

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

BULLETIN 2294

September 6, 1978

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1. APPELLATE DECISIONS - DAVID-CARLENE CORP. v. WEST NEW YORK.

David-Carlene Corp.,
t/a Rolan Bar,

Appellant,

v.

Board of Commissioners of the
Town of West New York,

Respondent.

.....

Erwin K. Weitz, Esq., Attorney for Appellant.

Gregory J. Castano, Esq., Attorney for Respondent.

ON APPEAL
CONCLUSIONS
AND
ORDER

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the respondent, Board of Commissioners of the Town of West New York (Board), which, on June 29, 1977, found appellant guilty of a charge alleging that, on or about October 23, 1976, it allowed, permitted and suffered gambling in or upon its licensed premises; in violation of Rule 7 of State Regulation No. 20; and suspended appellant's license for six months, effective June 30, 1977.

It is Petition of Appeal, appellant alleges that the Board's action was erroneous in that the finding of guilt, (1) was contrary to the weight of evidence; (2) the finding of guilt was arbitrary and capricious; and (3) the imposition of a six-month suspension constitutes an abuse of discretion.

In its Answer, the Board denies the substantive allegations contained in the Petition of Appeal.

Upon filing of the appeal, by order dated July 1, 1977, the Director stayed the Board's order of suspension and extended the subject license for the 1977-78 license term pending the determination of this appeal.

The stenographic transcript of the hearing was submitted into evidence in addition to testimony of witnesses produced by the appellant at the de novo hearing, in accordance with Rules 6 and 8 of State Regulation No. 15.

I

The transcript discloses that the Board relied upon the testimony of West New York Police Detectives Thomas Maggi and Frank Caroccio.

Maggi testified that, on October 23, 1976, an anonymous caller informed the police of gambling activity taking place in appellant's licensed premises. The informant stated that two Spanish males, wearing shirts with floral or tropical-type designs, were seated at the rear part of the bar and were taking bets over the phone.

The detectives entered the tavern and observed two males fitting the informant's description. They were seated together at the end of the bar and engaged in conversation. As the detectives approached, the phone rang. The barmaid answered and called one of the two men, later identified as Enrique Mascio, speaking to him in Spanish, which neither detective understands. The second man, later identified as Rolando Fernandez, the bar manager, remained seated.

Mascio conversed in Spanish with the phone caller and was observed to be casually placing white paper in his mouth. Detective Maggi identified himself to Mascio and observed that he still was stuffing the object, later identified as a match book, into his mouth. Maggi reached for it and a tin foil packet fell from inside the match book, to the floor. Upon examination, the packet contained a white powder, which he suspected as being a controlled dangerous substance.

A minor scuffle ensued as Rolando Fernandez attempted to assist Mascio. Fernandez shouted in English "Leave him alone." Maggi placed Mascio against the wall and informed him that he was under arrest. After minor resistance, which the detective subdued, a search of his person revealed pieces of paper containing numbers, believed to be evidence of an illegal lottery.

Detective Frank Caroccio next testified in support of the charges and stated that, based upon his experience and training, the sheets of paper taken from Mascio were lottery or numbers play slips.

At the hearing below and also in this Division, Rolando Fernandez testified in behalf of the licensee. He denied any knowledge of illegal activity and stated he only shouted because an unknown person grabbed him and he was unaware of what was transpiring.

II

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is a firmly settled principle that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds, as a fact, that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way: Could the members of the Council, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? Lyons Farms Tavern, Inc. v. Mun. Bd. of Alcoholic Beverage Control, Newark, 55 N.J. 292, 303 (1970); Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957).

The relevant inquiry is whether the licensee or its employee, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, has exercised that degree of care consistent with such obligation in keeping the premises free from illegal activity.

It is a well-established principle that a licensee is responsible for the misconduct of his employees, and is fully responsible for their activities during their employ on the licensed premises. In re Olympic, Inc., 49 N.J. Super. 299 (App. Div. 1958). In re Schneider, supra; Rule 33 of State Regulation No. 20.

Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions.

F. & A. Distrib. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961); Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951).

I find the transcript to be devoid of any testimony by the detectives to corroborate the naked assertion, made by an anonymous informant over the telephone, that an illegal lottery was being conducted in the subject tavern and that its employees knew, or should have known, of its existence.

The crucial issue presented is entirely factual. Was an illegal lottery suffered or permitted to exist on the licensed premises as alleged? The test in this and similar matters involving illegal activity is:

Did the licensee know of the illegal activity or could the licensee reasonably have taken steps to prevent the illegal activity that is alleged to have taken place on its licensed premises, but failed to do so.

Riverside Corp. v. Elizabeth, Bulletin 2144, Item 3.

As stated earlier, I found no testimony which would establish that the manager, or the corporate licensee, should have known or suspected the possible existence of an illegal lottery within its establishment. That the bar manager created a disturbance and may have interfered in the police effort cannot, in and of itself, establish that this employee was aware of the illegal activity of Mascio or permitted its sufference in the licensed premises.

The efforts of this Board in coming to grips with the problem of illegal lottery within a licensed establishment is highly commendable. However, this (and all other) Board functions in the manner of a quasi-judicial body, and as such, is required to make its determinations in accordance with the applicable rules of evidence and due process.

In disciplinary proceedings, a preponderance of the evidence is necessary to support and justify a finding of guilt, and questions of fact not proven by that standard must be resolved in the licensee's favor. See Wasserman and Goldberg v. Newark, Bulletin 1590, Item 1; Club Zanzibar Corp. v. Paterson, Bulletin 1408, Item 1.

After carefully considering the testimony adduced, I find an absence of substantial credible evidence to support a finding of guilt. Thus, I conclude that appellant has sustained it's burden of establishing that the action of respondent was erroneous and should be reversed.

Accordingly, I recommend that the action of the respondent be reversed and this charge be dismissed.

Conclusions and Order

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

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

Accordingly, it is, on this 28th day of February, 1978,

ORDERED that the action of the respondent Board of Commissioners of the Town of West New York be and the same is hereby reversed, and the charge herein be and is hereby dismissed.

Joseph H. Lerner
Director

2. APPELLATE DECISIONS - RUBIN'S TAVERN, INC. v. PATERSON.

Rubin's Tavern, Inc.	:	
	:	
Appellant,	:	
	:	ON APPEAL
v.	:	CONCLUSIONS
	:	AND
Municipal Board of Alco-	:	ORDER
holic Beverage Control for	:	
the City of Paterson,	:	
	:	
Respondent.	:	
.....	:	

Goodman & Rothenberg, by Robert Goodman, Esq., Attorneys for Appellant.

Joseph A. LaCava, Esq., by Ralph L. DeLuccia, Jr. Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

In this consolidated Hearer's Report, the appellant appeals initially from the action of the Municipal Board of Alcoholic Beverage Control for the City of Paterson (Board) which, by Resolution dated May 11, 1977, found appellant guilty of permitting its licensed premises to be conducted as a nuisance, and suspended its license for eighty days. An appeal followed to the Director of this Division, with a stay of suspension granted, and a de novo hearing pursuant to Rule 6 of State Regulation No. 15 was scheduled.

However, prior to the return date of that hearing, a further appeal was filed by appellant from the action of the Board which, by Resolution dated June 22, 1977, denied appellant's application for renewal of its license for the 1977-78 license term.

Subsequently, both hearings were consolidated in this Division. A transcript of the proceedings before the Board on May 11, 1977, from which hearing the eighty days suspension resulted, was received into evidence, pursuant to Rule 8 of State Regulation No. 15. Additionally, the parties were permitted to introduce evidence and to cross-examine witnesses, in accordance with Rule 6 of State Regulation No. 15.

In reference to the appeal from the finding of guilt to charges that, on February 26, 1977, appellant permitted a nuisance with the licensed premises, the transcript of the proceedings before the Board contains the testimony of Paterson police Detectives Petrelli and Pasquale. In essence, their testimony related a visit to appellant's premises on a narcotics investigation, and, while there, Detective Petrelli discovered a glassine envelope, later confirmed to have contained cocaine, at the feet of the principal stockholder of appellant corporation.

The bartender and the owner both denied to the Board that they had any knowledge of the presence of that packet of narcotic drugs and implied that, upon the arrival of the detectives, one of their patrons dropped the envelope containing the drugs at the feet of the owner.

One of the members of the Board summed up its conclusions thusly:

The questions for the Commission were, whether or not the owner of the tavern would have sufficient knowledge that this kind of condition exists, so he may have taken action to prevent it. On our prior occasion, before this Board, this licensee has been so notified that the patrons that frequent this tavern did participate and had been found to carry such contraband upon themselves and were freely admitted in and upon his licensed premises. He had been so notified by incident reports received by us. Brought to his attention at a prior hearing, therefore, this Board feels that he had sufficient knowledge to know that this condition could exist and have not demonstrated to this Board sufficient action to indicate that he had taken the proper steps to bring an end and halt to the dope traffic on his premises,....

It is firmly settled that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds as a fact that, there was a clear abuse of discretion, an unwarranted finding of fact, or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Harry's Bar and Grill, Inc. v. Roselle Park, Bulletin 2234, Item 1; Ann T. Murray, Inc. v. Clifton, Bulletin 2258, Item 2.

The burden of establishing that the Board acted erroneously, and in an abuse of its discretion rests with appellant, Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way: could the members of the Board, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds, as a fact, that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E. & A. 1947).

Reference was made by the Board to the prior record of this appellant, a review of which reveals that the appellant was subject to identical charges stemming from a discovery of narcotic drugs with the premises on February 9, 10 and 11th, 1977, a mere two weeks prior to the within charge. In that matter the Board imposed a ninety day suspension, which was affirmed, on appeal, by the Director of this Division. Rubins' Tavern, Inc. v. Paterson, Bulletin 2273 Item 2.

Considering the testimony before the Board in conjunction with the prior finding and the notice to appellant of the Board's determination to require additional vigilance by appellant, the conclusions of the Board were fully warranted. It is, thus, recommended that the action of the Board in finding appellant guilty of the charge alleged and imposing the said suspension be affirmed.

On June 22, 1977, appellant's application for renewal of its Plenary Retail Consumption License C-112 was denied. The Resolution of denial provides in full as follows:

WHEREAS, an application has been made to this Board for renewal of Plenary Retail Consumption License C-112; heretofore issued to Rubin's Tavern, a Corp.; for premises situated at 42 Paterson Street, Paterson, New Jersey; and

WHEREAS, on February 23, 1977, this Board suspended said license for permitting known narcotic users to frequent the licensed premises and allowing narcotic activity and possession of narcotic drugs on the licensed premises on divers dates; and

WHEREAS, on March 17, 1977, this Board again suspended said license for allowing the unlawful possession of narcotic drugs in the licensed premises; and

WHEREAS, this Board is in receipt of numerous police reports relative to persons of ill repute frequenting the licensed premises and narcotic activity within the premises; and

WHEREAS, this Board has considered the past record of the license, which includes the following:

- March 20, 1962 - Act of violence (cutting) on the licensed premises
- July 18, 1966 - License suspended for 15 days for after hour package sale
- Oct. 17, 1966 - Act of violence and hindering by employee of a police officer
- Jan. 6, 1969 - License suspended for 25 days for Sunday Package sale
- Jan. 23, 1973 - License suspended for 28 days for after hours package sale
- July 1, 1975 - Narcotic activity and possession of illegal lottery slips
- March 5, 1976 - Allowing a brawl on 10/20/75
Allowing a brawl on 12/4/75
- Feb. 23, 1977 - License suspended for 90 days due to 5 Charges of narcotic activity on the licensed premises
- May 11, 1977 - License suspended for 80 days for possession of narcotic drugs on the licensed premises.

and it is their unanimous opinion that the licensed premises constitutes a nuisance and to renew said license would be detrimental to the well-being of the citizens of Paterson; NOW, THEREFORE,

BE IT RESOLVED, that the renewal of said license be and the same is hereby denied.

At the de novo appeal heard in this Division, the appellant introduced the testimony of the owner of the corporate stock of appellant, Jack Glass. He stated that he is sixty-seven years of age and is in poor health. The licensed premises are under the control of the principal bartender, Gatewood Perkins, who has a long creditable record as a bartender within this establishment.

Upon receiving medical advice, he began a search for a buyer of the tavern and had entered into a contract of sale for the business with one, Alvin Lee Rodgers, who is anxious to acquire it.

Alvin Lee Rodgers testified that he is interested in purchasing the business.

From the remarks of counsel for appellant, it was apparent that no proof was to be offered to support a contention that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15. To the contrary, the appellant's efforts appeared to be directed toward the obtaining of sufficient time within which a person-to-person transfer of the license from appellant to Alvin Lee Rodgers could be approved.

That request was not opposed by the Board's counsel, and a stipulation was developed between counsel wherein the matter was remanded to the Board so that it could entertain that application for person-to-person transfer.

Subsequent to the remand, the Board did act upon the aforesaid application, which action resulted in the following Resolution, adopted November 23, 1977:

WHEREAS, on June 22, 1977, this Board denied the 1977-1978 renewal application of Plenary Retail Consumption License C-1112, heretofore issued to Rubin's Tavern, a Corporation, for premises situated at 42 Paterson Street, Paterson, New Jersey; and

WHEREAS, an appeal of this denial is presently pending before the Division of Alcoholic Beverage Control of the State of New Jersey; and

WHEREAS, on September 21, 1977, this Board was advised that all of the corporate stock of Rubin's Tavern was transferred to Alvin Rodgers and Josette Rodgers; and

WHEREAS, this Board is in receipt of a report from the State Police of New Jersey, wherein it discloses that the aforesaid Alvin Rodgers was arrested and convicted on several occasions for crimes involving the element of moral turpitude (a copy of which is attached to this resolution); and

WHEREAS, it is the unanimous opinion of this Board that the personal background of Alvin Rodgers is not suitable for the privilege of holding a liquor license; NOW, THEREFORE;

BE IT RESOLVED, that the request for a change of stockholders in the above named corporation be and the same is hereby denied.

The failure to appellant to obtain approval for its transfer of ownership to Rodgers, who the Board determined was statutorily disqualified from having an interest in a liquor license, returns the issue to this Division to determine whether the action of the Board in denying renewal of appellant's license was erroneous. Or, to put it another way, has appellant established by sufficient evidence that the Board acted erroneously, as required by Rule 6 of State Regulation No. 15, as would justify a reversal by the Director of the Board's action?

It is firmly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of the Board in the first instance, and, in order to prevail on appeal, the appellant must show unreasonable action on the part of the Board constituting a clear abuse of such discretion. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962). The burden of proof in all these cases, which involve discretionary action, falls upon appellant to show manifest error or abuse of discretion by the issuing authority. Downie v. Somerdale, 44 N.J. Super. 84 (App. Div. 1957).

From the entire record herein, together with an examination of the records of the matters cited in the Board's Resolution, it is apparent that there was insufficient control exercised by the appellant to keep its premises from being a source of trouble and drug traffic in the area. I find that the Board's acted properly within its discretionary power, and its action was not manifestly erroneous or unreasonable. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957). Thus, absent such clear abuse or unreasonable or arbitrary exercise of discretion, the judgment of the Board should not be reversed. Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292 (1970).

Finally, appellant advanced the contention that the factual situation giving rise to the difficulties at appellant's premises resembled those found in Ishmal v. Div. of Alcoholic Bev. Control, 58 N.J. 347 (1971). In that landmark decision, the court found that the narcotic drug traffic within the licensed premises and in the area was so prevalent that the licensee could not cope with it despite her constant and repeated personal efforts and pleas for assistance to the police.

In consequence thereof, the court reversed a denial of renewal of license with direction that the licensee be given an opportunity to apply for a transfer of the license to some other location.

In the matter sub judice the similarity with Ishmal ends with the finding that the subject premises is the seat of narcotic drug activity. Testimony had been produced by appellant that its owner expressed despair concerning the apparent narcotic market within or near the premises to members of the narcotic squad. Such expression in no way comports to the active, continuous efforts of the licensee in the Ishmal case to eradicate a drug problem caused by the area in which the tavern was located, rather than the conduct of the licensee. In February 1977, the premises were searched upon a surprise raid by members of the narcotic squad of the Paterson police. A cache of narcotics were found in two areas of the premises, both within control or observation of the bartender. Two weeks later, on another visit to the premises, narcotics were found at the feet of the owner.

Despite the constant presence of narcotic with the appellant's premises, the Board agreed to accept the application of a prospective purchaser of the premises, and had such individual been without criminal record, it is assumed that the transfer would have been approved. Hence, it cannot be said that the Board took any unreasonable or arbitrary action in respect to the denial of renewal of appellant's license.

Therefore, it is recommended that the action of the Board in denying renewal of appellant's Plenary Retail Consumption License, C-112, for premises 42 Paterson Street, Paterson, be affirmed, and the appeals herein be dismissed.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the appellant, and written Answers thereto were filed by the respondent, pursuant to Rule 14 of State Regulation No. 15.

In its Exceptions, the licensee requests, in essence, that it be afforded the opportunity to transfer the subject license to another party. Annexed to the Exceptions is a contract between the appellant and a real estate broker for the sale of the licensed business.

The Board opposes the aforesaid application and submits that consideration of the agreement is outside the scope of the appeal. It further questions the appropriateness and ability of a real estate broker to own this license, in light of the history of difficulties experienced in connection with this license.

At the de novo hearing in this Division, the Board stipulated that it would afford appellant the opportunity to apply for the transfer of its license to Alvin Rodgers. The Board then ascertained that Alvin Rodgers was statutorily disqualified from having an interest in a liquor license, by virtue of his conviction of crimes involving moral turpitude. Upon notification to this Division of the inability of appellant to comply with the opportunity afforded it, the subject Hearer's Report was issued.

In light of the valid and substantial objections set forth by the Board, I reject the appellant's request as without merit.

The Board was under no obligation to allow the appellant the first opportunity to preserve its license. Clearly, there is no basis to allow another opportunity at this time. See Nordco, Inc. v. State, 43 N.J. Super. 277, 288 (App. Div. 1957).

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

Accordingly, it is, on this 22nd day of March, 1978,

ORDERED that the actions of the Board of Alcoholic Beverage Control of the City of Paterson be and the same are hereby affirmed, and the appeals herein be and are hereby dismissed; and it is further

ORDERED that my Order of May 18, 1977 staying the subject suspension, and my Order to Show Cause dated June 27, 1977 extending the subject license, pending determination of the appeals, be and the same are hereby vacated.

Joseph H. Lerner
Director

3. APPELLATE DECISIONS - SCHIFF v. ATLANTIC CITY, ET AL.

ROBERT AND ABRAHAM SCHIFF :
t/a Dennis Restaurant and Tiki Terrace :

Appellant, :

v. :

Board of Commissioners of the City :
of Atlantic City and Michigan :
Boardwalk Company, :

Respondent. :

..... :

ON APPEAL
CONCLUSIONS
AND
ORDER

Greenbaum, Greenbaum, Rowe and Smith, Esqs., by Dennis A. Estis, Esq., Attorneys for Appellant Schiff.
Sills, Beck, Cummis, Radin and Tischman, Esqs., by Gerald Span, Esq. and Bleakly, Stockwell and Zink, Esqs., Associate Counsel, Attorneys for Respondent, Michigan Boardwalk Company.
W. Goddard Lashman, Esq., City Solicitor, by Dennis J. Braithwaite, Esq., Attorney for Respondent, Board of Commissioners of Atlantic City.

BY THE DIRECTOR:

Appellants appeal from the action of the Board of Commissioners of the City of Atlantic City, which, by resolution dated April 28, 1977, ordered the said appellants Schiff to deliver Plenary Retail Consumption License C-105 to the Board of Commissioners, pending determination of conflicting claims to that license. By the surrender of the license, the respondent did, *de facto*, deny a pending application to transfer the subject license to Michigan Boardwalk Company, which, thereafter, filed an appeal to this Division. Since the same license is the subject of both appeals, they were consolidated for hearing.

Upon filing of the appeal by appellants, the Director of this Division, by Order dated May 11, 1977, stayed respondent's order to deliver the subject license pending determination of the appeal. Said license was renewed for the 1977-78 license term, pending the appeal.

At the request of the parties, the scheduled hearing dates in this Division were adjourned pending a determination by a court of plenary jurisdiction of the conflicting claims of ownership of the license, and substantial efforts to achieve a settlement of the issues in dispute.

Prior to the de novo hearing in this Division, counsel for appellants, Schiff, respondent Board of Commissioners, and respondent Michigan Boardwalk Company, advised by letters dated April 21, 1978, April 3, 1978 and March 17, 1978 respectively that the Board of Commissioners of the City of Atlantic City by Resolution adopted on March 30, 1978, has recinded its order of April 28, 1977: that the litigation will soon be concluded by the entry of a final judgement; and that the parties wish to withdraw their appeals. The issues raised in the within appeals have been rendered moot.

Good cause appearing, I shall dismiss the appeals.

Accordingly, it is, on this 28th day of April, 1978,

ORDERED that the appeals herein be and the same are hereby dismissed; and it is further

ORDERED that my Order of May 11, 1977, staying the impounding of the subject license pending determination of the appeal, be and the same is hereby vacated.



JOSEPH H. LERNER
DIRECTOR