

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2269

November 14, 1977

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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2269

November 14, 1977

1. APPELLATE DECISIONS - RIDGEWOOD BAR, INC. v. NEWARK - ORDER DENYING
STAY PENDING APPEAL.

Ridgewood Bar, Inc.
t/a Lloyd's Ridgewood Bar,

Appellant,

v.

Board of Alcoholic Beverage
Control of the City of
Newark,

Respondent.

O R D E R

DENYING STAY

PENDING APPEAL

Schechner and Targan, Esqs., by Edward Weisslitz, Esq., Attorneys
for Appellant
Milton A. Buck, Esq., by John C. Pidgeon, Esq., Attorneys for
Respondent

BY THE DIRECTOR:

Appellant appeals from the action of the respondent Board of Alcoholic Beverage Control of the City of Newark which, on May 17, 1977, revoked appellant's Plenary Retail Consumption License C-532, in consequence of a finding of violations of Rules 5 and 6 of State Regulation No. 20.

Upon filing of the within appeal, an Order to Show Cause was entered, dated May 20, 1977, why a stay of respondent's revocation should not be granted pending final hearing and determination of the appeal.

On May 31, 1977, argument was held in this Division on the Order to Show Cause.

The alleged serious offenses which resulted in the revocation by the respondent included the arrangement for sale of narcotic drugs, the maintenance of a nuisance by virtue of drug related incidents, and permitting and suffering possession of tickets and participation rights in a lottery on the licensed premises.

The respondent Board objects to any stay pending determination of the appeal, based upon the seriousness of the charges, and the alleged direct participation in the violations by the appellant.

Appellant asserts economic hardship if the stay is denied, inadequate proofs before the issuing authority to support a violation, and the mitigating circumstance of the nature of the neighborhood where the licensed premises are located.

I find that the alleged offenses which are the subject of this appeal, are extremely serious. I note that this Division has preferred charges against the appellant on May 24, 1977 alleging that, between February 21, 1977 and March 4, 1977, and more generally between March 1976 and March 1977, the appellant engaged in unlawful activity in connection with narcotics and a lottery, and permitted the employment of a person disqualified by virtue of a conviction of a crime involving moral turpitude.

I, therefore, find that it would be in the public interest, and consistent with the objectives and purposes of N.J.S.A. 33:1 et seq. to deny appellant's application for a stay of respondent's Order of Revocation pending the determination of this appeal.

Accordingly, it is, on this 8th day of June 1977,

ORDERED that, pursuant to N.J.S.A. 33:1-31, the application of the appellant for an Order Staying respondent's Order of Revocation pending the determination of the appeal herein be and the same is hereby denied; and it is further

ORDERED that the hearing on the appeal be and the same is hereby scheduled for Friday, the 24th day of June 1977 at nine-thirty o'clock in the forenoon at the Division offices, 25 Commerce Drive, Cranford, New Jersey.

Joseph H. Lerner
Director

2. APPELLATE DECISIONS - OROR, INC. v. HACKENSACK.

Oror, Inc.,

Appellant,

v.

Mayor and Council of the
City of Hackensack,

Respondent.

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On Appeal

CONCLUSIONS
AND
ORDER

Galantucci & Patuto, Esqs., by Robert L. Galantucci, Esq.,
Attorneys for Appellant
Seymour Chase, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

An appeal was filed herein by New Rail Liquor Corp. (New Rail) the holder of Plenary Retail Distribution License D-5, and by Loro Corp. (Loro) from the action of the Mayor and Council of the City of Hackensack which denied the person-to-person place-to-place transfer of New Rail's retail distribution license for premises 180 Essex Street, Hackensack, to Loro for premises 210-212 Essex Street, Hackensack.

The name Loro Corp., was thereafter amended to read "Oror, Inc." by stipulation of all parties. This was verified by a letter received from the City Clerk which stated that all documents therein pertaining had been amended from Loro Corp. to Oror, Inc.

At the commencement of the hearing the caption of the within appeal was amended to reflect the amended name of the appellant and to delete the corporate transferor and the City Clerk as parties for the reason that they are neither proper nor necessary parties to the within litigation.

The matter was presented for determination based upon a stipulation of facts entered into by the parties which may be capsulated as follows: Between 180 Essex Street and 210-212 Essex Street (the present and proposed situs of the license) is located an abandoned garage of which "some people have

spoken of as making a park". The proposed situs is not dedicated park land or even owned by the municipality. There is no ordinance or regulation adopted by the municipality which would proscribe the location of a liquor license within any distance of a park.

Two Councilmen voted in favor of transfer application and two voted against same on the basis of the possibility of a park being located at the aforementioned location. The attorney for the Council correctly ruled that, inasmuch as the vote resulted in a tie, the application failed passage. See Manno v. City of Clifton, 14 N.J. Super. 100 (App. Div. 1941); Pasqua and Vecchione v. Weehawken, Bulletin 1363, Item 1; Friendly Tavern, Inc. v. South Amboy, Bulletin 2194, Item 1.

Preliminarily, I observe that the transfer of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was arbitrary and unreasonable, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398; Item 1; Bomwell v. Newark, Bulletin 1639, Item 1. The instant case is comparable to and governed by the case of Bivona v. Hock, 5 N.J. Super. 118, 120 (App. Div. 1949). As the court pointed out in that case:

"...the issue is, not whether a discretionary power has been improperly exercised, but rather whether in the exercise of the power respecting transfers, R.S. 33:1-26, authority existed in the local body to refuse a transfer of a license for the reason upon which the refusal was based."

In order to arrive at a fair determination of the controversy, I have examined the stated reason for the denial of the transfer, that is, the possibility of a park being created at the site of an abandoned garage. I find that the reason enunciated is, at best, speculative and devoid of any sound basis upon which to deny the proposed transfer.

General objections or expressions of concern are not, in themselves, sufficient reason for denying a transfer. Fran-Mort, Inc. v. Saddle Brook, Bulletin 2218, Item 1 and cases therein cited.

In reviewing the record herein, I find no factual or legal foundation to support the Council's action, and I find that the action of the Council was unreasonable and arbitrary.

For the reasons stated, I conclude that the appellant has sustained the burden imposed upon it under Rule 6 of State Regulation No. 15. It is, therefore, recommended that the Council's action be reversed, and that an order be entered directing the Council to grant the application for transfer, in accordance with the application filed therefor.

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, and the Hearer's report, I concur in the findings and the recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of June 1977,

ORDERED that the action of the respondent Mayor and Council of the City of Hackensack be and the same is hereby reversed; and it is further

ORDERED that the Mayor and Council of the City of Hackensack be and the same are hereby directed to grant appellant's application for a person-to-person and place-to-place transfer of Plenary Retail Distribution License D-5, in accordance with the application filed therefor.

Joseph H. Lerner
Director

3. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - CONDUCTING LOTTERY - NO LIST OF EMPLOYEES - PRIOR DISSIMILAR OFFENSE - LICENSE SUSPENDED FOR 40 DAYS.

In the Matter of Disciplinary Proceedings against :

Casino Royal (A Corporation) :
2118 Bergenline Avenue :
Union City, N.J. :

Transferee of Plenary Retail Consumption License from: :

Gaston Diaz :
t/a La Piragua :

CONCLUSIONS
AND
ORDER

Holder of Plenary Retail Consumption License C-182, issued by the Board of Commissioners of the City of Union City. :

Altamura, Hughes, Farber, Finnerty & Krause, Esqs., by Leonard J. Altamura, Esq., Attorneys for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded "not guilty" to three charges alleging that: (1) on September 10, 1976, it sold alcoholic beverages to a minor, Omar R--, age 16; in violation of Rule 1 of State Regulation No. 20; (2) on September 10 and 11, 1976, it conducted a lottery on the licensed premises; in violation of Rule 6 of State Regulation No. 20; and (3) it failed to have in its licensed premises, a list of, in the form as prescribed by the Director of the Division, the names and addresses of, and required information, with respect to all persons currently employed on the licensed premises; in violation of Rule 16c of State Regulation No. 20.

Prior to the hearing held herein, a plea of guilty to Charge 3 had been entered by the licensee; but, at the outset of the hearing, the licensee retracted its plea and the matter then proceeded with a "not guilty" plea as to all charges.

Prior to the introduction of testimony, counsel stipulated that Omar R--, the alleged minor, was served a rum and coke (an alcoholic beverage) on the night charged; that each male patron, upon entry into the licensed premises and payment of a \$2.00 admission fee, was given a "ticket"; and that a drawing was thereafter held, and the holder of the winning ticket received a bottle of whiskey.

In behalf of the Division Omar R-- testified that he was born October 11, 1958. Therefore, he was seventeen years of age at the time of the alleged offense, September 11, 1976.

On cross examination Omar R-- conceded that, a week prior to October 11, 1958, he had entered the same premises, and upon being questioned relative to his age by a special police officer identified as Nicholas Marino, produced a driver's license of his brother who was nineteen years of age.

In defense of Charge 1, Nicholas Marino testified that he is employed as a police officer in Union City and that he is employed part time as a "special policeman" by the licensee. In the latter capacity, he did check identities of patrons, among whom was Omar, who produced his brother's driver's license which indicated he was nineteen years of age. No written representation of age was obtained from Omar.

Ivan De Moyn, one of the stockholders of the corporate licensee testified that he employs a special police officer on Fridays, Saturdays and Sundays. The purpose of employing a special police officer is to keep order, and prevent the intrusion of minors.

De Moyn conceded that he did not have "that form" (referring presumably to an E-141 form). However, he did have "permits" containing the names, addresses and social security numbers of each employee.

The admission charge of \$2.00 for which the male patrons are assessed, permits the patron the usage of the dance area but the raffle is entirely gratuitous on the part of the management. The monetary value of the prizes is nominal, being only a pint of whiskey for the men and a ring or earrings for the women, the cost of which do not exceed \$2.00. The women pay no admission and the raffle is held as an inducement to the patrons to remain longer in the premises. A winner is selected by the drawing of a coupon from a container.

The basis for the licensee's defense is that (1) the minor held himself out to be nineteen years of age; (2) the raffle is without consideration and being a gift is not the type of "lottery" proscribed by the regulations and (3) the list of employees in the premises, although not on the E-141 Form of this Division, carried the same information, hence, the licensee was not guilty of that charge.

In adjudicating matters of this kind, 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, not officially reported, reprinted in Bulletin 1491, Item 1.

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.

With respect to Charge 1, I find that Marino's admission that no written representation whatever was required of the minor, either at the time of the production of the fraudulent driver's license on the prior occasion or at the time of the entry on the night in question is dispositive of the question of guilt or innocence.

The prevention of sales of intoxicating liquor to a minor not only justifies but necessitates the most rigid control. Hudson-Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947).

Display of a driver's license has been definitely held to be an insufficient defense to a sale to a minor, posing as an adult. Sportsman 300 v. Nutley, 42 N.J. Super. 488 (App. Div. 1957). This doctrine has been long and consistently followed, see Balzar's Delicatessen, Inc. v. Teaneck, Bulletin 2110, Item 1 (and cases cited therein), affirmed by the Appellate Division (1974) in an unreported decision, Bulletin 2139, Item 1.

Accordingly, after careful evaluation and consideration of the testimony adduced herein and the legal principles applicable thereto, I find that the Division has established the truth of Charge 1 by a fair preponderance of the credible evidence, indeed, by uncontroverted evidence, and recommend that the licensee be adjudged guilty thereof.

II.

With respect to Charge 2, I observe that Rule 6 of State Regulation No. 20, in its pertinent part (which I find to be severable from its other parts), provides as follows: "No licensee shall engage in or allow, permit or suffer in or upon the licensed premises the conduct of any lottery,...."

It was stipulated and candidly admitted by a principal stockholder of the corporate licensee (De Moyn) that a ticket was given to each patron upon entry and a raffle was conducted with prizes offered and given on the basis of the tickets given to the patrons. The raffle tickets confiscated in the licensed premises were admitted in evidence.

De Moyn conceded that the raffle was usually conducted at approximately 1:00 a.m.

That there was some type of consideration in favor of the licensee, albeit indirect, was reflected in the answers to questions posed on cross examination of the principal stockholder of the licensed establishment:

"Q. Now, why do you have your raffle at one o'clock or why do you have your raffle?

A. That was one idea to try to keep the people into the place because when you see--these people go into the place, they spend money, you know. They only don't come to dance. They don't stay, they spend money and you try to keep them into the place. That's the only thing."

Hence, the theory that the raffle is a gift without consideration to the licensee is inaccurate. Although not a direct consideration, as would be, if raffle tickets were sold independently of admission, there is an indirect benefit for which the idea of a raffle was conceived.

The intent was to retain the patronage in the establishment, thus, resulting in an economic benefit to the licensee. The winner or winners were picked by drawing one of the coupons.

Licensee's assertion that the raffle was gratuitously operated on its part, if true, is of no moment in arriving at a determination. It must be emphasized that the Legislature has enjoined the Director to supervise the alcoholic beverage industry in such a manner as to promote temperance. N.J.S.A. 33:1-3. Certainly, it was not this licensee's intent to promote temperance. Rather it was his intent to promote his economic betterment.

Based upon the stipulations and the evidence, I find and determine that the Division has proved its case by a fair preponderance of the evidence. Re Town Tavern of Bound Brook, Inc., Bulletin 1913, Item 2.

III.

Charge 3 relates to the alleged failure of the licensee to comply with the Regulation requiring that a licensee have a completed (and presumably up-to-date) E-141 Form, disclosing certain information concerning its employees.

The Regulation pertaining (Rule 16 of State Regulation No. 20) provides, inter alia that:

"(c) a list, in form prescribed by the Director of the Division of Alcoholic Beverage Control, containing the names and addresses of, and required information with respect to, all persons currently employed on the licensed

premises, is kept on the licensed premises. Such ... list shall be available for inspection by the Director, his deputies, inspectors and investigators and by any officer as defined by R.S. 33:1-1 (p)."

The defense posed is that the licensee did have such information in the form of permits posted on the wall for each employee.

The standard form prescribed by the Director (E-141) provides for data in addition to an employee's name and address, such as his age, date of birth, whether he is or is not a citizen, the capacity of his employment and whether that employment requires sale or service of alcoholic beverages, the date of the commencement of such employment and, if applicable, the date of termination of employment. Further identification of employment permit number and whether the employee was or was not ever convicted of a crime is also required on this form.

The requirement of the form may enure to the benefit of a licensee particularly in view of the holding in Kravis v. Hock, 137 N.J.L. 252 (1948) at p. 255:

"The Commissioner (now Director)... has consistently construed the word 'employed' ...to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship'."

The mere presence of municipally required permits posted on the wall of the licensed premises is not an adequate substitute for the presence of the completed form (E-141) to be available for inspection by enforcement officials.

Hence, the licensee's defense is without merit.

Accordingly, it is, recommended that the licensee be found guilty of this charge.

Records of this Division disclose that the licensee paid a fine, in lieu of suspension of license, in consequence of a charge alleging that it possessed mislabeled alcoholic beverages; the fine was paid May 14, 1976.

It is, further, recommended that the license be suspended for fifteen days in consequence of the first charge herein; for fifteen days as a result of the second charge and on the third charge, five days, making a total of thirty-five days, to which should be added five days by reason of the dissimilar offense occurring within the past five years, or a total recommended suspension of forty (40) days.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the licensee, and written answers thereto were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In its first Exception, the licensee argues that the production of a driver's license together with the physical appearance of the minor, constitutes a defense within N.J.S.A. 33:1-77. Such assertion is without merit, and was correctly resolved in the Hearer's Report. Sportsman 300 v. Board of Com'rs of Town of Nutley, 42 N.J. Super. 488 (App. Div. 1957); Laurino v. Division of Alcoholic Beverage Control, 81 N.J. Super. 220 (App. Div. 1964).

The additional aspect of this Exception, i.e., the attempt to relieve or abdicate responsibility for the underage violation because an off-duty police officer accepted the false indicia of age, is similarly without merit. The police officer was a paid employee of the licensee at that time, and the licensee is specifically responsible for his acts or omissions. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948); Rule 33 of State Regulation No. 20.

I note that the above employment of a regular police officer is an apparent violation of Rule 30 of State Regulation No. 20. While these activities are not part of the present charges, it is clear that such activity is prohibited, and may well subject the licensee to further disciplinary charges.

The arguments set forth in the balance of the licensee's Exceptions were advanced at the hearing and correctly resolved in the Hearer's Report. I find them to be lacking in merit.

Finally, I do not find the recommended suspension of forty days inappropriate or unduly severe under the circumstances herein.

Having fully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report, the written Exceptions to the said report and written answer thereto, I concur in the findings and the recommendations of the Hearer, and adopt them as my conclusions herein. I find the licensee guilty as charged, and shall suspend its license for forty days.

Accordingly, it is, on this 9th day of June 1977,

ORDERED that Plenary Retail Consumption License C-182 issued by the Board of Commissioners of the City of Union City to Casino Royal, A Corporation, transferee from Gaston Diaz, t/a La Piragua, for premises 2118 Bergenline Avenue, Union City,

be and the same is hereby suspended for the balance of its term, i.e., midnite, June 30, 1977, commencing at 3:00 a.m. Wednesday, June 22, 1977; and it is further

ORDERED that any renewal of said license which may be granted for the 1977-78 licensing year be and the same is hereby suspended until 3:00 a.m. Monday, August 1, 1977.

JOSEPH H. LERNER
DIRECTOR

- 4. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - PRIOR SIMILAR OFFENSE - LICENSE SUSPENDED FOR 20 DAYS.

In the Matter of Disciplinary Proceedings against

James V. Sylvester, Inc.
179-181 Kearny Avenue
Kearny, N.J.

Holder of Plenary Retail Distribution License D-8, issued by the Town Council of the Town of Kearny.

CONCLUSIONS
AND
ORDER

Farley and Rush, Esqs., by Thomas R. Farley, Esq., Attorneys for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads "not guilty" to a charge alleging that, on August 18, 1976 it sold alcoholic beverages to a minor, Kevin B---, age 17; in violation of Rule 1 of State Regulation No. 20.

At the Division hearing, Kevin B--- testified that he was born on February 8, 1959. He entered the subject licensed premises on August 18, 1976 and ordered and received from the clerk (identified as James V. Sylvester) a six-pack and a quart of beer, for which he paid "two dollars and about eighty cents". He was accompanied by another youth (identified as DeMaio) whom he believed bought a quart of beer. He denied that he was asked his age by the clerk.

ABC Agent B testified that on August 18, 1976 at approximately 10:15 p.m. he observed, while diagonally across the street, two "youthful appearing males" enter the licensed premises.

Agent B and his fellow agent crossed the street as the youths exited the premises, one carrying a brown paper bag. The bag carrying youth, identified as Kevin B---, was asked his age and what he had in the bag. He readily admitted that he was seventeen years of age and had a six-pack and a quart of beer and a bag of pretzels. He further admitted that he had made the purchases at the licensed premises. An inspection of the bag revealed that it did contain a six-pack and a quart of beer and a bag of pretzels. The receipt slip showed a purchase of \$2.87.

Entering the licensed premises with the youth, the clerk, James V. Sylvester, was apprised of the violation and placed under arrest.

In defense of the charge, James V. Sylvester, sole owner of the corporate stock of the licensee, testified that, on the evening in question, he did sell a six-pack and a quart of beer to a young man who accompanied Kevin B---. The minor, Kevin B---, handed him a bag of pretzels which was placed in the same bag containing the beer purchased by the other youth.

Sylvester explained that Kevin B--- had come into his liquor store on two previous occasions and he refused to sell him any liquor because he appeared to be under age, and failed, upon request, to produce identification.

Kevin's companion, identified only by his last name, De Maio, was not present at the hearing, hence, did not testify for either the Division or the licensee. Nor did the other agent of the Division testify, it being represented that he was ill.

The licensee argued that De Maio, who was apparently an adult, made the purchase of alcoholic beverages in question. In short, there was a complete denial that any sale of beer was made at all to Kevin B---. It was not denied, however, that the entire purchases were put into one bag.

It is axiomatic that, in disciplinary proceedings, a finding of guilt of the charge must be established by a fair preponderance of the credible evidence, and cannot be based upon mere suspicion. Re Doyle, Bulletin 469, Item 2. The guiding rule in these matters 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.

The issue presented for determination is strictly factual and, therefore, the issue of credibility of witnesses is of paramount importance. 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).

No testimony need be believed, but rather, so much or so little may be believed as the trier finds reliable Wigmore Evidence, Sec. 2100 (1940).

I have noted that, in his sworn testimony, the minor stated that he had purchased the beer and identified the amount paid.

It is further noted that, although Sylvester did not, in his testimony, admit to the agents the sale of the alcoholic beverages to the minor, neither did he deny such sale upon confrontation.

I have had an opportunity to observe the demeanor of the witnesses as they testified and, in view of the sharp factual conflict in the testimony, I have made a careful analysis and evaluation of their testimony.

I am persuaded that the minor's version of the transaction, his identification and recollection of the particulars in connection therewith, including the items purchased and the amount of the transaction, has a substantial ring of truth. I carefully noted the demeanor of the minor as he testified, and carefully examined the entire record herein, and I fail to detect any semblance of improper motivation on his part. Additionally, an extensive cross examination by the licensee's counsel failed to reveal improper motivation on the part of the minor.

In juxtaposition, the denial of sale to the minor is subject to direct rebuttal, as well as the reasonable inferences to be derived from the testimony of the licensee. I cannot reconcile the incorporation of a sale of alcoholic beverages and a bag of pretzels into one purchase when the licensee had questioned, on two prior occasions, the age of the minor.

The licensee also proffered testimony that the minor had admitted soliciting others to purchase alcoholic beverages for his consumption in the past. The inference he then argues is that such was the procedure sub judice. But why would the minor enter the store jointly with De Maio, risk a refusal as an allegedly known minor by the licensee, when De Maio was to make the purchase for him? I cannot accept the conclusion sought to be drawn from the evidence advanced by the licensee.

Lastly, the alleged inconsistency in the testimony of the minor at this Division and in municipal court has been carefully considered. The res gestae statements and admissions at the time of incident, confirmed at this hearing, are more credible than those given subsequently in the Municipal Court proceedings. This is further supported by the uncontradicted testimony that the minor was in possession of the alcoholic beverages, as well as, the other objective testimony of Agent B.

While a finding of guilt should not be made where the evidence is in serious conflict and equally consistent with innocence as with guilt, nevertheless a categorical denial by the licensee should not be permitted to overcome clear and convincing evidence to the contrary. I am of the opinion that a fair evaluation and consideration of the evidence clearly leads to the conclusion that the evidence preponderates in favor of a finding of guilt; and I so recommend.

Licensee has a prior record of suspension of license by the Municipal Issuing Authority for fifteen days, effective December 21, 1971 for sale to two minors, affirmed on appeal to this Division; see Bulletin 2061, Item 1.

It is, further, recommended that the license be suspended for fifteen days, to which should be added five days for a similar violation occurring more than five years but less than ten years ago, making a total suspension of twenty days.

Conclusions and Order

Written Exceptions to the Hearer's report was filed by the licensee, and written answer thereto was filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In its Exceptions, the licensee argues it did not receive a "full fair hearing" because one of the investigating officers and another witness were not called to testify by the Division.

This contention is without support in law or fact, and is rejected. The Hearer correctly resolved the factual issue. He made a correct evaluation of the credibility of witnesses, and drew fair and reasonable inferences from the testimony adduced.

There is no obligation upon the Division to produce every witness who has knowledge of the matter at issue. Additionally, the licensee could have subpoenaed such witnesses if it so desired.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report, the written Exceptions filed with respect thereto, and the written answer, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein. I find the licensee guilty as charged, and shall suspend its license for twenty (20) days.

Accordingly, it is, on this 9th day of June 1977,

ORDERED that Plenary Retail Distribution License D-8, issued by the Town Council of the Town of Kearny to James V. Sylvester, Inc. for premises 179-181 Kearny Avenue, Kearny, be

and the same is hereby suspended for the balance of its term, i.e.; midnite, June 30, 1977, commencing at 2:00 a.m. Tuesday, June 21, 1977; and it is further

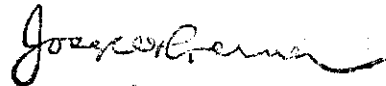
ORDERED that any renewal of said license which may be granted for the 1977-78 licensing year be and the same is hereby suspended until 2:00 a.m. Monday, July 11, 1977.

JOSEPH H. LERNER
DIRECTOR

5. STATE LICENSES - NEW APPLICATION FILED.

Monterey Bay Company, Inc.
t/a Carlton Sales Company
155 East 44th Street
New York, New York

Application filed November 9, 1977
for plenary wholesale license.



Joseph H. Lerner
Director