

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

BULLETIN 2304

December 6, 1978

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1. APPELLATE DECISIONS - JOLLY TINKER, INC. v. UNION.

Jolly Tinker, Inc.,)	
)	
Appellant,)	ON APPEAL
)	
v.)	CONCLUSIONS
)	
Board of Commissioners)	AND
of the City of Union)	
City,)	ORDER
)	
Respondent.)	

Santo Calarco, Esq., Attorney for Appellant.
Edward J. Lynch, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Board of Commissioners of the City of Union City (hereinafter Board) which, by Resolution dated January 5, 1978, suspended appellant's Plenary Retail Consumption License C-126, for premises 1906 Bergenline Avenue, Union City, for thirty days following a finding that, on July 23, 1977, appellant did permit the sale, service and/or consumption of alcoholic beverages in the licensed premises during prohibited hours, in violation of the local ordinance, Section 8-4.1.

Appellant, in its Petition of Appeal, contends that the action of the Board was erroneous, in that, the premises were open solely as a result of an emergency caused when a woman patron became ill and aid had to be summoned. The Board in its Answer denies this contention.

Upon the filing of the appeal, the suspension imposed by the Board was stayed by Order of the Director dated January 18, 1978, pending the determination of the Director.

An appeal de novo was heard in this Division, pursuant to Rule 6 of State Regulation No. 15, with full opportunity provided the parties to introduce evidence and to cross-examine witnesses.

At the hearing in this Division, Union City Police Officer Joseph Passaretti testified in behalf of the respondent Board. On

July 23, 1977, while on duty, he received a radio call at 3:25 a.m. to proceed to appellant's premises where a woman was reported lying on the floor. Upon entry into the premises, he observed about fifteen people seated at the bar. Three of the patrons were observed drinking. A woman patron was lying on the floor. She stated she felt sick, and the officer noted a strong odor of alcohol on her breath. An ambulance was called to the licensed premises.

Officer Passaretti asked the bartender why people were still in the premises. The bartender replied that they were waiting for somebody to help the woman. The officer observed one of the persons drinking out of a beer bottle, as well as other glasses on the bar. The bartender admitted knowledge that patrons were drinking in a conversation with the officer as they awaited the arrival of the ambulance. The closing hour for licensed premises in that city is 3:00 a.m., and when he arrived it was already 3:35.

August Vaccaro, president of the appellant corporation, testified in behalf of the appellant. He was not present in the licensed premises on the evening in question, and he did not learn of the incident until a week later. His own investigation of the incident revealed that the bartender called the police when a female patron fell to the ground in a convulsive state.

The sole issue in the matter is: was the presence of the fifteen patrons after closing hours a violation of the local ordinance under the circumstances herein?

The factual proofs are not in controversy. Patrons were present in the establishment after closing hours, some of whom were still drinking. Appellant maintains that their presence was permissible because they were standing around to be helpful.

The female patron fell ill and the bartender summoned aid. The ill patron was being ministered to by another female patron. At this juncture, there was no need for the dozen or so onlookers to have remained in the premises. They should have been ejected by the bartender. His lack of diligence in clearing the tavern perhaps stemmed from management's general lack of concern, as typified by the testimony of August Vaccaro that patrons would be permitted to finish drinks after 3:00 a.m.

The burden of establishing that the action of the Board is erroneous and should be reversed rests entirely upon appellant. Rule 6 of State Regulation No. 15.

The Director should not reverse unless he finds as a fact that there was a clear abuse or discretion, or unwarranted findings of fact, or mistake of law by the Board. Nordco, Inc. v. State, 43 N.J. Super. 277(App. Div. 1957).

It is abundantly clear that the appellant has failed to establish that the Board's action is erroneous or unreasonable. To the contrary, based upon the evidence in the matter, the Board could have come to no other conclusion. Hours ordinances have been uniformly interpreted to mean that if there be anyone (of the public), found on the licensed premises, a violation occurs. Jay Bee's Pub v. Irvington, Bulletin 2277, Item 1.

It is, thus, recommended that, the action of the Board in suspending appellant's Plenary Retail Consumption, C-126, for thirty days be affirmed, the Order of the Director staying the suspension pending determination of this appeal be vacated, and an Order be entered reimposing the said suspension.

Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-17.14 (formerly 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 recommendation of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 8th day of September, 1978,

ORDERED that the action of the Board of Commissioners of the City of Union City be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my Order of January 18, 1978, staying the suspension pending determination of the appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License 0910-33-101-001 issued by the Board of Commissioners of the City of Union City to Jolly Tinker, Inc. for premises 1906 Bergenline Avenue, Union City be and the same is hereby suspended for thirty (30) days commencing 3:00 a.m., Tuesday, September 19, 1978, and terminating 3:00 a.m., Thursday, October 19, 1978.

JOSEPH H. LERNER
DIRECTOR

2. APPELLATE DECISIONS - J M ASSOCIATES, A NEW JERSEY CORPORATION v. ALLENHURST

J M Associates, A New
 Jersey Corporation, :

Appellant, :

v. :

Board of Commissioners of
 the Borough of Allenhurst, :

Respondent. :

CONCLUSIONS
 AND
 ORDER

.....

Pappa, Manna & Kreizman, Esqs., by John Manna, Esq., Attorneys for Appellant.
 Stout, O'Hagan & Dowd, Esq., by Robert O'Hagan, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

This appeal came on for hearing pursuant to the provisions of Rule 6 of State Regulation No. 15 (now N.J.A.C. 13:2-17.6) from the actions of the Board of Commissioners of the Borough of Allenhurst (hereafter Borough) which, by Ordinance adopted March 28, 1978 concerning permissible distances between licensed premises, effectively prevented any favorable determination of appellant's application for a place-to-place transfer of its Plenary Retail Distribution License D-3, from 321 Main Street to 314 Main Street, Allenhurst.

At the outset of the hearing, it appeared that the parties had developed between them, and among other plenary retail distribution licensees in the said Borough, an arrangement for the successful resolution of the problems raised in the appeal, which arrangement is subject to the approval of the Director of this Division.

From oral argument of counsel, it appears that there are presently three plenary retail distribution licenses within the Borough. Upon appellant's application to transfer its license to other premises, the Borough considered same as an opportunity to reduce the number of such licenses from three to two.

To safeguard itself from ministerial deficiencies in the development of satisfactory arrangement for the retirement of the subject license, the appellant brought this appeal. However, at the outset of the hearing, as aforesaid, the parties presented the following agreement, the adoption of which is conditioned upon the approval of the Director of this Division.

The Agreement entered into by the Borough and other licensees respecting the acquisition and retirement of appellant's Plenary Retail Distribution Lic. No. 1301-44-002-001, is as follows:

THIS AGREEMENT made this 13th day of June, 1978,

- BETWEEN THE BOROUGH OF ALLENHURST, a municipal corporation of the State of New Jersey, having its principal office at 125 Corlies Avenue, Allenhurst, New Jersey, hereinafter referred to as "Alленhurst",
- AND JATCO, INC., a corporation of the State of New Jersey, trading as The Liquor Locker, having its place of business at 413 Main Street, Allenhurst, New Jersey, hereinafter referred to as "Jatco",
- AND JOHN COFF and ARLENE COFF, his wife, residing at 1506 Romaine Parkway, Wanamassa, Ocean Township, Monmouth County, New Jersey, hereinafter referred to as the "Coff's",
- AND STEVEN AUGUST HAMMARBERG and PATRICIA A. HAMMARBERG, his wife, residing at 404 7th Avenue, City of Asbury Park, Monmouth County, New Jersey, and trading as the Allenhurst Liquor & Deli, having its place of business at 327 Main Street, Allenhurst, New Jersey, hereinafter referred to as the "Hammarberg's".

WHEREAS, Jatco is the holder of plenary retail distribution license D-1 issued by Allenhurst and the Coff's are the sole shareholders and officers of Jatco, and

WHEREAS, Hammarberg's are the holders of plenary retail distribution license D-2 issued by Allenhurst, and

WHEREAS, representatives of Allenhurst have had discussions with Hammarberg's and Coff's regarding the Borough's purchase and retirement of plenary retail distribution license D-3 now held by J M Associates, and

WHEREAS, Allenhurst through its representatives has advised Hammarberg's and Coff's that its acquisition of license D-3 is conditioned upon and contingent upon Jatco and its principals and Hammarberg's reimbursing the Borough for its costs in acquiring such license, and

WHEREAS, the agreed upon acquisition cost of plenary retail distribution license D-3 totals \$18,000.00, and

WHEREAS, Jatco and its principals and Hammarberg's have agreed to reimburse Allenhurst acknowledging that the retirement of license D-3 will increase the value of the remaining two plenary retail distribution licenses issued by Allenhurst and acknowledging further that the operation of license D-3 within the Borough of Allenhurst would reduce the sales potential of Jatco and Hammarberg's to a significant extent, and

WHEREAS, the within agreement is subject to approval received from the Division of Alcoholic Beverage Control authorizing the acquisition and retirement of plenary retail distribution license D-3;

W I T N E S S E T H:

NOW, THEREFORE, BE IT AGREED by and between the parties for and in consideration of the exchange of the mutual promises and covenants herein expressed, as follows:

1. Allenhurst shall enter into an agreement with J M Associates regarding the purchase and retirement of plenary retail distribution license D-3 by Allenhurst for a consideration of \$18,000.00.

2. Jatco and the Coff's in their individual capacities and Hammarberg's in their individual capacities agree to reimburse the Borough for its acquisition costs in the following manner: Jatco and/or Coff's shall pay Allenhurst the sum of \$750.00 per year for 12 years. Hammarberg's shall pay Allenhurst the sum of \$750.00 per year for 12 years. Payment of \$1,500.00 per year for 12 years will reimburse Allenhurst for its costs.

3. Jatco, Inc., its successors, heirs and assigns, and Hammarberg's, their successors, heirs and assigns, shall be obligated in addition to pay the license fee imposed by the Borough of Allenhurst by ordinance for the issuance of plenary retail distribution licenses.

4. The obligation of Jatco and/or the Coff's and the Hammarberg's for the payment of \$750.00 per

year shall not be deemed a license fee as defined in the provisions of Title 33 of the Revised Statutes of the State of New Jersey, but shall be considered an acquisition cost refundable to the Borough of Allenhurst for the purchase of plenary retail distribution license D-3.

5. Jatco and the Coff's and the Hammarberg's agree and represent that they shall make no claim in this or any subsequent year that Allenhurst, by reason of its acceptance of the refunding fee referred to above, has increased its license fee in an amount exceeding that allowed by the Revised Statutes of the State of New Jersey.

6. Jatco, Inc., and the Coff's in their individual capacities and the Hammarberg's agree that all renewal resolutions adopted by Allenhurst shall state that the license is being renewed subject to payment of the sum of \$750.00 by the licensee.

7. Jatco and the Coff's in their individual capacities and the Hammarberg's agree that they shall make no claim in this or any subsequent year that Allenhurst has imposed a lien upon the license by reason of adoption of such resolution.

8. Jatco, Inc., and the Coff's in their individual capacities and the Hammarberg's agree that in any conveyance of the plenary retail distribution licenses issued by the Borough of Allenhurst, they shall require that their purchasers adhere to and be bound by the provisions of the within agreement.

9. It is understood by each of the principals of this agreement that all present and subsequent licensees shall be liable in their individual and personal capacities until such time as the full amount of the purchase price is refunded to Allenhurst.

10. Jatco, Inc., and the Coff's in their individual capacities and the Hammarberg's and any succeeding licensees shall require that any person purchasing the plenary retail distribution licenses referred to above agree to and be bound by the provisions of the within agreement and execute an agreement running to the Borough of Allenhurst in such regard.

11. The Coff's in their individual capacities and the Hammarberg's in their individual

capacities agree to execute a note prepared by the Borough Attorney providing for payment in each case in the sum of \$9,000.00 which note shall provide for payment each year of \$750.00 on or before the 1st day of November, commencing November 1, 1978, and shall provide further that in the event of any default all of the unpaid portions of the note shall be deemed immediately due and payable and Allenhurst shall have the right to institute suit and withhold issuance of the license involved until such time as the current year's payment is made. Such note shall also provide that in the event of default, Allenhurst shall be entitled to collection of reasonable attorney's fees not to exceed 20 percent of the original principal amount of the indebtedness.

(signatures)

Upon the conclusion of their respective oral arguments, counsel requested that a Hearer's Report be waived, and that the Director conclude the matter promptly with his findings.

Without intending to comment upon the overall legality of the subject agreement itself, it appears that its intentions are laudable in that the goal is a reduction of licenses within Allenhurst. Counsel represents that the population of Allenhurst is not in excess of one thousand two hundred persons. In view of N.J.S.A. 33:1-12.14, three retail distribution outlets exceed the statutory population ratio of one distribution license for every 7500 residents.

Under the terms of the agreement, the owners of the remaining licensed premises have agreed to reimburse the municipality over a protracted period for the sum expended by it towards the retirement of appellant's license.

However, it must be noted that despite the salutary purpose, consistent with the statutory intent, of the Borough to reduce the number of outstanding licenses within its borders, the Legislature has outlined the method by which a municipality may acquire an alcoholic beverage license for the purpose of retirement. That statutory mandate has certain specific limitations. N.J.S.A. 40:48-2.40 provides that:

The governing body of any municipality in which the number of existing alcoholic beverage retail consumption licenses exceeds one for each 2,000 of its population according to the latest Federal census, may by ordinance determine if

it is in the public interest to reduce the number of such licenses, authorize the acquisition and retirement by the municipality of licenses in excess of such limitation by contracts with licensees and appropriate funds therefor.

(underscore added)

Nothing in that act refers to a purchase of a plenary retail "distribution" license, other than a reference to Chapter 317 of P.L. 1966, (N.J.S.A. 40:48-2.39) which deals with a "retail licenses" being located in a building which is acquired by purchase or condemnation by the municipality. No distinction is made in that act between retail "consumption" and "distribution" licenses. Hence, it can only be concluded that there exists a right of a municipality to acquire for retirement only retail "consumption" licenses, save when they are located in a building acquired by purchase or condemnation by a municipality. In that single instance, a "distribution" license could then be acquired.

Additionally, it is noted that the purchase price of the license as set forth in the subject agreement is \$18,000.00. The statute which relates to consumption license limits the municipality to \$10,000.00 it may pay to retire licenses.

The objective sought is not one that the Director of this Division would oppose, but in the absence of the specific statutory authority therefor, no definitive approval from the Division of Alcoholic Beverage Control can be provided. The issue is one of municipal powers and purposes, and not cognizable under the Alcoholic Beverage Law.

This conclusion, as inescapable as it may be, does not in any sense deprive the parties from seeking judicial approval or interpretation respecting the rights of the parties. Because of the lack of approval, upon which the subject agreement is conditioned, may require further action on the part of the parties hereto, the appeal filed herein shall be remanded for further action without retention of jurisdiction by this Division.

Accordingly, it is, on this 21st day of September, 1978,

ORDERED the appeal filed herein be and the same is hereby remanded to the Board of Commissioners of the Borough of Allenhurst for the sole purpose of resolving the issue concerning the retirement of Plenary Retail Consumption License D-3, held by the appellants herein, or to adjudicate appellant's application for transfer; and it is further

ORDERED that the appeal filed herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - MR. JON'S PUB, INC. v. PASSAIC.

Mr. Jon's Pub, Inc.,
t/a Gianni's Ristorante,

Appellant,

vs.

Municipal Board of Alcoholic
Beverage Control of the City
of Passaic,

Respondent.

.....

Dominick Giordano, Esq., Attorney for Appellant.
Randolph A. Newman, Esq., Attorney for Respondent, Board.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic (hereafter Board) which, on December 6, 1977, suspended appellant's Plenary Retail Consumption License, C-156, for twenty days upon a finding that, on April 8, 1977, and prior thereto on December 15, 1976, the appellant violated the local ordinance (5-4.1 c. & d.) regulating the hours of sale.

Upon the filing of the Petition of Appeal, the Director of this Division, by Order of December 30, 1977, stayed the effective dates of the suspension pending the determination of this appeal.

Appellant contends that the action of the Board was erroneous in that its findings were against the weight of the evidence. The Board denies this contention averring that its action was proper and reasonable.

A de novo appeal was heard in this Division, pursuant to Rule 6 of State Regulation No. 15, at which the parties were permitted to introduce evidence and cross-examine witnesses.

The Board produced the testimony of Passaic Police Detective Christopher Heiser who recounted his activities at 4:35 a.m., on April 8, 1977. He was, at that time, a

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regular uniformed officer on radio patrol when he made observations of the appellant's premises. He approached the licensed premises and observed through a window that there were several persons at the bar drinking. The doorway was locked. He knocked and shortly thereafter was admitted entry.

Within the premises he observed that there were no longer glasses on the bar and that it was clear. The owner of the corporate stock of appellant corporation was present in the premises and explained to the officer that all of the persons then present were employees. The names of those persons were obtained by the officer and each of the names appeared on the "employees work-sheet" (a Division-required E-141 form that contains the names of all employees in each licensed premises).

No evidence whatever was presented in support of the charge relating to the alleged violation on December 15, 1976. Hence, insofar as the suspension imposed related to that charge, i.e. five days, the appellant has sustained the burden of proof, pursuant to Rule 6 of State Regulation No. 15, and I recommend that finding of guilt to this charge be reversed.

John Comperatore, the owner of all of the corporate stock of the appellant, testified for the appellant that, he was in the premises on the date related by the officer. At that time there were eight persons present, some of whom were completing the cleaning operation and others merely awaiting a "checking of the tapes". He described the business as a restaurant-tavern contained in a very large room in which there is a fifty-stool bar, circular in shape, surrounded by tables. He employs cooks, waitresses, bartenders and go-go girls, all of whom have some responsibilities to be discharged after closing hours.

The specific charge moved by the Board at the de novo hearing is as follows:

On April 8, 1977 at 4:32 a.m. you failed to have the entire licensed premises closed during the hours when sales of alcoholic beverages are prohibited in violation of Section 5-4.1(c) of the 1975 Revised General Ordinances of the City of Passaic.

The applicable Ordinance - 5-4.1(c) provides as follows:

During the hours when sales of alcoholic beverages are prohibited, the entire licensed premises shall also be closed except in bona fide hotels and restaurants.

In response to a question concerning the subject premises being a restaurant, and not just a corner tavern, Detective Heiser answered: "There is a restaurant in the rear of the building, yes."

The critical question therefore becomes whether the presence of the employees after hours is violative of the local Ordinance.

As used in ordinances of this type, "closed" means that all members of the public must be excluded. Proof of the charge requires only that a member of the public was present in the licensed premises after hours, unless it may be construed that the subject premises is a bona fide restaurant. P.J. Mullins Bar, Inc. v. Paterson, Bulletin 1968, Item 1.

The presence of off-duty police detectives in an establishment after hours, waiting to escort the licensee home, was not construed as a violation of a similar ordinance. The Big Top Cafe v. Newark, Bulletin 2109, Item 1.

Similarly, in a matter involving the presence of a large number of employees within the licensed premises after hours, the Director held that the appellant had successfully rebutted the presumption, that the mere presence of persons was violative of the ordinance, by establishing that those persons were not members of the public, but were, in fact, employees awaiting rides to their homes. "Hence, their (employees) presence in the licensed premises was not violative of the ordinance". Beira Mar Bar & Grill, Inc. v. Newark, Bulletin 2011, Item 1.

The question as to whether or not appellant's premises can be properly described as a "bona fide restaurant", and as such, excluded from the prohibition of that section of the ordinance, need not here be decided. The persons within the establishment were all designated employees of appellant and not patrons or members of the public; and, therefore excluded from the applicability of the subject ordinance.

Accordingly, I find that the appellant has successfully established that the action of the Board was erroneous as to the April 8, 1977 charge and recommended that an order be entered reversing the action of the Board and dismissing the said charges.

CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-17.14 (formerly 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 recommendation of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 8th day of September, 1978,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE TO A 17 YEAR OLD MINOR - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against
Jean Mary Peppe
t/a Pequest Liquor Store
Route #46
Liberty Twp.
R.D. Oxford, N.J. 07863
Holder of Plenary Retail Distribution License D-1, issued by the Township Committee of Liberty Township.
.....

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AND
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Jean Mary Peppe, pro se.
Mart Vaarsi, Esq., Deputy Attorney General, Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleads "not guilty" to the following charge:

On December 13, 1976, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage, directly or indirectly, to a person under the age of eighteen (18) years, viz., John S--- age 17; in violation of Rule 1 of State Regulation No. 20.

John S---, now eighteen, testified that he entered licensee's establishment on December 13, 1976, at approximately 2:00 p.m., and purchased a bottle of Leroux Blackberry Brandy. He was seventeen at the time, and was not asked for identification, proof of age or to sign the prescribed form attesting to his age.

He handed the purchase to another minor, Linda K--- upon his return to the automobile. John S--- further stated that the purchase was made at the request of Linda K---, who provided the purchase price. He did not open the bottle, nor was it opened by Linda K--- in his presence.

On January 20, 1977, he was called from his class by the school's Vice Principal. In the school office he was introduced to ABC Inspector C who, in the Vice Principal's presence, questioned him about the purchase. John S--- disclosed what transpired and signed a statement. He was taken by Agent C and the Vice Principal to the Pequest Liquor Store, which he identified as the store from which he purchased the brandy. Inside, he identified Jean Mary Peppe as the person who sold it to him.

Linda K---, seventeen years of age, testified, in corroboration of what John S--- had stated. She indicated that the next day she opened the bottle while a passenger in her girl friend's vehicle. They consumed the major part of the brandy and Linda K--- became ill in the vehicle. They parked in a super market parking lot. The girlfriend went into the market while Linda K--- remained in the vehicle. Apparently the brakes were not set properly, and the vehicle rolled down an incline and hit another parked car. The police investigated and discovered the almost empty bottle of brandy on the floor. Both girls were taken to the police station. Linda K--- was questioned, at which time she disclosed how she came to possess the alcoholic beverage. She signed a statement in her mother's presence.

Linda K--- similarly was taken from her class on January 20, 1977 and interviewed by Agent C in a same fashion as was John S---. Both minors were questioned separately. Linda K--- identified the subject licensee as the liquor store where the brandy was purchased, but was not taken inside to identify Mrs. Peppe.

ABC Agent C testified in support of the charges. On January 20, 1977, he met with Detective Edward Wisniewski of the Hackettstown Police Department, who gave him the signed statement and almost empty bottle of Leroux Blackberry Brandy. He next proceeded to the high school where he met with the school's principal. His testimony thereafter, corroborates that of the minors. Agent C stated that he informed Mrs. Peppe that the boy with him claimed to have purchased an alcoholic beverage from her and that he was not (then) eighteen years of age.

Jean Mary Peppe, owner of the Pequest Liquor store admitted being confronted by Agent C in the presence of John S---, and being advised of the alleged purchase of a bottle of Leroux Blackberry Brandy several weeks earlier. She denied having seen the boy previously. She handled the particular size and brand of blackberry brandy purchased, although she was out of stock at the time of Agent C's visit. She expressed doubt that the bottle was purchased from her store because the tax stamp, upon which she marks the price, was missing.

Licensee further maintained that at the hour the alleged purchase was made, the store was closed. She testified that she and her husband visited their daughter in New Hampshire on December 13, 1976, departing at about 9:30 a.m. and arriving at the store between 4:00 and 4:30 p.m. She remembers removing the big wooden boards which cover her windows, unlocking the door and turning on the lights as it was dusk. Her girl friend, Louise Spangenberg, arrived at about this time and advised her that a beer salesman had been waiting for several hours to see her.

Mrs. Peppe produced a notarized statement signed by her daughter, as follows:

To Whom it May Concern:

I hereby testify that Jean M. Peppe
was in New Hampstead, New Hampshire
visiting me and my family on December 13,
1976 at 9:30 a.m.

(signed)

Carol A. Lange

Louise Spangenberg testified on behalf of the licensee that she found the store closed on three occasions that day. On the second visit, a beer salesman was present. He stated to her that the store had not been open all afternoon and he was "going to wait a couple more hours." Mrs. Spangenberg returned between 4:00 and 4:30 and stated that as she arrived Mrs. Peppe "was just opening the door." She remained with Mrs. Peppe until she closed, and no such sale, as charged, was made that day.

Mrs. Spangenberg further stated that they discussed the Division's charge, when it arrived, and agreed that it could not have happened as the store was closed until 4:00 - 4:30 p.m. It is noted that the charge is silent as to the hour that the sale is alleged to have occurred.

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 not criminal, 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).

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony, to be believed, must not only proceed from the mouth of a credible witness, but must be credible in itself. It must be such as the common experience and observation of mankind can approve

as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). The demeanor of a witness may be as revealing as his words. Reynolds v. U.S., 98 U.S. 145, 156-7, 25 L. Ed 244, 247 (1879).

The finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of all of the evidence. 32A C.J.S., Evidence, Sec. 1042 (1964). It is a fundamental principle that no testimony need be believed, but rather, the hearer may credit as much, or as little, as he finds reliable. 7 Wigmore Evidence, Sec. 2100 (1940); Greenleaf Evidence, Sec. 201 (16th Ed. 1899).

Applying these principles, I am persuaded that the more credible version was presented on behalf of the Division through the testimony of the minors and the Division Agent. The statements of the minors to the police made soon after, identifying the licensed premises as the source of purchase, has a ring of truth.

I find the testimony of the licensee to have been hesitant, and in general, fraught with a feeling of unreliability. The notarized statement supplied by her daughter was prepared on October 1, 1977, less than one week before the hearing, although the charge was sent on August 18, 1977, and lacks credibility.

I find Mrs. Spangenberg's statement relative to the beer salesman to be incredulous. Further, I question her memory, eight months later, that Mrs. Peppe was closed until 4:00 or 4:30 p.m., on the day in question, absent some momentous or significant occurrence through which she could identify the date.

I, therefore, find that the Division has established the truth of the charge by a fair preponderance of the credible evidence. I, recommend that the licensee be adjudged guilty thereof.

Licensee has no prior adjudicated record. I further recommend that the license be suspended for fifteen days.

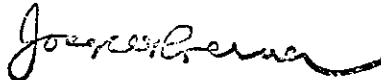
Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-19.6 (formerly Rule 6 of State Regulation No. 16).

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 recommendation of the Hearer and adopt them as my conclusions herein. Thus, the license shall be suspended for fifteen days on the charge herein.

Accordingly, it is, on this 11th day of September, 1978,

ORDERED that Plenary Retail Distribution License 2114-44-005-001 issued by the Township Committee of Liberty Township to Jean Mary Peppe, t/a Pequest Liquor Store for premises Route #46, Liberty Township be and the same is hereby suspended for fifteen (15) days commencing 10:00 p.m., Monday, September 18, 1978, and terminating 10:00 p.m., Tuesday, October 3, 1978.



JOSEPH H. LERNER
DIRECTOR