

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

BULLETIN 1530

October 1, 1963

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1. APPELLATE DECISIONS - DONTAL, INC. v. HOPATCONG.

DONTAL, INC., t/a MAD HOUSE,)
Appellant,)
v.) ON APPEAL
MAYOR AND COMMON COUNCIL OF) CONCLUSIONS
THE BOROUGH OF HOPATCONG,) AND ORDER
Respondent.)

McGovern and Roseman, Esqs., by William J. McGovern, Esq.,
Attorneys for Appellant.
Harry R. Walker, Jr., Esq., Attorney for Respondent.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent whereby on the 7th day of September 1962 it suspended appellant's plenary retail consumption license for thirty days effective May 20, 1963, after finding appellant guilty of charges alleging sale of alcoholic beverages to four minors on August 10-11, 1962, in violation of Rule 1 of State Regulation No. 20. Appellant's premises are located on River Styx Road, Hopatcong.

"Upon the filing of the appeal an order was entered by the Director on October 8, 1962, staying respondent's order of suspension until further order herein. R.S. 33:1-31.

"Appellant in its petition of appeal alleges that the action of respondent was erroneous and should be reversed for reasons which may be summarized as follows:

- (a) the action was capricious, arbitrary and contrary to the weight of the evidence;
- (b) that certain witnesses testified before the respondent at the original hearing that they were 'motivated to make the charges against the appellant because (1) the appellant had refused entrance and admission to the premises to James --- (2) because the appellant had instituted criminal proceedings against Richard --- for breaking and entering and stealing alcoholic beverages (3) that if one of the principals of the license holder had not acted in the manner referred to herein they would not have caused these complaints to be filed (4) that the witnesses ... were motivated in the nature and spirit of revenge against this appellant;'
- (c) the appellant was not permitted to fully explore the question of motive and of truthfulness relating to certain alleged influences and pressures brought upon the appellant to cease

and desist from making criminal charges against one of the minors, Richard ---;

- (d) the Mayor of the respondent, who presided at the hearing below, manifested prejudice against the appellant but refused to disqualify himself as one of the hearers;
- (e) the penalty was excessive; the period wherein the penalty was fixed was arbitrary and not based 'upon reasonable standards as to the enforcement period.'

"Respondent in its answer admits the jurisdictional paragraphs of the petition of appeal, denies that portion of the petition which contains the charges as set forth hereinabove and which were used as a basis for the prayers set forth in the said petition.

"The hearing on appeal was heard 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. Melstan Corp v. Randolph, Bulletin 1496, Item 1.

"It should be stated preliminarily that the resolution adopted by the respondent after a hearing on the charges below contained the following language:

'WHEREAS, charges have been heretofore duly served upon the above named licensee, charging that

On August 10, 1962, on diver dates since July 1, 1962, on diver dates since the beginning of June 1962, on every Friday and Saturday since the end of June to August 11, 1962 you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to persons under the age of twenty-one (21) years, viz., Robert ---, age 18 and Stanley ---, age 19, and Richard ---, age 19, and James ---, age 20, and you allowed, permitted and suffered the consumption of alcoholic beverages by such persons in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20....'

"At a hearing duly held thereon, the testimony having established the truth of said charges, the resolution of respondent thereon further indicates that there was a penalty imposed of a suspension for a period of thirty days effective May 20, 1963.

"At the conclusion of the presentation of the primary case by the respondent at this appeal de novo, in accordance with the usual procedure in these matters counsel for the respondent informed me that he was unable to locate three of the four minors and could not produce them at this hearing. He stated further: 'I don't even know that they are in the State, to subpoena them, and my opinion is, it makes no difference whether ten minors drank in there or whether one did. It's a question of whether liquor was sold on the 10th or 11th of

August, to a minor.' A motion was thereupon made by counsel for the appellant to dismiss that portion of the charges which referred to the sale and service of alcoholic beverages to the minors other than to Richard ---, age 19, and to limit the proof of such sale and service to the dates of August 10 and 11.

"I thereupon indicated that I would recommend that such motion be granted, and I do recommend that that part of the judgment relating to charges on dates other than August 10 and 11, 1962, and which refers to any other minor than Richard ---, age 19, should be reversed in conformity with the proofs offered by the respondent.

"In order to obtain a proper setting for the material facts herein involved, the following facts are set forth as reflective of the evidence: The appellant's licensed premises attracts large numbers of young people on Friday and Saturday evenings, as well as on Wednesday evenings during the summer months. On the evening of August 10 (Friday) and the early morning of August 11 there were approximately three hundred fifty to four hundred persons congregated in the upper bar of these premises who were engaged in drinking and dancing. There was also a bar on the first floor of the premises which attracted large numbers of people.

"Richard --- testified that he was born in New York City on August 16, 1942, and was nineteen years of age on the dates herein alleged. He had completed his junior year at Rutgers University and was planning to enter his senior year in September 1962. On August 10, at about 8:30 p.m., he entered the Mad House and seated himself at the first floor bar and had several glasses of beer. At approximately 9:30 p.m. he went upstairs and sat at a table where he was served bourbon and ginger ale by a waitress. There he remained until 11 p.m. when he decided to go downstairs and drank additional beers until about two o'clock when he left the premises.

"At no time did any one of the appellant's employees inquire about his age or request or require that he sign any representation with respect thereto. He never represented his age to be of statutory maturity. During the course of the evening he consumed approximately twenty beers, all of which were served by a bartender known and identified as Chester. The minor stated quite definitely that Donald Frank Caskey, the president of the corporate appellant, and his wife Mary Ann Caskey did not personally serve him any alcoholic beverages on August 10 or 11 although they had served him on prior occasions at these premises.

"The witness then admitted that he was so intoxicated upon leaving the premises that he is not certain of what occurred immediately thereafter. However, he was taken into custody by police during the early morning of August 11 upon a complaint of Caskey that certain bottles of beer found in his car were unlawfully taken by this witness from the warehouse of the appellant.

"On August 11, about 11 a.m., this witness returned to police headquarters with a statement which he prepared, in which he admitted having purchased and consumed alcoholic beverages on these premises on the night of August 10 and the early morning of August 11. He was sharply cross examined by counsel for the appellant with respect to the motivation for and preparation of this statement. However, counsel objected

to having the same entered into evidence and, because the witness was not examined specifically on the contents of the statement, I sustained his objection.

"The evidence further shows that on September 5, 1962, a preliminary hearing was held in the Municipal Court of the Borough of Hopatcong on charges made against Caskey for the sale and service of alcoholic beverages to minors and he was thereupon held for action by the Sussex County Grand Jury. On that same day this witness, Richard ---, was charged on three counts of a complaint signed by Donald Caskey as president of the corporate appellant charging Richard with (1) entering upon the appellant's premises on August 10 and 11 and purchasing from the appellant alcoholic beverages, (2) that the said Richard ---, being a minor, did on the dates alleged consume alcoholic beverages on the premises of the appellant, and (3) that the said Richard ---, being a minor, did misrepresent and misstate to appellant's agents, servants and employees his true age in order to induce them to sell, serve and deliver to him alcoholic beverages.

"It was stipulated by both counsel herein that a statement of the Magistrate, the Honorable Alfred Rossy, Jr., reflects the true disposition of these charges. That statement, admitted into evidence, notes that the disposition of the case was as follows:

'On September 5, 1962 Defendant pleaded guilty as to 1st and 2nd Counts and was fined \$10.00 and \$5.00 costs. The Third Count was dismissed on request of complainant.' (emphasis ours)

"The minor, on cross examination, admitted that on the morning of August 11 he came over to the Mad House to talk to Mr. Caskey about the charges that Mr. Caskey had threatened to bring against him for alleged breaking and entering. The reason for his visit there was that the minor was a college student and he sought to urge Caskey not to file any complaint against him because it might ruin his entire future. On re-direct, the witness emphasized that he had no recollection of taking any beer from the appellant's premises on the morning in question.

"On behalf of appellant, Donald F. Caskey, its president, testified that he was actively engaged in the operation of these premises on August 10 and 11, 1962 (a Friday night and Saturday morning) and actually performed bartending duties until about 9 p.m. on August 11. His testimony continued as follows: On August 11 there were about three hundred to three hundred fifty persons crowded in the upstairs premises, and appellant engaged a special officer, doorman and ticketman, in addition to Mrs. Caskey, to police the said premises. As patrons entered, their hands were stamped with an inked rubber stamp. Chester Brundage was the bartender at the upstairs bar. This witness stated that he had seen Richard --- on a number of previous occasions, particularly on Wednesday evenings when teenage dances were held. He did not see Richard on August 10, but on the early morning of August 11, at approximately 1 a.m., he heard a bottle or a glass crash and saw two boys, their arms loaded with beer, leaving the dock adjacent to his premises. He recognized one of them as Richard. Shortly thereafter he noticed Richard in the parking lot adjacent to these premises trying to back his car out, and also observed that he was drunk; he took him into the premises and called the police. After the

police arrived, they questioned Richard who disclaimed any knowledge of how any beer got into his automobile. Caskey, however, did not make an inspection of Richard's hand to ascertain whether there was a stamp on his hand to determine if he had been on the premises earlier. Since he was not willing to positively identify Richard, Richard was not taken into custody.

"Richard came to his premises later that morning, apologized and wanted to know whether he could reimburse him for any damages which he may have sustained, to which Caskey replied, 'I'm going to Judge Prickett this afternoon to fill out the complaint and I'll decide what action I'm going to take.' Thereafter he did sign a complaint against Richard charging him with purchasing and consuming alcoholic beverages at the premises on the dates in question and also misrepresenting his age for the purpose of inducing the appellant's employees to sell and serve him the said liquor.

"On cross examination Caskey admitted that it is possible that Richard could have been on the premises without having been noticed by him since there were three hundred fifty other persons there. He further admitted that he signed and swore to the complaint upon which Richard was subsequently found guilty. The third count, relating to alleged misrepresentation of age by the minor, was dismissed, as stipulated, with the consent of this witness.

"Mary Ann Caskey, the wife of Donald Caskey, testified that she was on the premises after 11 p.m. on August 10 until 2 p.m. on August 11, and had occasion to check the registers on both floors. She denied that she saw Richard on the premises during that period, although she had seen him on prior occasions at the teenage dances which were run by appellant.

"On cross examination she admitted that it was possible that he might have been there among the three to four hundred persons.

"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. 32 C.J.S. Evidence, sec. 1042. By a preponderance of the evidence is meant evidence which is of greater weight and more convincing than that which is offered in opposition. 32 C.J.S. Sec. 1021, at p. 1051, and cases cited therein.

"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, 378 (1956); Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 503.

"My evaluation of the evidence based upon these applicable principles persuades me that the clear, unequivocal and forthright testimony of the minor is more probably founded in truth than the rather equivocal, undertain and unconvincing denial made by the witnesses for the appellant. I was particularly impressed with the testimony of Richard who gave a straightforward, credible account of the incident, much of which was indirectly corroborated not only by the circumstances but, indeed by the witnesses for the appellant. Cf. Riker v. John Hancock Mutual Life Ins. Co., 129 N.J.L. 508, 511; Wigmore,

Evidence, 3rd Edition, Sec. 2948.

"It has been energetically advocated by counsel for appellant that the motivation for the statement of the minor, upon which both the criminal and disciplinary proceedings were supported, was the desire to seek revenge upon appellant because this minor was worried about the criminal charge of 'breaking and entering' which appellant's witness indicated he would file against him. However, regardless of motivation, the fact is clear, and not affirmatively disputed by the appellant's witnesses, that the minor was on the premises on the dates alleged, did purchase and consume a substantial quantity of alcoholic beverages.

"It is true that both witnesses for the appellant denied seeing him on the premises among the three to four hundred persons then congregated. However, the identified bartender was not produced, nor were the waitress, special police officer or any other employees either requested or subpoenaed to testify herein.

"Where the minor has identified the bartender by name, the failure of the appellant to produce such witness in order to deny or refute such testimony upon this appeal de novo, when he has heard this accusation and has had a reasonable opportunity on this appeal to so deny the same, raises a strong inference that he could not truthfully deny the same. Cf. State v. D'Adame, 82 N.J.L. 315, aff'd 84 N.J.L. 386; Re Piet Club, Bulletin 1479, Item 2. The very condition of the minor at the time of his alleged apprehension by Caskey on the early morning of August 11 indicates that he had been consuming substantial quantities of alcoholic beverages. Caskey suggests that Richard's drunken condition was as a result of beer which he had supposedly taken from the appellant's warehouse. On the basis of the evidence, this proposition must be rejected. I am persuaded that the minor consumed alcoholic beverages on the premises and was served the same on the dates in question.

"Frequently the uncorroborated testimony of a minor is examined circumspectly and with great caution. However, the testimony of the minor is herein corroborated by the primary witness for the appellant. Caskey states, and it is stipulated, that the signed statement of the Borough Magistrate reflects the true situation -- that he signed a complaint charging this minor with purchasing and consuming alcoholic beverages on his premises on the dates alleged. This was a complaint voluntarily sworn to by Caskey.

"He also admits that the docket records that he consented to a dismissal of that count which charges a misrepresentation as to age. It must, therefore, follow, as a logical postulate, that the minor did not in fact misrepresent his age or, at least, that there is no charge, and surely no affirmative proof of any alleged misrepresentation.

"I therefore find as a fact that Richard, a minor, did on August 10 and 11 enter upon the premises of appellant, and the appellant did then and there sell and deliver to him alcoholic beverages; and he did then and there consume large quantities of alcoholic beverages. I further find that no representation was made by this minor as to his age, nor did appellant, his agents, servants or employees require any

written representation as directed under Rule 1 of State Regulation No. 20 (more definitively spelled out in a special note in Section 5 of appendix to the rules). Cf. Re Kaczka and Trobiano, Bulletin 1063, Item 1. I am also convinced, on the basis of the testimony herein, that the respondent did not act capriciously, arbitrarily, but rendered its decision upon the greater weight of the evidence. I therefore find that the respondent has established the truth of the charges by a fair preponderance of the believable evidence. I am also satisfied that the appellant has not met the burden on this appeal of establishing that the action of the respondent herein was erroneous.

"However, point has been raised by counsel with respect to the penalty which he alleges to be grossly excessive and 'fixed' in a period which 'was arbitrary and capricious and not based upon reasonable standards as to the enforcement period.'

"It has generally been held by this Division that a suspension imposed in a local disciplinary proceeding rests, in the first instance, within the sound discretion of the municipal issuing authority, and the power of the Director to reduce or modify it will be sparingly exercised, and then with the greatest caution. Melstan Corp. v. Randolph, supra; Harrison Wine and Liquor Co. v. Harrison, Bulletin 1296, Item 2.

"I cannot say, under all of the circumstances herein, particularly in view of the large number of drinks sold to and consumed by the minor, that the penalty imposed herein was so severe as to form a basis for reversal, or even modification, on this appeal. This view is expressed with full consideration of and notwithstanding the recommendation herein made that the part of respondent's judgment relating to the other minors be reversed. The plea for modification, as well as the plea for the period during which the suspension is to be imposed, 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. Russo v. Lincoln Park, Bulletin 1177, Item 7.

"I have considered the other points raised on this appeal. They are without factual foundation in the record, and are without merit.

"I therefore recommend that an order be entered affirming respondent's action with respect to the sale and service of alcoholic beverages to Richard ---, a minor; reversing that part of the judgment of respondent which refers to the other minors, and dismissing the appeal, fixing the effective dates for the suspension imposed by respondent and stayed pending the entry of the order herein."

Pursuant to the provisions of Rule 14 of State Regulation No. 15, written exceptions to the Hearer's Report and written arguments thereon were filed with me by the attorneys for the appellant.

After carefully considering the testimony, the exhibits, the memoranda submitted in summation at the conclusion of the hearing by counsel for the appellant and the respondent, the Hearer's Report and the exceptions thereto, and written arguments filed on behalf of the appellant, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 3rd day of September 1963,

ORDERED that Plenary Retail Consumption License C-4, issued by the Mayor and Common Council of the Borough of Hopatcong to Dontal, Inc., for premises on River Styx Road, Hopatcong, be and the same is hereby suspended for thirty (30) days, commencing at 3 a.m. Tuesday, September 10, 1963, and terminating at 3 a.m. Thursday, October 10, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

- 2. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (INDECENT CONDUCT AND FOUL LANGUAGE) - SALE TO INTOXICATED PERSON - SALE IN VIOLATION OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 110 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

JERRY & ANN PARNES
t/a NYE AVENUE TAVERN
395 Nye Avenue
Irvington, N. J.

CONCLUSIONS
AND ORDER

Holders of Plenary Retail Consumption License C-50, issued by the Municipal Council of the Town of Irvington.

David H. Wiener, Esq., Attorney for Licensees.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads non vult to charges alleging that (1) on June 12-13 and 14-15, 1963, they permitted lewd and immoral conduct and foul language on the licensed premises, in violation of Rule 5 of State Regulation No. 20; (2) on June 14-15, 1963, they sold drinks of alcoholic beverages to an intoxicated person, in violation of Rule 1 of State Regulation No. 20 and, (3) on June 12-13 and 15, 1963, made several sales of alcoholic beverages in original containers for off-premises consumption during prohibited hours, in violation of Rule 1 of State Regulation No. 38.

With respect to the first charge, reports of investigation disclose that the bartender and a part-time male employee indecently fondled a drunken female patron including apparent acts of perverted sexual intercourse, the employee being egged on by the bartender in gutter language.

Absent prior record, the license will be suspended on the first charge for seventy-five days (Re Fiebig, Bulletin 1471, Item 4); on the second charge for twenty days (Re Pregnor, Bulletin 1517, Item 8); and on the third charge for fifteen days (Re Moniello, Bulletin 1521, Item 4); for a total of one hundred and ten days with remission of five days for plea entered, leaving a net suspension of one hundred and five days.

Accordingly, it is, on this 27th day of August, 1963,

ORDERED that Plenary Retail Consumption License C-50, issued by the Municipal Council of the Town of Irvington to Jerry & Ann Parnes, t/a Nye Avenue Tavern, for premises 395 Nye Avenue, Irvington, be and the same is hereby suspended for one hundred and five (105) days, commencing at 2:00 a.m. Tuesday, September 3, 1963, and terminating at 2:00 a.m. Tuesday, December 17, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - SALE DURING PROHIBITED HOURS - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

JOSEPH FISCHER)
t/a FOUR ACRES)
Route #130 between Windsor)
and Robbinsville)
Washington Township (Mercer County))
PO Robbinsville, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-4, issued by the Township Committee of the Township of Washington)

Licensee, Pro se.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads non vult to charges alleging that (1) on July 20-21, 1963 he sold whiskey highballs to two minors, age 18 and 19, in violation of Rule 1 of State Regulation No. 20 and (2)-(6) on Sunday, July 21, 1963 he sold alcoholic beverages between 2:00 and 2:35 a.m., during hours prohibited by municipal regulation and referendum.

Absent prior record, license will be suspended on the first charge for fifteen days (Re Colonel Cooper, Inc., Bulletin 1491, Item 8) and on the balance of the charges for fifteen days, (Re Duffy's Tavern, Inc., Bulletin 1476, Item 8), or a total of thirty days with remission of five days for the plea entered, leaving a net suspension of twenty-five days.

Accordingly, it is, on this 3rd day of September, 1963,

ORDERED that Plenary Retail Consumption License C-4, issued by the Township Committee of the Township of Washington to Joseph Fischer, t/a Four Acres, for premises Route #130 between Windsor and Robbinsville, Washington Township (Mercer County), be and the same is hereby suspended for twenty-five (25) days, commencing at 2:00 a.m. Monday, September 9, 1963 and terminating at 2:00 a.m. Friday, October 4, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

4. DISCIPLINARY PROCEEDINGS - FALSE STATEMENTS IN APPLICATION FOR LICENSE - FRONT - PRIOR DISSIMILAR RECORD OF PREDECESSOR IN INTEREST - LICENSE SUSPENDED FOR BALANCE OF TERM WITH LEAVE TO LIFT AFTER 25 DAYS UPON PROOF OF CORRECTION OF UNLAWFUL SITUATION.

In the Matter of Disciplinary Proceedings against)

WHITE POODLE, INC.)
339 Plane Street)
Newark 1, N. J.)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-534, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)

Samuel Raffaello, Esq., Attorney for Licensee.
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads nolo contendere to the following charges:

"1. In your application dated June 15, 1962, filed with the Municipal Board of Alcoholic Beverage Control of the City of Newark, upon which you obtained your current plenary retail consumption license, in answer to Question No. 22 you falsely listed David Contino, Jacquelyn Contino and Mildred Brienza as the holders of 40%, 20% and 40%, respectively, of your issued and outstanding stock, and, by amendment to your answer to such Question No. 22, filed with said Board by notice dated November 29, 1962, you falsely listed Anthony Natale, Lorenzo Mansueto and Harold Husted as the holders of all of your issued and outstanding stock, and, in answer to Question No. 23 thereof, you stated that no one other than said stockholders had any beneficial interest, directly or indirectly, in the stock held by said stockholders, whereas in truth and fact said six listed stockholders did not on either of said dates have any beneficial interest in said stock, but Ralph Brienza and Michael A. Contino on June 15, 1962 had such an interest in that they were the real and beneficial owners of all of said stock and Ralph Brienza, Michael A. Contino and Charles Caruso on November 29, 1962 had such an interest in that they were the real and beneficial owners of all of said stock; said false statements, misrepresentations and evasion and suppression of material facts being in violation of R.S. 33:1-25.

"2. In your aforesaid license application, you falsely stated 'No' in answer to Question No. 31, which asks: 'Have you agreed to pay (by way of

rent, salary or otherwise) to any employee, or other person, any portion or percentage of the gross or net profits or income derived from the business to be conducted under the license applied for?', whereas in truth and fact you had agreed to permit Ralph Brienza and Michael A. Contino to retain all the profits and income derived from your licensed business; in violation of R.S. 33:1-25.

"3. From on or about April 5, 1962 to date, you knowingly aided and abetted Ralph Brienza and Michael A. Contino and from on or about November 29, 1962 to date, you knowingly aided and abetted Charles Caruso to exercise, contrary to R.S. 33:1-26, the rights and privileges of your successive plenary retail consumption licenses; in violation of R.S. 33:1-52.

"4. In your aforesaid application, you falsely stated 'No' in answer to Question No. 32, which asks: 'Does any individual, partnership, corporation or association hold any chattel mortgage or conditional bill of sale on any furniture, fixtures, goods or equipment used or to be used in connection with the conduct of the alcoholic beverage business to be operated under the license applied for?', whereas in truth and fact A & B Bar, Inc., then held a chattel mortgage, securing a loan of \$6,800.00, on all the chattels and fixtures in your licensed premises; in violation of R.S. 33:1-25."

The facts are sufficiently set forth in the quoted charges.

To date, no correction of the unlawful situation has been accomplished.

The license of A & B Bar, Inc., predecessor in interest of the licensee, then held for the same premises, was suspended by the Director for ninety days, effective September 19, 1961, for permitting immoral activity (solicitation for prostitution), indecent conduct and nuisance. Re A & B Bar, Inc., Bulletin 1416, Item 1. Charles Caruso, named in the charges as one of the undisclosed beneficial owners of the licensed business, was then president and principal stockholder of A & B Bar, Inc. In addition, it may be noted that A & B Bar, Inc. is the undisclosed chattel mortgagee named in the fourth charge.

Considering the prior record of the licensee's predecessor in interest, to which it is linked by the undisclosed interest of Charles Caruso and the chattel mortgage relationship with A & B Bar, Inc., as well as the plea entered herein, the license will be suspended for the balance of its term, with leave granted to the licensee or any bona fide transferee of the license to apply for lifting of the suspension whenever the unlawful situation has been corrected but in no event sooner than twenty-five days from the date of commencement of the suspension herein. Cf. Re Bergen Smith Recreation, Inc., Bulletin 1498, Item 4.

Accordingly, it is, on this 3rd day of September 1963,

ORDERED that Plenary Retail Consumption License C-534, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to White Poodle, Inc., for premises 339 Plane Street, Newark, be and the same is hereby suspended for the balance of its term, effective 2 a.m. Monday, September 9, 1963, with leave to the licensee or any bona fide transferee of the license to file verified petition establishing correction of the unlawful situation for lifting of the suspension of the license on or after 2 a.m. Friday, October 4, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

5. DISCIPLINARY PROCEEDINGS - GAMBLING ("LIAR'S POKER") - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against)

ED FINN'S COCKTAIL BAR (A CORP.))
t/a ED FINN'S COCKTAIL BAR)
467 Kearny Avenue)
Kearny, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-16, issued by the Mayor and Council of the Town of Kearny.)

William E. McGlynn, Esq., Attorney for Licensee
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

"The licensee pleaded not guilty to the following charge:

"On March 25 and April 8, 1963, you allowed, permitted and suffered gambling, viz., the playing of a game commonly known as "Liar's Poker", with use of United States paper currency, for stakes of money, in and upon your licensed premises; in violation of Rule 7 of State Regulation No. 20."

"At the hearing held herein the Division called as its witnesses two ABC agents (hereafter referred to as Agent B and Agent O).

"The testimony of Agent B may be summarized as follows: In the company of Agent O, and in pursuance of a specific assignment to investigate alleged gambling which is the subject of the charge herein, he made two visits to the licensed premises. On his first visit he entered the said premises on Monday, March 25, 1963, at 4:05 p.m., and took a position at the bar. The bartender, later identified as Joseph Pitta, served him and Agent O as well as another couple and a male who were also seated at the bar.

"In a nearby booth were seated six males who were playing a game known as 'Liar's Poker.' He described this game in the following language:

'... it was played with a stack of single dollar bills, and one man more or less acted as banker and distributed them, starting at his left and going around, giving single dollar bills face down to each of the players. Then subsequently starting at the left they would call off numbers like "I have 6 4's," the next player, "I got 6 3's," they would go around the circle, and eventually it would come to the conclusion where the "4" winner would call all the other 5 dollar bills on each round.'

"The name 'Liar's Poker' is derived from the fact that the players do not actually call the exact amount of the numerals which they hold, but would call another number which he guessed would be the total of all bills played in that round. Thus 'he would be lying about the serial number.'

"The winner in each game would receive dollar bills from each of the five players on each round.

"Pitta worked as bartender until 5 p.m. on this date, and served drinks to the players and generally conversed with them. On one occasion he gave one of the players sixty single dollar bills in exchange for equivalent bills of larger denominations. At 4:30 p.m. Ed Finn (identified by this witness at this hearing as the president of corporate licensee) entered the premises and watched the play. At one point he handed Pitta a stack of single dollar bills and said 'Don't forget, Joe, there is a hundred over the register.' When Pitta left at 5 p.m. each of the players gave him a dollar tip. He was relieved by another bartender known as Ken.

"On Monday, April 8, 1963, at about 2:20 p.m., this witness, in the company of Agent O, re-entered these premises and was once again served at the bar by Pitta. Finn was in and about the premises and there was a group of five men at the rear table in the small adjoining area on the right rear side of the premises. He recognized them as having played the game 'Liar's Poker' on his first visit. After they completed their lunch, they entered into the 'Liar's Poker' game. These men later identified themselves to the agent. The game was played in the same manner as described on the first visit, and on one occasion 'Finn supplied single dollar bills, how many I don't know.'

"At 3:50 p.m. Agent O left the premises, contacted local police and returned shortly thereafter accompanied by two detectives of the local Police Department. The agents thereupon identified themselves and the remaining players were questioned at police headquarters. On cross examination the agent subsequently repeated his earlier testimony and noted that Robert Richmond served as the banker on the first occasion.

"After he identified himself, Finn declined to execute a written statement requested by the agents.

"It was stipulated that Agent O would testify on direct examination in circumstantial corroboration of the

testimony of Agent B. On cross examination he described the manner in which the dealer handed out the single dollar bills and stated that the lighting in that area was adequate for him to observe the play.

"A motion was made to dismiss the charge on the ground that the Division failed to establish a prima facie case against the licensee. I recommend that this motion be denied.

"The only witness produced on behalf of the licensee was Clarence L. Blauvelt, a frequent patron of these premises. He testified it was possible that he was in these premises on March 25 because he normally has lunch there two or three times a week. However, he was not certain about that date. He did have lunch on these premises on April 8 with four other friends, but denied that he ever played 'Liar's Poker' on these premises.

"On cross examination it was developed that he has played 'Liar's Poker' 'At my office, played it in a car, played it on a bus to pass time' but never on these premises. He verified the method of play as described by the agents.

"On April 8 he first entered this tavern at 1 p.m. and remained there until approximately 4 p.m. when the confrontation with the agents and police officers took place. He was asked the following questions:

'Q. Was there any talk among the group of you between 3:15 and the time the agents came in about money? \$1 bills, \$5 bills, or \$10 bills.

A. It could have been possible we were discussing our own business affairs.

Q. During that time of three-quarters of an hour or whatever it happened to be was there any talk among the group of you "3 4's" or "5 6's" or anything like that?

A. I don't recall but I don't believe so. But there might have been because we kid each other on occasion about numbers or playing golf, you would have 3 4's in a row.'

"We are presented with the positive, credible and forthright testimony of the two Division witnesses which appears to be totally uncontradicted or even denied by the corporate licensee with respect to the incident of March 25. As to the incident of April 8, the only witness produced by the corporate licensee to refute the Division's presentation was a patron.

"This is all the more remarkable because, if the testimony of the agents is to be believed, Finn (the corporate president) was present on both occasions. Yet neither Finn, who was present at the table where these games were allegedly played and who is alleged to have assisted in obtaining change for the players, nor Pitta, who is alleged to have served drinks to these players as well as single dollar bills, was called upon to testify. Nor were the other employees who were present on

April 8 summoned as witnesses in the licensee's behalf.

"Both Finn (the president and major stockholder of the corporate licensee) and Pitta were in a position to state what really happened or to deny the charge. Where circumstances are capable of explanation by the parties, their failure to explain gives rise to an inference adverse to such parties. 33 C.J.S. Evid., p. 53.

"As a general rule, in the absence of an explanation, the non-appearance of a party or his failure to testify as to material facts within his knowledge create an inference that he refrained from testifying because the truth would not aid his contention. Similarly, where a party has a witness or witnesses available and they possess peculiar knowledge concerning the facts essential to a party's case, the failure to call said witness or witnesses gives rise to an inference that, if called, the testimony elicited therefrom would be unfavorable to said party. 31 C.J.S. Evid., Sec. 156, p. 860; Jacoby v. Jacoby, 6 N.J. Misc. 86; Lone Star Cement Corp. v. Palmer, 129 N.J. Eq. 214; 7 Wigmore Evid., Section 2100 (3rd Ed. 1940).

"We are dealing here with a purely disciplinary measure and its alleged infraction. Such proceedings are civil in nature, and not criminal. Kravis v. Hock, 137 N.J.L. 252. These cases require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956); Freud and Pittala v. Davis, etc., 64 N.J. Super. 242, 248.

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

"Licensee has no prior adjudicated record. It is therefore recommended that an order be entered suspending the license for fifteen days (the minimum penalty imposed for permitting on licensed premises gambling of the kind alleged.) Re Borkowski, Bulletin 1520, Item 9."

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 6 of State Regulation No. 16.

Having carefully considered the transcript of the proceedings and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein. Hence I shall enter an order as recommended.

Accordingly, it is, on this 21st day of August 1963,

ORDERED that Plenary Retail Consumption License C-16, issued by the Mayor and Council of the Town of Kearny to Ed Finn's Cocktail Bar (A Corp.), t/a Ed Finn's Cocktail Bar, for premises 467 Kearny Avenue, Kearny, be and the same is hereby suspended for fifteen (15) days, commencing at 2 a.m. Monday, August 26, 1963, and terminating at 2 a.m. Tuesday, September 10, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

6. DISCIPLINARY PROCEEDINGS - SERVING ALCOHOLIC BEVERAGES
OTHER THAN ORDERED - LICENSE SUSPENDED FOR 15 DAYS, LESS
5 FOR PLEA.

In the Matter of Disciplinary)
Proceedings against)

GOLIA, INC.)
t/a PLAYPEN)
439-441 South Broad Street)
Trenton 9, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption)
License C-143, issued by the City)
Council of the City of Trenton)

Licensee, by Joseph C. Guidotti, President, Pro se.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic
Beverage Control

BY THE ACTING DIRECTOR:

Licensee pleads non vult to a charge alleging that
on June 7-8 and 15, 1963 it served alcoholic beverages other
than ordered in violation of Rule 23 of State Regulation No. 20.

Reports of investigation disclose that on the dates
in question, orders from persons seated at tables for "name"
brand Scotch, Canadian, and American whiskey mixed drinks
were filled at the bar with "off" brand Scotch and American
whiskies.

Absent prior record, the license will be
suspended for fifteen days with remission of five days for
the plea entered, leaving a net suspension of ten days. Re Shore
Motel, Inc., Bulletin 1513, Item 3.

Accordingly, it is, on this 28th day of August,
1963,

ORDERED that Plenary Retail Consumption License
C-143, issued by the City Council of the City of Trenton to
Golia, Inc., t/a Playpen, for premises 439-441 South Broad
Street, Trenton, be and the same is hereby suspended for ten
(10) days, commencing at 2:00 a.m. Saturday, August 31, 1963
and terminating at 2:00 a.m. Tuesday, September 10, 1963.


Emerson A. Tschupp
Acting Director