Deputy Director Saum

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

BULLETIN 1722 March 30, 1967

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

BULLETIN 1722 March 30, 1967

1. DISCIPLINARY PROCEEDINGS - NUISANCE (SALE OF NARCOTICS) - PRIOR DISSIMILAR RECORD - LICENSE REVOKED.

In the Matter of Disciplinary Proceedings against)
)
JOHN J. GNEWCENSKI
t/a Eagle Cafe)
346 Market Street
Perth Amboy, New Jersey) CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-99, issued by the Board of Commissioners of the City of Perth Amboy)
)

Charles B. Klitzman, 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 as follows:

"On August 18, 19, 26, 27, 30 and 31, 1966, you allowed, permitted and suffered immoral activity in and upon your licensed premises and your licensed place of business to be conducted in such manner as to become a nuisance, viz., in that on all of said dates you made offers to and arrangements with a patron or customer on your licensed premises to obtain or procure for and/or sell narcotic drugs to him, and, in furtherance of said offers and arrangements, sold narcotic drugs to said patron or customer on your licensed premises on said date of August 19, 1966; all such activity being in violation of Rule 5 of State Regulation No. 20."

The facts are sufficiently set forth in the quoted charge when it is added that reports of investigation disclose that the narcotic drugs in question were substantial quantities of marijuana in amounts varying up to one pound.

Licensee has a previous record of suspension of license by the municipal issuing authority for ninety days effective September 22, 1966, for sale during prohibited hours and hindering investigation.

In view of the serious social consequences resulting from the commercialized traffic in narcotics, the nature of the charge considered as well as the prior record, the only proper penalty is outright revocation of the license.

Accordingly, it is, on this 17th day of January, 1967,

ORDERED that Plenary Retail Consumption License C-99,

issued by the Board of Commissioners of the City of Perth Amboy to John J. Gnewcenski, t/a Eagle Cafe, for premises 346 Market Street, Perth Amboy, be and the same is hereby revoked, effective immediately.

JOSEPH P. LORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - NUISANCE (APPARENT HOMOSEXUALS) - SALE TO A MINOR - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 125 DAYS NO REMISSION FOR PLEA ENTERED AFTER PARTIAL HEARING ON ONE CHARGE AND CONTEST OF ANOTHER.

In the Matter of Disciplinary Proceedings against

THE BUNNY HUTCH (A CORP.)
169 Verona Avenue
Newark, New Jersey

Holder of Plenary Retail Consumption License C-448, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Norman D. Weisburd, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads non vult to the first charge (after partial hearing thereon) and not guilty to the second charge as follows:

"1. On Friday night, April 22 into Saturday morning, April 23 and on Friday night, April 29 into Saturday morning, April 30, 1966, you allowed, permitted and suffered lewdness and immoral activity and foul, filthy and obscene conduct in and upon your licensed premises and allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance, viz in that you allowed, permitted and suffered persons who appeared to be homosexuals, e.g. males impersonating females and females impersonating males, in and upon your licensed premises; allowed, permitted and suffered such persons to frequent and congregate in and upon your licensed premises; allowed, permitted and suffered such persons to make overtures for and arrangements with other patrons and customers for acts of perverted sexual relations; allowed, permitted and suffered lewdness, immoral activity and foul, filthy and obscene conduct by such persons and by others in and upon your licensed premises; and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20.

"2. On April 30, 1966, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Catherine ---, age 19, and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20."

The plea of non vult to Charge 1 obviated the necessity of hearing and evaluating the entire evidence in support of the said charge, which speaks for itself.

The Division's case against the corporate licensee with respect to the second charge was developed through the testimony of and ABC agent and the minor, and may be summarized as follows:

Catherine --- (age 19 on the date charged) testified that she was in the licensed premises in the early morning of April 30 in the company of her girl friend. Seating herself at the bar next to a male friend, she received a vodka collins which was ordered for her by her friend and served by the bartender. She denied, however, that she drank any part of it before it was seized by the agent. Questioned by the ABC agent, she ultimately admitted that she was nineteen years of age. She further admitted that she had in her possession a spurious birth certificate which set forth the age of its owner as twenty-four years. She added that the bartender did not make any inquiry with respect to her age or require her to make any representation with respect to same.

ABC Agent R gave the following account: In the course of a continuing investigation of the licensed premises he visited the said premises on the evening of April 29 and remained there through the early morning of April 30, 1966. At about 1:30 a.m. on April 30 he observed the said minor seated at the bar with an unidentified male and female. He noted that she was served an alcoholic beverage by a bartender (later identified as John Annicchiarico). After serving her a vodka collins, the bartender received payment from money which was on the top of the bar. The minor left the bar, danced with the male friend and, upon returning to the bar, consumed a small portion of this drink.

At this point the agent confronted her and questioned her about her age. She insisted that she was twenty-four years of age and, at his request, proceeded to a table where she was further interrogated. At this point this agent's attention was attracted by a fellow agent who was apparently being attacked by other patrons in the rear of the said premises. After going to his assistance, he returned to the table and found that the glass of alcoholic beverages which he had taken from this minor had disappeared. Catherine insisted that she did not know what happened to the drink because the lights in the premises were deliberately turned off for a short time during this fracas, rendering the premises to complete darkness. Further questioning elicited from this minor the fact that she was nineteen years of age. The agent then questioned the bartender about his sale and service to this minor, and he said, "I probably made the drink since I am the only one here knows how to prepare mixed drinks", but denied serving her.

On cross examination this agent insisted that he saw the bartender mix the drink, place it in front of the minor and saw her actually consume part of the drink.

John Annicchiarico, testifying on behalf of the licensee, denied serving any alcoholic beverages to this minor or accepting any money from her for any such drinks. He stated that one of the bartenders asked him to mix the drink because he was the only one who knew how to mix drinks and, after preparing the same, he placed it in front of a male, who paid therefor. The first that he knew that this minor had consumed any alcoholic beverages was when the agent informed him thereof.

On cross examination he insisted that one of the other bartenders on duty had actually received the order for this drink and that the drink was placed in front of the male patron. He also stated that the drink was not made for the minor but was in fact made for her male friend. However, he admitted that the minor was standing alongside this male patron at the time of the said service. He also added that this minor appeared to him to be over twenty-one years of age and he did not question her with respect to her age.

I have carefully analyzed the testimony adduced with respect to this charge, and have had an opportunity to observe the witnesses as they appeared at this hearing. I am persuaded that the version given by the agent is a forthright and accurate account of what actually transpired on the date charged herein. His testimony was substantially supported by the testimony of the minor who did not appear particularly anxious to serve as a friendly witness to the Division. Thus she denied having consumed any part of the drink, although this was positively asserted by the agent. However, she admitted that the drink was purchased for her, and that she held the drink in her hand at the time of the aforementioned confrontation.

I was singularly unimpressed with the testimony of Annicchiarico because his account was vague, indefinite, contradictory in some respects, and obviously lacked candor. His contention that the drink was ordered by the male patron for himself and not for this minor has no exculpatory competence since the preponderant testimony supports the Division's allegation that the drink was in fact ordered for, and consumed by, the said minor.

The fact that the minor did not pay for the drink or that it was not ordered directly by her does not relieve the licensee of its responsibility since it has been held, under the broad sweep of the Alcoholic Beverage Law and the principle of rigid control underlying its administration, that service, even indirectly, to a minor by service by the minor's companion is a violation of the statute. Cf. Fran-Bo-Car, Inc. v. Englewood, Bulletin 1186, Item 3; Grippo v. Hoboken, Bulletin 999, Item 2; Re Gahr, Bulletin 377, Item 7.

R.S. 33:1-1(w) defines "sale" (as far as applicable to this case) as "Every delivery of an alcoholic beverage otherwise than by purely gratuitous title, including ... the solicitation or acceptance of an order for an alcoholic beverage ...." It is undisputed that no representation by the minor was made of her age, nor indeed was she even questioned with respect thereto as required by the applicable law and the regulations of this Division. Rule 1 of State Regulation No. 20 and R.S. 33:1-77.

The prevention of sales of intoxicating liquor to minors not only justifies but necessitates the most rigid control. Hudson Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Guill v. Hoboken, 21 N.J. 574 (1956).

I therefore find as a fact that the Division has established the guilt of the licensee on this charge by a fair preponderance of the

credible evidence. It is therefore recommended that the licensee be found guilty of sale and service of alcoholic beverages to the minor as charged.

Licensee has a prior record of suspension by the Director of fifteen days effective January 21, 1965, for sale to minors. Re The Bunny Hutch, Bulletin 1603, Item 11.

It is further recommended that the license be suspended on the first charge for one hundred days (Re Per-Mac Corp., Bulletin 1546, Item 2; Re Four Corners Bar, Bulletin 1475, Item 3) and fifteen days on the second charge (Re Champion, Bulletin 1658, Item 8), to whic should be added ten days by reason of the record of suspension of license for the similar violation within the past five years (Re Schipani, Bulletin 1701, Item 8), making a total suspension of one hundred twenty-five days, without remission for the plea entered after partial hearing on the first charge and contest of the second charge. Re Triple Lake Ranch, Inc., Bulletin 1676, Item 3; Re Corvino, Bulletin 1706, Item 1.

Conclusions and Order

Following receipt of the Hearer's report, the attorney for the licensee advised that filing of exceptions pursuant to Rule 14 of State Regulation No. 15 was waived and requested that the penalty be imposed as promptly as possible.

No reason appearing to the contrary, I shall adopt the conclusions and recommendations of the Hearer as my conclusions herein.

Accordingly, it is, on this 19th day of January, 1967,

ORDERED that Plenary Retail Consumption License C-448, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to The Bunny Hutch (a corporation) for premises 169 Verona Avenue, Newark, be and the same is hereby suspended for one hundred twenty-five (125) days, commencing at 2:00 a.m. Tuesday, January 24, 1967, and terminating at 2:00 a.m. Monday, May 29, 1967.

JOSEPH P. LORDI
DIRECTOR

3. APPELLATE DECISIONS - S. BALISH & SON v. SUMMIT.

S. Balish & Son (a corp.),)
Appellant,)
v.) ON APPEAL
Common Council of the City of Summit,) CONCLUSIONS AND ORDER
Respondent.)

J. Alan Drummond, Esq., Attorney for Appellant.
Peter C. Triolo, 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 whereby it suspended appellant's plenary retail distribution license for premises 522 Morris Avenue, Summit, for five days commencing October 3, 1966, for permitting foul, filthy and obscene language on the licensed premises.

Upon the filing of this appeal an order dated September 30, 1966 was entered by the Director staying the suspension until further order herein.

Appellant in its petition of appeal alleges:

> "The petitioner states that the charges made against it in connection with an alleged violation of Rule 5 of State Regulations No. 20 were not proven by the preponderance of the credible evidence adduced at the hearing.
>
> "Petitioner further states that The Common Council of the City of Summit had no jurisdiction to try the petitioner for an alleged violation of Rule 5 of State Regulations No. 20 in that the language which was the subject of the charge was not uttered on or in or upon the licensed premises.
>
> "The petitioner states that facts which gave rise to the charge brought by The City of Summit do not constitute as a matter of law a violation of Rule 5 of State Regulation No. 20 in that they are not encompassed in the 'evil' to which and for which Rule 5 of State Regulations No. 20 is directed."

Respondent in its answer denies the substantive allegations of the petition of appeal.

The charge in the disciplinary proceedings instituted by respondent, which is the subject matter of the within appeal, alleged:

> "On June 12, 1966 you allowed, permitted or suffered in or upon your licensed premises, foul, filthy and obscene language and conduct in violation of Rule 5 of the State Regulations No. 20."

The hearing on appeal was de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for counsel to present testimony under oath and cross-examine witnesses.

Preliminarily it must be observed that appellant conducts a retail package liquor and grocery business at 522 Morris Avenue, Summit. A photograph (Exhibit R-3 in evidence) clearly depicts the exterior of the store premises. There are two doors leading into the premises, each apparently recessed several feet behind the building line. A patron would have to walk through a vestibule-like entranceway opening from the sidewalk in order to reach the door to the licensed premises.

Michael J. Formichella (a sergeant in the Summit Police Department) testified that he was on duty in his patrol car on June 12, 1966 (a Sunday). At approximately 10:30 p.m. he was in the vicinity

of the licensed premises for the purpose of having Patrolman John T. Connolly, of the Summit Police Department, sign a log-book. Patrolman Connolly was standing in front of the licensed premises when Formichella first saw him.

Noting the presence of Esa Balish (a stockholder of the appellant corporation) and two couples (identified as Mr. and Mrs. Miller and Mr. Dennis Forster and his sister) at the counter drinking an unidentified beverage, Sergeant Formichella knocked at one door and then at the other door in order to gain Mr. Balish's attention. Balish opened the door at the right-hand side of the premises to let out the Forster couple, and called to the Sergeant "Hey, Mike! You want a drink?" The Sergeant responded, "No. Are you crazy?" and advised Balish that no one was supposed to be in a package liquor store on a Sunday, that he should let the Millers out and close the store. Additionally he told Balish that no alcoholic beverages were to be consumed. In response Balish directed language at the Sergeant that was undeniably and admittedly foul, filthy and obscene. Sergeant Formichella then testified as follows:

> "Q Where was this language used? At what point of the store premises was Mr. Balish when this language was used?
> A It occurred in three different places over the period of time I was there. It happened on the sidewalk directly in front of the store, in the recessed area, and on the door jam or door sill.
> Q Was the door open when this language was employed?
> A Yes, sir.
> Q Was the language loud or soft or moderate?
> A It was loud.
>
> * * *
>
> Q This obscene language that was employed by Mr. Balish, can you tell us the number of times it was employed or used?
> A Specifically, no. A half-dozen times, at least.
> Q This took place at what point?
> A Like I said before, on the sidewalk, directly in front of the store, in this recessed area going into the store marked 'X2,' and in the doorway, the door jam or door sill, of X2." (referring to Exhibit R-3)

On cross examination the Sergeant testified that, in order to let the Forsters out of the premises, he backed out of the recessed area, three or four feet deep. It was his recollection that in the report made to the Chief of Police he stated that the abusive language took place on the sidewalk in front of 522 Morris Avenue.

John T. Connolly (a member of the Police Department of the City of Summit) testified that he was on duty on Sunday night, June 12, 1966. Looking in a window at 522 Morris Avenue (the licensed premises) at approximately 10:45 p.m., he observed Esa Balish and two couples drinking. He did not know what they were drinking. At that time Sergeant Formichella pulled up in a patrol car for the purpose of having the witness sign the log-book. Sergeant Formichella looked into the licensed premises and knocked on a door and a window. Subsequently Balish escorted a couple to the door, greeted the Sergeant and "asked him if he wanted a drink." The Sergeant asked Balish "if he was crazy and told him he wasn't supposed to be in the store drinking." Balish replied that the Sergeant didn't know the ABC laws and directed foul, filthy and obscene language at Sergeant Formichella. He called him

a particularly foul name at least five or six times and another foul name at least twice. Balish's tone of voice was loud and he appeared to be angry. As to the place where the language was used, Officer Connolly testified as follows:

> "Q At the first time this language was employed where was Mr. Balish?
>
> A He was on the sidewalk in front of X2 [referring to Exhibit R-3] at the start of the conversation.
>
> * * *
>
> Q Officer Connolly, I want to get clear where this bad language was used. You say it was on the sidewalk. Did it happen any other place?
>
> A Part of this conversation was on the sidewalk. As I said before, it took place on the sidewalk, part of the curb, in the recessed area before the door, and some of it directly on the door jam as Mr. Balish was going back into the store."

When the witness was asked on cross examination as to where Balish used the foul language, he replied:

> "Well, as I said, most of it took place on the sidewalk, but some as he was headed to the store in the recessed area and on the door jam."

Later the witness testified that the language took place within the door jam, meaning that it took place within "the confines of the door frame is what I am referring to." Further, he testified that the door was open and no one was holding the door.

Prior to proceeding with its defense appellant's attorney admitted the usage of the foul language by Esa Balish, but placed in issue the location where the language was used.

Esa Balish testified that he had played golf on the date in question with Mr. Miller and returned to the vicinity of the licensed premises with Mr. Miller at 9:30 p.m. The store had been closed all day. He saw Mr. Miller's wife and Mr. Forster and his sister and invited all of them to enter the store for a sandwich and a cold non-alcoholic beverage. About an hour later he went to the door to let the Forsters out. He heard no knock on the door. As he let the Forsters out, he saw Sergeant Formichella at the far side of the sidewalk near the gutter and invited him in for a cold drink. Formichella's response to the invitation culminated in Balish's usage of the foul language. Balish testified:

> "All this thing happened on the sidewalk, in the middle of the sidewalk, because I didn't want Mr. and Mrs. Miller to hear any language in the store, any argument with the police. I didn't want them to know the police were there. We had heard no knocks.
>
> * * *
>
> "I came out of this door and let Forster out, and Mike Formichella was down in the middle of the sidewalk. As I go out the door the door closes behind me because there is a forty pound weight -- when I open the door I have to put two twenty pound things to hold it open. I went outside, and the words there was in the middle of the sidewalk. He gave me a lot of guff, and I will admit I gave him a lot of guff back. That is the whole thing in a nutshell. At no time was we in the doorway or the door sill or the door jam at any time."

Dennis Forster testified that, when he and his sister were let out of the liquor store on the night in question, he saw two police officers on the sidewalk. Forster and his sister continued to his parked automobile and he heard nothing at all.

Appellant's attorney argued that the alleged foul language was not used in or upon the licensed premises and therefore appellant did not violate Rule 5 of State Regulation No. 20.

Prior to discussing what I consider the sole controversial issue, I find that (1) Esa Balish (a stockholder and employee of appellant corporation) used words that were unquestionably foul, filthy and obscene and squarely within the proscription of Rule 5 of State Regulation No. 20; (2) the door jam or framework of the door of the licensed premises is a part of the licensed premises, and (3) if Balish used the foul words while standing on, upon or within the door jam or framework of the doorway of the licensed premises, then the aforesaid rule has been violated.

It is my view that the pivotal point of inquiry is clearly established, that is, where was Balish when the foul language was used. The determination of this issue presents a purely factual question.

In evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (App. Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented in this proceeding, 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).

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

I find that the testimony of Sergeant Formichella, presented in a detailed and direct manner, was factual and credible. I am amply convinced that his graphic description of the locations where Balish was at the times he uttered the foul language truly depicted the actual occurrence of June 12, 1966. Undoubtedly, some of the foul language was uttered while Balish was standing in the door jam or framework of the door of the premises and therefore he was in or upon the licensed premises at the time of the utterance. Sergeant Formichella's testimony relative to this vital point was buttressed by the testimony of Officer Connolly. I did not discern any semblance of improper motivation in the testimony of either police officer.

I am satisfied that respondent has proved its case by a fair preponderance of the credible evidence, indeed by substantial evidence. Appellant has failed to meet the burden of establishing that the action of respondent herein was erroneous. Rule 6 of State Regulation No. 15.

Accordingly, it is recommended that an order be entered affirming respondent's action, dismissing the appeal and fixing the effective date of suspension which was stayed by the Director pending the entry of the order herein.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's report were filed by the attorney for appellant and answer thereto was filed by the attorney for respondent.

I find that the matters contained in the exceptions have either been considered in detail by the Hearer in his report or are without merit.

Having carefully considered the entire record, including the transcript of testimony, the Hearer's report, the exceptions thereto and answer to the exceptions, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 23rd day of January 1967,

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

ORDERED that Plenary Retail Distribution License D-12, issued by the Common Council of the City of Summit to S. Balish & Son, for premises 522 Morris Avenue, Summit, be and the same is hereby suspended for five (5) days, commencing at 9 a.m. Monday, January 30, 1967, and terminating at 9 a.m. Saturday, February 4, 1967.

JOSEPH P. LORDI
DIRECTOR

4. APPELLATE DECISIONS - ELMORA LIQUORS, INC. v. ELIZABETH.

ELMORA LIQUORS, INC., t/a Old Colony Wine & Liquor Store,
Appellant,
v.
City Council of the City of Elizabeth,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Milford E. Levenson, Esq., Attorney for Appellant.
Edward W. McGrath, Esq., by Frank P. Trocino, Esq., Attorney for Respondent.
Raymond D. O'Brien, Esq., Attorney for Objector, Butler's Liquors, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal is from the action of respondent, City Council of the City of Elizabeth, whereby on July 15, 1966 it denied the application for a place-to-place transfer of appellant's plenary retail distribution license from premises 611 Westfield Avenue to premises 190 Elmora Avenue, Elizabeth. Six of the nine councilmen who constitute the Alcoholic Beverage Control Board were present at the hearing for the transfer of appellant's license, and all six voted unanimously to deny appellant's application.

Appellant seeks reversal of the denial of the transfer and sets forth in its petition grounds of appeal which may be stated as follows:

(a) Respondent misinterpreted or misunderstood Section 7 of the ordinance relating to place-to-place transfers of liquor licenses as amended on July 15, 1965.

(b) The area of the proposed licensed premises is not overburdened with other licensed premises.

(c) The fact that the transfer in question would create a hardship on other licensees is strictly speculative and of no concern of the licensing authority.

(d) The denial of the application for transfer was not in the public interest.

(e) There is off-street parking at the proposed premises whereas there is none available at the present location.

Respondent's answer denies the aforesaid allegations in appellant's petition of appeal.

It appears from the testimony of Martin Marcus, president of appellant, that appellant has operated a liquor store at its present location since March, 1962; that the distance between the existing licensed premises and the proposed site is approximately

700 feet "as the crow flies;" that in the building to which appellant has sought to transfer its license, there are two stores adjacen to the Food Fair market, one of which appellant has leased for licensed premises;that the proposed premises are "on the West Grand Street side;" that there are parking facilities for approximately "two hundred cars;" that at appellant's present location, it is necessary that customers park on the street and, if appellant were permitted to transfer to the new location, he assumed that its business would increase.

Thaddeus F. Gora, councilman at large and president of the Alcoholic Beverage Control Board, testified that he voted to deny the transfer based on the opinion of the special counsel for the board, wherein it was stated that although the provision in the ordinance permitted place-to-place transfer of a license within 1500 feet of the licensee's present location, it was not mandatory to do so, but was within the discretion of the board. Councilman Gora further said that appellant presented no evidence of hardship and, after full consideration of the matter, it was his opinion that the best interests of the community would be served by denying the transfer.

James G. Murphy, a councilman, testified that he voted to deny appellant's application for the place-to-place transfer of its license "In view of the fact of the legal opinion rendered informing us it was discretionary application on our part, I took into consideration being very familiar with the area there weren't any strong factors to move the license to another area where there were an abundance of licenses, heavily congested area where they proposed to move. I didn't think it would be sound planning from the city counci point of view to have an additional license in the area." Councilman Murphy further stated that in his opinion, the purpose of the distance between premises ordinarily is to prevent an accumulation of licenses in a small congested area and that within "a 2 or 3 block area", there are already "5 or 6" liquor outlets.

Abraham Uslander, operator of a liquor store at 182 Elmora Avenue, testified that he objects to the transfer of appellant's license to the new location because, in addition to his licensed premises, there are five other liquor establishments in the immediate area sought by appellant.

Petitions containing four hundred names objecting to the transfer of the license in question were filed by objectors.

The pertinent part of Section 7 of the amended ordinance provides, among other things, that:

> "Nothing in this section shall prevent transfer of a license to premises located within a radius of 1,500 feet of the premises for which the license sought to be transferred is issued and outstanding at the time this ordinance is adopted."

It is quite apparent that the aforesaid provision in the ordinance permits the issuing authority in its discretion to approve a place-to-place transfer of a liquor license, but there is no compulsion that it do so.

It has long been held that the question of whether or not a license should be permitted at a particular location is one within the sound discretion of the local issuing authority and that it is not the Director's function on appeal to substitute his opinion for that of the issuing authority but, rather, to determine whether

reasonable cause exists for its opinion and, if so, to affirm. Redfield v. Long Branch et al., Bulletin 1027, Item 1. It is apparent by the unanimous vote of the members who heard the application for the place-to-place transfer that appellant failed to satisfy them that the public interest would best be served by the transfer of the license. Furthermore, there is nothing appearing in the record which in any way indicates that the refusal to approve appellant's application was inspired by improper motives. See Fanwood v. Rocco and Division of Alcoholic Beverage Control, 59 N.J. Super. 306 (App. Div. 1960), aff'd 33 N.J. 404 (1960).

Although the refusal to permit appellant to transfer to the proposed site may cause a hardship to it, it has always been recognized by this Division that the test to be applied is the welfare of the community.

The action of the municipal issuing authority may not be reversed by the Director unless he finds "the act of the board was clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502, at p. 511.

There was no evidence submitted on the part of appellant indicating a need or necessity for a license at the proposed premises. Although a convenience in a proper case may be considered a reason for the granting of a license, that in itself is rarely, if ever, a valid reason upon which the Director may compel the municipal issuing authority to do so. Fanwood v. Rocco and Division of Alcoholic Beverage Control, supra.

I have fully considered the various grounds of appeal advanced by appellant in its petition of appeal. After reviewing the testimony and the exhibits, including the argument given by the attorneys for the respective parties at the hearing below, I find that respondent's unanimous action is neither arbitrary, capricious, unreasonable nor did it constitute an abuse of discretion.

I conclude that appellant has failed to sustain the burden of proof necessary to establish that the action of respondent was erroneous so as to warrant reversal thereof. Rule 6 of State Regulation No. 15. Hence, I recommend that an order be entered affirming respondent's action and dismissing the appeal.

Conclusions and Order

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

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

Accordingly, it is, on this 17th day of January 1967,

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

JOSEPH P. LORDI
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED 10 DAYS.

In the Matter of Disciplinary Proceedings against

ALBERT F. FAUSTINO & JOHN R. BOHANAN)
t/a Hop 'n' Scotch Lounge
7126 Bergenline Avenue)
North Bergen, New Jersey
) CONCLUSIONS AND ORDER
Holders of Plenary Retail Consumption
License C-68, issued by the Municipal)
Board of Alcoholic Beverage Control
of the Township of North Bergen)

- -

Licensees, Pro se.
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensees pleaded not guilty to the following charge:

"On June 10, 1966, 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 quart bottle labeled 'Imported Seagram's V. O. Canadian Whisky, 86.8 Proof';

in violation of Rule 27 of State Regulation No. 20."

ABC Agent M testified that on June 10, 1966, he entered the licensees' premises and tested all of the open bottles of alcoholic beverages. His preliminary test of a bottle labeled "Imported Seagram's V. O. Canadian Whisky, 86.8 Proof" showed that the contents thereof appeared to be off in color and low in proof based upon the standard for that brand. The agent seized the said bottle and also a full sealed bottle of the same brand for comparison purposes. The open bottle was then sealed, a receipt for both bottles was given to Peter Lazzara, the bartender, and thereafter the said alcoholic beverages were brought to the Division for chemical analysis.

John P. Brady, a qualified chemist employed by the Division testified that analysis of the bottle of whiskey in question, when compared to the analysis of a genuine bottle of the same brand of whiskey, disclosed it to be "19 points under in proof, it is 12 points over in acids, it is 49.6 over in solids, and it has a higher color index by 65." Because of the variations in the contents of the open bottle and that of the genuine bottle of the same brand, Mr. Brady stated that in his opinion the open bottle seized by the agent was not genuine Seagram's V. O. Canadian whiskey 86.8 proof as labeled.

John R. Bohanan, one of the licensees, testified that he and his partner, Albert F. Faustino, "hold other jobs", Faustino working in Philadelphia and he (Bohanan) in New York. He further testified that two bartenders were employed in the tavern and that he also helps in the evening. He further stated: "The only defense we have

is the fact that we did not do anything to the bottle." Mr. Bohanan said Peter Lazzara "was let go in July."

I am satisfied from an examination and evaluation of this case that there is no question the licensees possessed, had custody of and allowed, permitted and suffered on their premises an alcoholic beverage in a bottle with a label thereon which did not truly describe its contents.

The Division's chemist stated that his tests established that the label on the bottle did not truly describe the contents therein. This testimony must be considered as conclusive in the absence of any contradictory testimony. No such testimony in opposition was offered by the licensees.

A licensee's responsibility for any "refills" found on the licensed premises was considered in Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156, wherein, among other things, the court stated:

> "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."

A licensee being liable for the actions and conduct of his employees regardless of personal knowledge, intent or participation which resulted in the violation, the licensee is not released from responsibility even though the said violation was contrary to express instructions. Mazza v. Cavicchia, 28 N.J. Super. 280, reversed on other grounds 15 N.J. 498; Greenbrier, Inc. v. Hock, 14 N.J. Super. 39; Essex Holding Corp. v. Hock, 136 N.J.L. 28; Rule 33 of State Regulation No. 20.

I conclude after careful consideration in the matter herein that the Division has established the truth of the charge by a fair preponderance of the evidence and recommend that the licensees be found guilty of the said charge.

In view of the fact that the licensees have no prior adjudicated record, it is further recommended that an order be entered suspending the license for ten days, the minimum penalty in such cases involving one bottle bearing a label which did not describe its contents. Re Jive Shack Bar, Bulletin 1706, Item 8.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the transcript of testimony, the exhibits and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 24th day of January 1967,

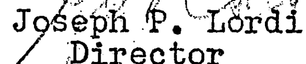
ORDERED that Plenary Retail Consumption License C-68, issued by the Municipal Board of Alcoholic Beverage Control of the Township of North Bergen to Albert F. Faustino & John R. Bohanan, t/a Hop 'n' Scotch Lounge, for premises 7126 Bergenline Avenue, North Bergen, be and the same is hereby suspended for ten (10) days, commencing at 3 a.m. Tuesday, January 31, 1967, and terminating at 3 a.m. Friday, February 10, 1967.

JOSEPH P. LORDI
DIRECTOR

6. STATE LICENSES - NEW APPLICATIONS FILED.

Hiram Walker Incorporated
8325 Jefferson East
Detroit, Michigan
Application filed March 29, 1967 for place-to-place transfer of licensed salesroom, operated under Plenary Wholesale License W-12, from 920 National Newark Building, 744 Broad Street, Newark, New Jersey, to 43 Prospect Street, East Orange, New Jersey.

Arthur M. Credico
t/a Circle Beverages
936-938 South Elmora Avenue
Elizabeth, New Jersey
Application filed March 29, 1967 for person-to-person transfer of State Beverage Distributor's License SBD-106 from Menotti Lembo, t/a Lembo Distributing Company and Circle Beverages.



Joseph P. Lordi
Director

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