted of the bartender, the two combatants (the wife of one being the aunt of the bartender), and one regular patron of the establishment. Foley was the person who called the police when Hoey re-entered the premises on the second occasion and resumed the attack on Doyle. As stated by Foley, and not contradicted by the bartender, the latter made no attempt at all to call the police or the hospital although Doyle was lying on the floor and, as some of the witnesses said, was unconscious for a considerable length of time.

Webster defines brawl as a "loud, angry, or disorderly quarrel ... a rough noisy and often prolonged hand-to-hand fight (a barroom brawl)." Webster's Third New International Dictionary Unabridged. See also Plikaytis v. Harrison, Bulletin 754, Item 1.

The incident wherein Doyle was struck by Hoey, causing him to fall to the floor, lasted a minimum of five minutes. The bartender most certainly was, or should have been, aware, when Hoey had previously slapped Doyle, that further trouble could be anticipated. Therefore, instead of ignoring the matter, he was under a duty to request Hoey to leave the premises and, if he refused to do so, forthwith to seek assistance from the police.

It has been consistently held that a licensee or other person in charge of licensed premises cannot stand idly by and witness a brawl, acts of violence or other serious occurrence without using every means at his command to stop the disturbance

and prevent its recurrence. In this instance it is clear that the bartender failed to meet his obligation for reasons best known to himself.

Under the circumstances herein, I am satisfied that a disturbance, acts of violence and brawl took place on appellant's premises. According to Hoey, he and Doyle, during an argument, engaged in a heated discussion accompanied by "dirty remarks" before a physical assault occurred. Shortly thereafter the fight involving the parties in question resumed. Hoey then left appellant's premises for a period of time but returned and continued to assault Doyle.

In Connor v. Fogg, 75 N.J.L. 245, Sup. Ct. 1907, the court, in considering the terms "allowed, permitted or suffered", stated:

> "To permit is defined as meaning to authorize or to give leave (McHenry v. Winston, 49 S.W. Rep. 4), but the term 'permit' has been often used synonymously with 'suffer,' so that it may be said that one who suffers the doing of a thing which he might have prevented permits it."

Because of the bartender's conduct, the licensee must be held accountable for the violation permitted by his employee (Rule 31 of State Regulation No. 20) for allowing, permitting and suffering a brawl, act of violence or disturbance on the licensed premises.

It is apparent that, in the absence of a prior adjudicated record, the penalty imposed herein is quite severe. However, in fixing a penalty, the local issuing authority has a right to consider not only the offense but the offender and all of the surrounding circumstances. In the nature of things, penalties can be identical only by accident. The statute contemplates individual treatment of offenses and offenders and, in the absence of arbitrary, discriminatory, oppressive or otherwise palpably unjust treatment, the courts will not interfere. DeFebb v. Davis, App. Div. 1962, not officially reported, reprinted in Bulletin 1482, Item 1. The power of the Director to reduce or modify a penalty imposed by a municipal issuing authority will be sparingly exercised and only with the greatest caution. Russo v. Lincoln Park, Bulletin 1177, Item 7. See also Benedetti v. Trenton, Bulletin 1040, Item 1. Any plea for mitigation should be made, if at all, to respondent, which may grant relief in the event that the members thereof determine that such action is advisable. In Re Bischoff, Bulletin 53, Item 5, the Commissioner pointed out that it is within the jurisdiction of the municipal issuing authority to modify a penalty previously imposed where the facts warrant it.

It is recommended that an order be entered affirming respondent's action, dismissing the appeal, and fixing the effective dates for the suspension imposed by respondent and stayed pending the entry of the order herein.

## Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, the attorney for appellant filed exceptions to the Hearer's Report and written argument in substantiation thereof.

I have considered all of the exceptions taken to the Hearer's Report and find that they lack merit.

After carefully considering all of the evidence adduced in this matter, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein, except so much thereof as characterizes the penalty as "quite severe". As to this, it is my view that under all of the facts and circumstances, the penalty is amply warranted and fully justified.

I shall, therefore, affirm the action of respondent and reimpose the suspension of license.

Accordingly, it is, on this 29th day of December, 1965,

ORDERED that Plenary Retail Consumption License C-2, issued by the Mayor and Council of the Town of Harrison to Robert McCrate, t/a Dublin House, for premises 613 North 4th Street, Harrison, be and the same is hereby suspended for ninety-two (92) days (the equivalent of the original suspension for three months from June 13, 1965 to September 13, 1965), commencing at 2:00 a.m. Wednesday, January 5, 1966, and terminating at 2:00 a.m. Thursday, April 7, 1966.

JOSEPH P. LORDI,
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - AGGRAVATING CIRCUMSTANCE - LICENSE SUSPENDED FOR 75 DAYS.

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| In the Matter of Disciplinary Proceedings against<br><br>Joseph A. Strada, Jr.<br>t/a Strada Lounge<br>6615 Hudson Avenue<br>West New York, New Jersey<br><br>Holder of Plenary Retail Consumption License C-59, issued by the Board of Commissioners of the Town of West New York. | CONCLUSIONS and ORDER |

Alexander A. Abramson, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on September 3, 1965, he sold drinks of beer and mixed drinks to twelve minors, one age 16, one age 17, five age 18, three age 19 and two age 20, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, but considering the violation as aggravated by the ages and the number of minors involved, as well as the confessive plea entered, the license will be suspended for seventy-five days.

Accordingly, it is, on this 29th day of December, 1965,

ORDERED that Plenary Retail Consumption License C-59, issued by the Board of Commissioners of the Town of West New York, to Joseph A. Strada, J., t/a Strada Lounge, for premises 6615 Hudson Avenue, West New York, be and the same is hereby suspended for seventy-five (75) days, commencing at 3:00 a.m. Wednesday, January 5, 1966, and terminating at 3:00 a.m. Monday, March 21, 1966.

JOSEPH P. LORDI,
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Mikedan, Inc.
t/a Ritchie's Tavern
274 Halsey Street
Newark, N. J.

Holder of Plenary Retail Consumption License C-239, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark

CONCLUSIONS and ORDER

Licensee, by Daniel P. Marchese, President, Pro se.
Morton B. Zemel, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on September 8, 1965, it possessed alcoholic beverages in four bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty days, with remission of five days for the plea entered, leaving a net suspension of fifteen days. Re Al's Cafe Bar, Inc., Bulletin 1625, Item 5.

Accordingly, it is, on this 30th day of December, 1965,

ORDERED that Plenary Retail Consumption License C-239, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Mikedan, Inc., t/a Ritchie's Tavern, for premises 274 Halsey Street, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Thursday, January 6, 1966, and terminating at 2:00 a.m. Friday, January 21, 1966.

JOSEPH P. LORDI,
DIRECTOR

DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA - CHARGE OF SALE BELOW FILED PRICE DISMISSED.

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| In the Matter of Disciplinary Proceedings against<br><br>The Point Tavern, Inc.<br>1 Main Street<br>Matawan, New Jersey<br><br>Holder of Plenary Retail Consumption License C-3, issued by the Borough Council of the Borough of Matawan | CONCLUSIONS and ORDER |

Rosen & Kanov, Esqs., by Leon M. Rosen, Esq., Attorneys for Licensee

Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensees pleaded non vult to Charge 1 and not guilty to Charge 2, as follows:

> "1. On Saturday, August 28, 1965, at about 1:25 a.m., you sold and delivered and allowed, permitted and suffered the sale and delivery of an alcoholic beverage, viz., a pint bottle of Calvert Extra Blended Whiskey, at retail, in its original container for consumption off your licensed premises and allowed, permitted and suffered the removal of said alcoholic beverage in its original container from your licensed premises; in violation of Rule 1 of State Regulation No. 38.
>
> "2. On Saturday, August 28, 1965, you sold and offered for sale, at retail, directly or indirectly, the above-mentioned pint bottle of Calvert's Extra Blended Whiskey, an alcoholic beverage, at less than the price thereof filed with the Director of the Division of Alcoholic Beverage Control; in violation of Rule 5 of State Regulation No. 30."

In view of the confessive plea to Charge 1, I shall consider the facts and issues relevant solely to the disposition of Charge 2.

Two Division agents participated in the investigation which culminated in preferring the above charges.

Prior to presenting the factual picture, the attorney for the Division and the attorney for the licensee stipulated that the date in each charge be amended to read "Sunday, August 29, 1965" instead of Saturday, August 28, 1965.

Agent M testified that he and Agent B and two other agents who did not actively participate in this investigation arrived at the vicinity of the licensed premises at 12:50 a.m. on Sunday, August 29, 1965, at which time Agent B entered alone. About two minutes thereafter, Agent M entered the licensed premises and took a seat at the bar about four seats to the right of Agent B Mrs. Elsie Ball was tending bar.

Upon entering the licensed premises, Agent M ordered and was served a glass of beer, in payment of which he gave the barmaid a $5 bill. The beer cost 15¢ and he received four single dollar bills and coins from the barmaid. At about 1:20 a.m. he purchased a pint of Calvert whiskey of Mrs. Ball, giving her three of the $1 bills from the change of $5, and left the tavern. It had been stipulated that the filed price for the item was $3.05.

Under vigorous cross examination, the agent's version of the occurrence did not vary. He stated that he had control over his money and he did not see Mrs. Ball pick up a nickel from his change on the bar. He did admit that he did not count his change when he picked it up. He denied paying for the beer with a fifty-cent coin and paying for the bottle of whiskey with a $5 bill.

Agent B testified that he entered the licensed premises at 12:50 a.m. on Sunday, August 29, 1965, and took a position midway at the bar. He saw Agent M and the barmaid (identified as Elsie Ball) engage in a short conversation. Mrs. Ball turned, reached on a shelf, took down a pint of Calvert whiskey, put it in a paper bag and handed it to Agent M. Agent M handed the barmaid three $1 bills and she went to the cash register with the three single dollar bills.

On cross examination, Agent B reiterated that Agent M paid for the bottle of whiskey with three $1 bills and he did not see Mrs. Ball pick up any change from the bar. He denied that Agent M entered the men's room immediately upon entering the tavern and that he asked Mrs. Ball for the bottle of whiskey immediately upon approaching the bar. He conceded that he was not watching Agent M's change all of the time.

In behalf of the licensee, Elsie Ball testified that she was employed as a barmaid; that Agent M entered the tavern at 1:00 p.m., first went to the men's room and then ordered a bottle of beer which he paid for with a fifty-cent piece. The beer cost 30¢ and she gave him a dime and two nickels change. After Mrs. Ball admitted the sale of the bottle of Calvert, she testified as follows:

> "He gave me a five dollar bill. I gave him back two one dollar bills. I rang it up. He had change from the bottle of beer of the fifty cents he had given me, and I took a nickel from the change."

On cross examination, the witness admitted that she knew the price of the bottle of whiskey was $3.05 and she explained the transaction as follows:

> "Q You knew the price was $3.05?
> A That is right.
> Q When you took the five dollar bill from him you say you went to the register and rang it up?
> A I certainly did.
> Q What did you ring up?
> A Three dollars, and I went back and took a nickel.
> Q Then what did you do?
> A Rang up five cents.
> Q Was there any reason you did not ring $3.05 at one time?
> A Because he had given me a $5 bill and I gave him two $1's. What was the use taking a nickel from a dollar when he had 20 cents laying on the bar?"

It is a 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); Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501 (1956). This principle was restated in Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (App.Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1, where the court said:

> "The truth of charges in a proceeding before an administrative agency need be established only by a preponderance of the believable evidence, not beyond a reasonable doubt. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962)."

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I have carefully weighed, evaluated and considered all of the material testimony presented in this proceeding. I am persuaded that Agent M's testimony (buttressed by the testimony of Agent B) to the effect that the barmaid accepted three single dollar bills in payment of the pint bottle of Calvert's whiskey presents a true and accurate account of the occurrence. I am convinced that the explanation given by the barmaid, Mrs. Elsie Ball, that she made two separate transactions in receiving payment in the sum of $3.05, is improbable, contrary to common experience and incredible.

While a finding of guilt should not be made where the evidence is in serious conflict and equally as consistent with innocence as with guilt, nevertheless a categorical denial by the licensee should not be permitted to overcome clear and logical evidence to the contrary.

It is a fundamental principle that a licensee is responsible for the misconduct of his employees and is fully accountable for their activities on the licensed premises. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948); In re Schneider, 12 N.J.Super. 449 (App.Div. 1951); Rule 33 of State Regulation No. 20.

I conclude and I find that the Division has established the truth of Charge 2 by a fair preponderance of the credible evidence, and I recommend that the licensee be found guilty of said Charge 2.

The licensee has no prior adjudicated record. It is further recommended that an order be entered suspending the license on the first charge for fifteen days (Re Maesm, Inc., Bulletin 1634, Item 2) and on the second charge for ten days (Re City Hall Wines & Liquors, Inc., Bulletin 1615, Item 7) without remission for the plea to Charge 1 in view of the contest on Charge 2 (Re Edna W. Fuller Company, Bulletin 1545, Item 3), making a total suspension of twenty-five days.

## Conclusions and Order

Having carefully considered the entire record herein, including the transcript of testimony, the Hearer's report and exceptions thereto, I cannot adopt the Hearer's report in which he recommends that the licensee be found guilty of Charge 2. The proofs, in my opinion, fail to support the charge by a fair preponderance of the believable evidence. Under the circumstances, I find the licensee not guilty of Charge 2.

Since the plea of non vult to Charge 1 was entered prior to the date of hearing, the license will be suspended on the first charge for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days.

Accordingly, it is, on this 10th day of January 1966,

ORDERED that Plenary Retail Consumption License C-3, issued by the Borough Council of the Borough of Matawan to The Point Tavern, Inc. for premises 1 Main Street, Matawan, be and the same is hereby suspended for ten (10) days, commencing at 2:00 a.m. Monday, January 17, 1966, and terminating at 2:00 a.m. Thursday, January 27, 1966.

Joseph P. Lordi
Director