COPY NO. 1

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

BULLETIN 1368 December 27, 1960

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BULLETIN 1368   December 27, 1960

1. COURT DECISIONS - ESSEX COUNTY RETAIL LIQUOR STORES ASSOCIATION v. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, DIVISION OF ALCOHOLIC BEVERAGE CONTROL and R. H. MACY CO., INC., -- DIRECTOR AFFIRMED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-640-59

ESSEX COUNTY RETAIL LIQUOR
STORES ASSOCIATION,

Appellant,

vs.

MUNICIPAL BOARD OF ALCOHOLIC
BEVERAGE CONTROL OF THE CITY
OF NEWARK, DIVISION OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF NEW JERSEY,
and R. H. MACY CO., INC., T/A
Bamberger's, New Jersey.

Respondents.

Argued October 31, 1960 -- Decided December 2, 1960

Before Judges Conford, Freund and Kilkenny

Mr. Leonard Brass argued the cause for appellant (Messrs. Brass & Brass, attorneys).

Mr. David M. Satz, Jr., Deputy Attorney General, argued the cause for respondent Division of Alcoholic Beverage Control (Mr. David D. Furman, Attorney General, attorney; Mr. Samuel B. Helfand, Deputy Attorney General, of counsel).

Mr. Herbert D. Kelleher argued the cause for respondent, R. H. Macy & Co., Inc., t/a Bamberger's, New Jersey (Messrs. Lum, Fairlie & Foster, attorneys; Mr. William F. Tompkins, of counsel; Mr. Kelleher, on the brief).

The opinion of the court was delivered by FREUND, J.A.D.

This case involves the validity of a renewal plenary retail distribution license issued by the Board of Alcoholic Beverage Control of the City of Newark to the respondent, R. H. Macy Co., Inc., trading as Bamberger's, New Jersey, covering premises located at 109-135 Market Street, Newark, for the 1959-1960 licensing year. The basic question is the right to operate four different, physically-separated, liquor-selling areas in the store under a single license.

Petitioner had filed formal objection to the renewal of Bamberger's license and a public hearing was held by the Municipal Board. The Board granted the license renewal, and petitioner appealed to the Director of the Division of Alcoholic Beverage Control of the State of New Jersey. A hearing was then held before a hearing officer, who filed his recommendations with the Director. The Director, in granting the renewal, amended the recommendations only to the extent of prohibiting respondent from accepting orders for alcoholic beverages over its regular switchboard and requiring that all such telephoned orders be transferred directly to the liquor department. Petitioner files its present appeal from the conclusions and order of the Director.

It is noted, preliminarily, that the license here under attack expired on June 30, 1960. While the controversy might be considered moot at this point, see Haulenbeek v. Allenhurst, 136 N. J. L. 557, 560 (E. & A. 1948); Fox v. Board of Education of Newark, 129 N. J. L. 349, 354 (Sup. Ct.), affirmed 130 N. J. L. 531 (E. & A. 1943); 73 C. J. S., Public Administrative Bodies and Procedure, Section 190, p. 538, nevertheless, since the license has been renewed for the 1960-1961 licensing year and it may be assumed that application will be made in the future for renewal under the existing conditions, we conclude that a justiciable issue has been presented, and we will therefore exercise our jurisdiction on the merits.

The facts, substantially undisputed, are as follows. Bamberger's is a well-known, large department store in the City of Newark, occupying a multi-story building situated on a block bounded by Washington, Market, Halsey, and Bank Streets. Prior to the institution of this litigation, Bamberger's had operated its liquor department under a Class C plenary retail distribution license, permitting the sale of alcoholic beverages in original containers for off-premises consumption. N.J.S.A. 33:1-12(3a). From 1933 to the time of the instant litigation, the license was renewed annually without opposition. During this period there have been no violations of the Alcoholic Beverage Law, state regulations or municipal ordinances with respect to the licensed premises. In the standard application form for license renewal, filed as usual by respondent in seeking its 1959-1960 permit, the following pertinent questions and answers appear:

"5. Location of premises to be licensed:

Street and number 109-135 Market Street
Municipality Newark
Post Office address 131 Market Street,
Newark 1, New Jersey

* * * * * * * *

6. (b) For what purpose used Department Store

* * * * * * * *

7. Will the entire building or buildings constitute the licensed premises? No.

(a) If not, specify in detail the floors and rooms which WILL constitute the licensed premises (where alcoholic beverages will be sold, served or stored)

First floor selling and stock space 2477 sq. ft. corner of Market and Washington

Streets. 513 sq. ft. in center aisle -- 112 feet from Market Street entrance.

Fourth basement stock and wrapping space, adjacent to the building wall facing Market Street, near Halsey and Bank Street corner, 2760 square feet.

Basement selling space 252 sq. ft. at foot of down escalator in center of building.

Basement selling and stock area 448 sq. ft. on west side of building at entrance to tunnel under Bank Street."

As recited by Bamberger's in its application and as gathered from the proofs adduced at the hearing, respondent has four alcoholic beverage selling areas in its Newark building. One area, on the first floor, is located at the Washington and Market Streets corner of the building, is set off from the rest of the store by glass doors, and bears the inscription, "Fine Wines and Liquors -- The Smoke Shop." There are two entrances to this area from the main floor and one from the lobby of the store. The second selling area on the first floor is a center aisle located about 150 feet from the "Smoke Shop." In the basement of the building, there are two selling areas and one storage space. Each of these basement areas is isolated from the other, but is located amidst sales areas dispensing merchandise other than alcoholic beverages. All areas selling alcoholic beverages are manned by separate sales personnel using separate cash registers.

Petitioner, in resisting the renewal of respondent's license, raises two basic contentions. It argues first that Bamberger's, by maintaining four separate selling areas on a single plenary retail distribution license, is in violation of that part of N.J.S.A. 33:1-26 which provides that "a separate license is required for each specific place of business and the operation and effect of every license is confined to the licensed premises." Secondly, petitioner asserts that it was not granted a fair hearing by the Municipal Board, in contravention of R.S. 33:1-24.

Renewal of a license rests in the sound discretion of the local issuing authorities and of the Director on appeal, and the courts will interfere only in cases where the exercise of that discretion is manifestly improper. Nordco, Inc. v. State, 43 N. J. Super. 277, 282 (App. Div. 1957). However, in situations such as the instant one, where the basic contentions are legal rather than factual, the reviewing court will subordinate the "discretion" of the administrator to an original consideration of the applicable rules of law. Borough of Fanwood v. Rocco, 59 N. J. Super. 306, 315 (App. Div.), affirmed N. J. (1960).

The principal question before us is whether each selling area in respondent's building is "a specific place of business" within the meaning of N.J.S.A. 33:1-26, requiring a separate license, or whether a single license for the entire building constitutes sufficient compliance with the statute. While the Alcoholic Beverage Law does not explicitly define "specific place of business," several of the other pertinent phrases are statutorily construed. "Building" is defined as a "structure of which licensed premises are or may be a part." N.J.S.A. 33:1-1(c). "Licensed building" is described as "any building containing licensed premises." N.J.S.A. 33:1-1(j).

"Premises" are "the physical place at which a licensee is or may be licensed to conduct * * * the * * * sale of alcoholic beverages * * *," N.J.S.A. 33:1-1(s), while "licensed premises" comprise "any premises for which a license under this chapter is in force and effect." N.J.S.A. 33:1-1(k).

Our determination of whether Bamberger's selling areas constitute one "specific place of business" within the intendment of the statute should be made in the light of the obvious purpose of the "specific place of business" requirement, that is, to prevent the splitting of licenses and indirect avoidance of the maximum license limitations. We do not consider respondent's arrangement to be inimical to that purpose. Bamberger's is licensed to sell liquor at premises located at 109-135 Market Street, Newark. However, every application for renewal of that license has stated that "the entire building or buildings" will not "constitute the licensed premises," but has satisfactorily described "in detail the floors and rooms which will constitute the licensed premises * * * ."

It would thus seem clear that the "licensed premises," for which a single license is required, may consist of less than an entire "specific place of business." We do not find that a violation has been committed merely because respondent's "place of business" is a large establishment and, in order to accommodate its many customers conveniently and to provide distribution centers for the various grades of liquor sold, it has spaced its "licensed premises" throughout its "place of business." The license was awarded for the "place of business" indicated, and the sale of liquor was permitted in the square footage specified in the license application, the latter area constituting the "licensed premises." In Bamberger's Newark department store, various and sundry merchandise is offered for sale at separate sections and counters, but the business is operated by respondent as a single entity under its complete domination; each department in the store cannot realistically be regarded as "a specific place of business," separate and distinct from the others.

In essence, petitioner has confused the "specific place of business" requirement with the definition of "licensed premises." The former refers to the physical establishment or structure at which the licensee's business is conducted; the latter has reference to that part of the place of business officially licensed for the sale of alcoholic beverages.

Since the particular point appears to be res nova in our courts, administrative construction of the relevant statute is entitled to great weight, especially when such construction is substantially contemporaneous with the enactment of the statute and is followed for many years. Cino v. Driscoll, 130 N. J. L. 535, 540 (Sup. Ct. 1943); Passarella v. Board of Commissioners, 1 N. J. Super. 313, 320 (App. Div. 1949); Presbyterian Church of Livingston v. Division of Alcoholic Beverage Control, 53 N. J. Super. 271, 276 (App. Div. 1958), certif. denied 29 N. J. 137 (1959). Since 1935, the Director has interpreted R.S. 33:1-26, now N.J.S.A. 33:1-26, to require only one license under circumstances similar to those herein. For example, in A.B.C. Bull. No. 241, item 8 (1938), it was held that a single license could cover two social halls on the opposite sides of a public highway, one used in summer and the other in winter, if "so arranged and operated that they could be said to constitute a single place of business * * * ."

As an alternative to its primary contention, petitioner urges that if respondent requires only one license, then the entire store constitutes the "licensed premises" and Bamberger's must comply, with respect to the entire building, with Division and municipal regulations respecting the physical separation of the areas in which alcoholic and non-alcoholic merchandise is sold.

Petitioner has failed to distinguish between a plenary retail consumption license, N.J.S.A. 33:1-12(1), and a plenary retail distribution license, N.J.S.A. 33:1-12(3a), such as is here involved. Separation of alcoholic and non-alcoholic merchandise is mandatory only where liquor is consumed on the premises. In the case of a retail distribution license, separation is required only if a municipal ordinance so directs. Petitioner has failed to bring to our attention any such regulating ordinance of the City of Newark, and we therefore assume that none exists.

Petitioner further contends that respondent has violated the provisions of State Regulation 20, Rule 16, and section 3:17 of Ordinances of the City of Newark, requiring, respectively, that the current license certificate be "conspicuously displayed on the licensed premises in such plain view as to be easily read by all persons visiting such premises" and displayed "in such manner and place that it may be seen by anyone entering the licensed place of business." Bamberger's displays its license at its first-floor selling location at the Washington and Market Streets corner of its building. The determination of the Municipal Board and the Director that this constitutes sufficient display was clearly reasonable and should be upheld. The purpose of the display requirement is fulfilled when the certificate is openly in view of those entering the place of business containing the licensed premises.

Petitioner next argues that it was not afforded a fair public hearing by the Municipal Board on its objections to respondent's renewal application, in violation of State Regulation No. 6, Rule 2, and R.S. 33:1-24. To support its allegations that the Board prejudged the case, petitioner points to the following statements by the chairman of the hearing board at the start of the hearing:

> "It was the opinion of this Board, in the light of our consistency in renewing the license from year to year, that certainly it may be advisable for us to proceed with the renewal and permit this whole matter to be placed in the hands of the State Director on an appeal from your group, Mr. Brass, because we could see no way, in fairness to our previous decisions, that we can say it was unjustifiable for us to renew during all the years and now to say not to renew it.
>
> * * * * * * *
>
> Commissioner Cerefice: Let me interrupt you for a moment. As long as you want to have a record, let's proceed orderly, let us hear from Mr. Niebling and then we will hear you and then the Board will render its decision.
>
> You know, of course, what the Board has decided to do and in order to make the record clear, on appeal, state all of your contentions to be decided."

While we disapprove of prejudgment of any cause prior to hearing, notwithstanding that in this particular instance respondent's license had been previously renewed without objection, the error was not here prejudicial to petitioner. Cf. Boots 'n Saddle v. Newark Municipal Board, A.B.C., 44 N. J. Super. 38, 41 (App. Div. 1957). The facts of this cause were not in dispute and the basic contentions of the parties were legal in nature. The Director, on appeal, conducted a de novo hearing and made the necessary determination of the issues litigated. His conclusion and order are the sole subject of this appeal. Passaic County Retail Liquor Dealers Association v. Board of Alcoholic Beverage Control of Paterson, 37 N. J. Super. 187, 197 (App. Div. 1955); Neiden Bar and Grill v. Municipal Bd., etc. of Newark, 40 N. J. Super. 24, 29 (App. Div. 1956).

Petitioner has had a full opportunity to be heard on the facts and the law.

Affirmed.

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2. COURT DECISIONS - FREUD and PITTALA v. DIRECTOR - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-703-59

DAVID FREUD and PATRICK PITTALA,
t/a Airship Cocktail Lounge,

licensees-appellants,

vs.

WILLIAM HOWE DAVIS, Director, Division
of Alcoholic Beverage Control, etc.,

respondent.

Argued November 28, 1960 -- Decided December 2, 1960

Before Judges Goldmann, Foley and Labrecque.

Mr. Newton M. Roemer argued the cause for appellants.

Mr. David M. Satz, Jr., Deputy Attorney-General, argued the cause for respondent (Mr. David D. Furman, Attorney-General, attorney; Mr. Samuel B. Helfand, Deputy Attorney-General, of counsel).

The opinion of the court was delivered by
GOLDMANN, S.J.A.D.

This appeal by the holders of a plenary retail consumption liquor license seeks a reversal of an order entered by the Director of the Division of Alcoholic Beverage Control, suspending their license for 35 days. A consent order staying the suspension was entered by this court pending appeal.

The Division had charged appellants with violating Rules 1 and 24 of State Regulation No. 20. Rule 1 provides:

> "No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverages, directly or indirectly * * * to any person actually or apparently intoxicated, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises."

And Rule 24 provides, in pertinent part:

> "No licensee shall * * * allow, permit or suffer any actually or apparently intoxicated person to work in any capacity in or upon the licensed premises."

The licensees pleaded not guilty. After a full hearing, the Division hearer found that the licensees had permitted the sale or service of alcoholic beverages to an apparently intoxicated person, one Alverjous Johnson, and allowed him to work in and upon their licensed premises while apparently intoxicated, in violation of the quoted rules. He recommended a 35-day suspension.

The licensees filed written exceptions with the Director, arguing that the Division had failed to prove by a preponderance of the believable evidence that they had permitted the sale and service

of alcoholic beverages to Johnson while he was apparently intoxicated, and that Johnson, who had accompanied the tavern pianist on his drums while the Division agents were present, was not working in the premises. They also contended the penalty was excessive. The Director concluded that the evidence clearly established that drinks were served to the drummer while he was apparently intoxicated, and that he was then working on the premises. He found the licensees guilty as charged and imposed the 35-day suspension recommended by the hearer.

Appellants argue that the findings of the Director are not based on legally sufficient evidence in a substantial sense, and therefore the suspension order should be reversed.

This court held in Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 504 (1956), that the generally accepted gauge of administrative facual finality is whether the factual findings are supported by substantial evidence. Ordinarily, the court will not resolve conflicting evidence independently of the factual conclusion of the respondent agency. The conventional formula for judicial application of the substantial evidence rule is that there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L. Ed. 456 (1951). As the court said in that case, respondent is an agency "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carried the authority of an expertness which courts do not possess and therefore must respect." And see N. J. Bell Tel. Co. v. Communications Workers, etc., 5 N.J. 354, 377-9 (1950). The question is: Could a reasonable man, acting reasonably, have reached the decision sought to be reviewed, from the evidence found in the entire record, including the inferences to be drawn therefrom? See Stason, "'Substantial Evidence' in Administrative Law," 89 U. of Pa. L. Rev. 1026, 1038 (1941); Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 Harvard L. Rev. 70, 89 (1944).

The choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal. We canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but in order to determine whether a reasonable mind might accept the evidence as adequate to support the conclusion and, if so, to sustain it. Hornauer, above, 40 N.J. Super., at page 506.

Appellants do not challenge the reasonableness of the "apparently intoxicated" provision of either of the agency rules in question. There was conflicting evidence as to whether Johnson, the drummer, was apparently intoxicated. The two agents who investigated the licensed premises said he was; Johnson, as well as the pianist who was employed at the premises, the bartender, and one of the licensees said that he was not. After weighing the evidence, the Director decided not to accept as believable the testimony of appellants' witnesses. We do not find the decision arbitrary or capricious; his findings are supported by substantial evidence.

It is suggested that the Division agents could not have positively determined that Johnson was apparently intoxicated. We have held that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a person was sober or intoxicated. State v. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960); State v. Pichadou, 34 N.J. Super. 177,

180-1 (App. Div. 1955). As our highest court said almost a century ago, it is "the constant and established practice" to permit lay opinion evidence on the question of intoxication. Castner v. Sliker, 33 N.J.L. 507, 509-510 (E. & A. 1869). The agents here were, at the very least, average witnesses of ordinary intelligence, who had many times in the course of their investigations undoubtedly had the opportunity to observe whether certain persons were sober or intoxicated.

The testimony of the agents established the well-recognized indicia of observable manifestations of intoxication; their description of Johnson's person, speech, gait and deportment led inevitably to the finding of apparent intoxication. Additionally, Johnson admitted to having had at least five drinks of gin in a period of less than two hours. As was said in State v. Pichadou, above, experience indicates that such witnesses do not exaggerate their estimates.

Appellants allege that the testimony given by the agents, who had initially visited the licensed premises on a complaint that it was "an alleged hangout for females who solicit males for immoral purposes," stemmed from a desire to satisfy their "power urge," because they had found no evidence of the activity they had hoped to find and punish. There is not the slightest proof to support the assertion, with its implied charge that the agents deliberately fabricated their testimony.

Disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956); Hornauer v. Division of Alcoholic Beverage Control, above, 40 N.J.Super., at page 503. There is substantial support for the agency finding of apparent intoxication, and accordingly we will not disturb it.

It remains to be considered whether Johnson was permitted to work in or upon the licensed premises while apparently intoxicated, in violation of Rule 24 of State Regulation No. 20.

The Division has consistently construed "work" as embracing all persons whose services are utilized in furtherance of the licensed business, nothwithstanding the absence of a technical employer-employee relationship. That construction was considered logical and approved in Kravis v. Hock, 137 N.J.L. 252, 255 (Sup. Ct. 1948), albeit in a different setting. Appellants, although admitting that "work," as used in Rule 24, is to be liberally interpreted, urge that the word be construed to mean "something undertaken for gain," as distinguished from "something done for pleasure, sport or immediate gratification." However, the administrative interpretation long given the rule by the agency charged with its enforcement, and the view expressed in Kravis, are commanding.

It is argued that the Division failed to prove that Johnson was actually employed by the licensees (this is admitted by the Division), or that he was working within the legal definition of that term. Further, there is no evidence that Johnson's drum-playing and singing, while accompanying the hired pianist, was authorized by the licensees in furtherance of their business.

We are not dealing here with a situation where a tavern patron on the spur of the moment satisfies his urge to perform. Johnson was not a patron and his was not an impromptu performance. He had come to appellants' cocktail lounge for the admitted purpose of playing his drums, bringing his own instruments with him. He said he had performed there on two or three prior occasions, apparently with appellants' permission and acquiescence. This was

confirmed by the bartender and the pianist. The licensee who testified admitted that he did not permit other patrons "to sing or entertain in the same sense that Mr. Johnson did." Johnson was therefore an entertainer, working in the tavern, and permitted to play in furtherance of appellants' business. The fact that he received no compensation from the licensees for this work is of no moment.

We hold that Johnson's playing was "work" within the intendment of the rule, and that appellants permitted him to work while apparently intoxicated.

The suspension is affirmed.

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3. DISCIPLINARY PROCEEDINGS - SALE IN OTHER THAN PUBLIC BARROOM BY HOLDER OF CONSUMPTION LICENSE WITHOUT BROAD PACKAGE PRIVILEGE - FALSE ANSWER IN APPLICATION - LICENSEE FOUND GULITY BUT NO PENALTY IMPOSED.

In the Matter of Disciplinary Proceedings against

Benjamin & Genevieve Oskierko
t/a Water Tower Liquors Inn
Bordentown Avenue
(Plot 5, Block 33)
Sayreville, New Jersey,

Holders of Plenary Retail Consumption License C-3 (for the 1959-60 and 1960-61 licensing years), issued by the Mayor and Borough Council of the Borough of Sayreville.

CONCLUSIONS AND ORDER

- -

Defendant-licensees, Pro se
William F. Wood, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"On April 20, 1960, a copy of the following charges was served upon the defendants herein:

'1. On November 30, 1959 and prior thereto you, the holders of a plenary retail consumption license, sold and displayed for sale alcoholic beverages in original containers for off-premises consumption not from and in a public barroom of your licensed premises without having the so-called broad package privilege notation on your then current license certificate and a statement in the application for your then current license as respectively set forth in Rules 4 and 2 of State Regulation No. 32; in violation of Rule 6 of State Regulation No. 32.

'2. In your application dated May 28, 1959, filed with the Mayor and Borough Council of the Borough of Sayreville, upon which you obtained your current plenary retail consumption license, in answer to Question 6(b) thereof, which asked the purpose for which the licensed building would be used, you falsely stated "Tavern ...", whereas in truth and fact the building was not to be used as a tavern; said false statement being in violation of R.S. 33:1-25.'

"Defendants, who hold a plenary retail consumption license without broad package privileges pleaded not guilty, and a hearing on the charges was held on June 14, 1960.

"At the hearing an ABC agent testified that on November 30, 1959, he inspected defendants' premises, which consist of a single room, 22 feet in width and 28 feet in depth. From his description, and from photographs he then took, it appears that package goods were displayed on shelves 18 feet long and 8 feet high on the left wall, and also on shelves 24 feet long and 8 feet high on the right wall of the room; that there was a service counter 8 feet in width in the rear center of the room, with two shelves in the lower part thereof, on which bottles of wine were displayed; that there were numerous display racks on the floor and that both front windows contained displays of bottled alcoholic beverages. The only evidence that the room was a 'public barroom' within the meaning of R.S. 33:1-12.23 was that there was an inconspicuous bar, slightly more than 4 feet in width, with one stool in front thereof and one stool on each side thereof. From the above it appears that the room in which defendants were displaying and selling alcoholic beverages in original containers for off-premises consumption was not then a bona fide public barroom. Passaic County Retail Liquor Dealers Association v. Paterson and Bertelli's Liquor Store, Inc., Bulletin 1021, Item 1.

"At the hearing herein Benjamin Oskierko testified that he has been unable to find any regulation concerning the size of the bar which must be installed in order to make the room a public barroom. There is no such regulation. The question as to whether or not any given room is a bona fide barroom seems to depend upon numerous factors, none of which was found to exist when the inspection was made on November 30, 1959. Passaic County Retail Liquor Dealers Association v. Paterson and Bertelli's Liquor Store, Inc., Bulletin 1043, Item 3 (aff'd sub. nom. Passaic County Retail Liquor Dealers Association v. Board of Alcoholic Beverage Control for the City of Paterson, et al., 37 N.J. Super. 187); Messinger v. Pompton Lakes and Bertelli's Liquor Inc., Bulletin 1129, Item 3. Benjamin Oskierko also introduced into evidence a copy of a letter dated August 13, 1959, sent to the Mayor and Borough Council of the Borough of Sayreville by the Chairman of the Excise Committee and the Borough Engineer. Therein both advised that they had inspected the building erected by defendants, found it to be constructed in accordance with the plans and specifications on file with the Borough Clerk, and recommended the transfer of the license in question to defendants' newly constructed premises. At the close of the hearing it was agreed that the same ABC agent would re-examine the premises to ascertain if, after the prior inspection, defendants had made changes on the premises as testified to by Benjamin Oskierko.

"The subsequent inspection made by the same ABC agent on June 18, 1960, discloses that the display racks have been removed from the room's center floor area; that the four-foot bar has been extended on the right side of the room, and that it is now 15 feet 9 inches in length and has six stools in front thereof; that on top of the bar there are only ashtrays and coasters, and that there is a newly erected sign located near the street with the word 'Bar' in large letters and 'Package Goods' in smaller letters. A diagram submitted by the agent indicates that there is now free and open access from the entrance door to the bar. Thus the room now satisfies the requirements necessary to establish that the room is a public barroom, as set forth in Messinger v. Pompton Lakes and Bertelli's Liquor Inc., supra. In my opinion, the illegal situation has been corrected.

"The question to be decided herein is whether or not, under the facts set forth above, defendants should be found guilty of either of the charges herein. Charge 1 alleges that they violated Rule 6 of State Regulation No. 32. Said rule prohibits the holder of a plenary

retail consumption license without broad package privileges from selling or displaying alcoholic beverages intended for off-premises consumption except in the public barroom of the licensed premises. Clearly, if any such licensee is selling or displaying in any room which has no bar he is violating the rule. However, if he has placed a bar in the room there is no regulation as to the required width thereof. Thus, for example, a licensee with an eight-foot bar might find himself in violation if the other requirements set forth in the Messinger case have not been met, whereas another licensee with a smaller bar might not be in violation if such requirements have been met. Fairness dictates that, where such a licensee installs a bar in good faith, he should not be held to have violated said Rule 6 unless and until he fails or refuses to comply with a ruling of the Director that certain specified changes must be made before the room can be considered to be a public barroom. Defendants herein have fully cooperated at all times and, in fact, they enlarged the bar to more than twelve feet in width before the charges herein were served. In addition, I believe that they were lulled into a sense of security by the action of the local issuing authority when the license was transferred to them and to their newly erected premises in August 1959. As to Charge 2, I believe that defendants acted in good faith when they stated that the building was to be used as a tavern.

"After considering all the evidence and exhibits herein, it is recommended that defendants be found not guilty of either charge and that an order be entered herein dismissing said charges."

Exceptions were filed by the Division's prosecutor; and defendants, in turn, filed an answer and argument to such exceptions. Pursuant to Rule 6 of State Regulation No. 16, I scheduled oral argument in the case for Tuesday, October 4, 1960, at 11 a.m., but no one appeared thereat on behalf of defendants.

I agree with the Hearer's finding that the room in which defendants were displaying and selling package goods was not a bona fide public barroom at the time of the Division's original investigation. The so-called bar was a counter only about 4'2" in length, while the package goods counter was about 8' long. The "bar" apparatus was equipped with only three stools and only one of these stools was on the customers' side of the apparatus, the other two being located respectively at the ends thereof. Most of the floor space was taken up with displays of alcoholic beverages and other merchandise, leaving only a 6' to 9' wide passageway from the front door to the counters. The layout and facilities were those characteristic of a package goods store rather than a tavern. The premises were so uninviting to on-premises-consumption patrons that, during the hour and twenty minutes that the Division agent was there investigating the alleged violation, not a single drink sale was made. Several package goods sales were made during that time.

I disagree, however, with the Hearer's recommendation that the defendants should not be found guilty of violating the Broad Package Privilege Statute and Regulation unless and until they refuse to comply with a specific ruling by me as to changes to be made in their set-up. That idea would make effective law-enforcement in such cases extremely difficult, if not impossible. Licensees are not entitled to receive from me individual blueprints or designs for the layout of their barrooms. The general requirements of the statute and regulation have been set forth by me in several previous decisions. See, in addition to the cases cited by the Hearer, Re Krystyniak, Bulletin 1021, Item 2. The bar apparatus must be both designed and used to facilitate sale of alcoholic beverages by the drink. Since defendants' bar did not meet these requirements, I find them guilty as charged.

However, following the original investigation in this case, defendants voluntarily corrected the unlawful situation by installing what appears to be a bona fide bar (which is approximately 5'9" in length and equipped with stools for its entire length) and by removing the objectionable floor displays. When a Division agent returned to the premises to check on the correction, he saw several patrons purchase drinks at the bar.

In view of such prompt and voluntary correction, I shall not impose any penalty this time. On the other hand, licensees are emphatically warned that in the future they may expect suspensions of their licenses if found guilty of violating the above statute and regulation.

Accordingly, it is, on this 27th day of October 1960,

ORDERED that no penalty shall be imposed against the defendants for the foregoing violations.

WILLIAM HOWE DAVIS
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES CONTRARY TO REFERENDUM - SALE DURING PROHIBITED HOURS IN VIOLATION OF LOCAL REGULATION - FAILURE TO HAVE PREMISES CLOSED DURING PROHIBITED HOURS - PRIOR RECORD - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

Richard Schweitzer
515 Midland Avenue
Garfield, New Jersey) CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-9, issued by the Mayor and Council of the City of Garfield.)

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Defendant-licensee, Pro se.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded non vult to charges alleging that (1) he sold alcoholic beverages contrary to a referendum held in the City of Garfield on November 4, 1958, in violation of R. S. 33:1-47.1; (2) he sold, served and delivered alcoholic beverages during prohibited hours and permitted the consumption of such beverages during said hours in and upon his licensed premises, in violation of a local ordinance, and (3) he failed to have his entire premises closed during prohibited hours and permitted someone other than himself and bona fide employees to enter and remain in his premises during said hours, in violation of the same local ordinance. The prohibited hours of sale in the City of Garfield are from 3:00 a.m to 8:00 a.m. weekdays.

On Tuesday morning, August 9, 1960, ABC agents arrived in the vicinity of defendant's licensed premises and, from a vantage point, observed Richard Schweitzer, the licensee, enter the tavern at 6:50 a.m. At 7:00 a.m. they observed another man, later identified as Albert Luterzo, park his car near the side entrance door

through which he proceeded to the barroom. Shortly thereafter, one of the agents entered the premises through the same door and saw Luterzo and the licensee seated at the bar consuming what appeared to be alcoholic beverages. The agent ordered "a shot and a beer" and was told by the licensee that "we don't open up until 8 o'clock. We are waiting to clean the place up." The agent summoned his fellow agent and, after identifying themselves, they seized for evidential purposes the drink in front of each man. Schweitzer stated that he had poured himself a drink because he was nervous and Luterzo stated that he was on the premises to help the licensee clean up and that he had not purchased the drink he was served.

An analysis by the Division's chemist shows that the beverage seized contained whiskey and carbonated water. There is no substantial evidence to indicate that Luterzo was a bona fide employee.

Defendant has a prior adjudicated record. Effective March 7, 1960 his license was suspended for five days by this Division for possessing on his licensed premises liquor in bottles not truly labeled. Re Schweitzer, Bulletin 1333, Item 2. The minimum penalty imposed for the violations charged herein is a suspension of the license for a period of fifteen days. Re Romeo, Bulletin 1146, Item 11; Re Schlechtweg, Bulletin 1337, Item 4. However, since the prior dissimilar violation occurred within a five-year period, the penalty will be increased by five days. I shall suspend defendant's license for twenty days and remit five days for the plea entered herein, leaving a net suspension of fifteen days.

Accordingly, it is, on this 27th day of October 1960,

ORDERED that Plenary Retail Consumption License C-9 issued by the Mayor and Council of the City of Garfield to Richard Schweitzer, for premises 515 Midland Avenue, Garfield, be and the same is hereby suspended for fifteen (15) days, commencing at 3:00 a.m., Monday, November 7, 1960 and terminating at 3:00 a.m., Tuesday, November 22, 1960.

WILLIAM HOWE DAVIS
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - CONDUCTING BUSINESS AS A NUISANCE (HOMOSEXUALS) - PRIOR RECORD - LICENSE SUSPENDED FOR 180 DAYS.

In the Matter of Disciplinary Proceedings against)

The Paddock Bar, Inc.
t/a Paddock Bar
1013 Main Street
Asbury Park, New Jersey)

Holder of Plenary Retail Consumption License C-31, issued by the City Council of the City of Asbury Park.)

CONCLUSIONS AND ORDER

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J. George Smith, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded non vult to the following charge:

"On Wednesday night August 3 and early Thursday morning August 4, Saturday night August 6 and early Sunday morning August 7, Thursday night August 11 and early Friday morning August 12 and Friday night August 12 and early Saturday morning August 13, 1960, you allowed, permitted and suffered your licensed place of business to be conducted in such a manner as to become a nuisance in that you allowed, permitted and suffered persons who appeared to be homosexuals, viz., males impersonating females, to frequent and congregate in and upon your licensed premises; and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

ABC agents were at defendant's licensed premises on the late evening hours of August 3 and the early morning hours of August 4, and at similar hours on August 6-7, August 11-12 and August 12-13, 1960. During the course of their first visit, the agents observed 26 men and three women present, of whom almost all of the men, by their attire, speech, actions and general demeanor, appeared to be homosexuals. On their second visit the agents observed approximately 75 men in the premises, most of whom appeared to be homosexuals. On the third visit the agents observed a total of 22 men, over half of whom appeared to be homosexuals.

When the agents entered on the last visit they observed approximately 20 men there, 17 of whom appeared to be homosexuals, and during the course of the evening, observed a total of 40 men, of whom about 35 appeared to be homosexuals. At about 11:15 p.m. a woman, later identified as Marion R. Brown, president and treasurer of the corporate-licensee, came into the premises and mingled with the apparent homosexuals. When one of the agents remarked to her about the presence there of a "gay crowd of kids", she replied, "They are all over 21". The agents then said, "They call themselves kids, all these queers -- most of them in here are all a bunch of queers", whereupon Mrs. Brown replied, "They are all nice -- we have no trouble -- nobody in here bothers anybody".

At the conclusion of this conversation, the agents identified themselves to Mrs. Brown and called her attention to the past record of similar violations at the premises, whereupon she stated, "What am I going to do? How can I refuse them drinks? Can I ask them if they

are queer? I'd like to know from you how can I refuse them? I've talked it over with my partner and even thought we might close up for a while in the beginning of the season to encourage the queers to go somewhere else and drink. My partner and I decided to stay open because there was nothing we could do to keep them out. I myself, cannot determine who is an apparent homosexual and who is not."

The past record of defendant-licensee referred to consists of the suspension of its license by the Director for sixty days, effective March 4, 1957, and the suspension of its license by the Director for 115 days, effective December 2, 1957, both for violations similar to that here involved. Additionally, its license was suspended for a mislabeled beer tap, effective September 16, 1947, which is not being considered in fixing the penalty because it was committed over five years ago.

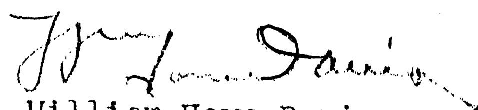
On the basis of three similar violations within the past five years, a strong inference would be justified that the corporate officers deliberately carried on the improper activities at the licensed premises without regard to or being deterred by the successive penalties and which well merit revocation of its license. However, the conversation between Mrs. Brown and the agents would seem to indicate that its officers believe themselves helpless to discourage the patronage of apparent homosexuals and were not deliberate violators. That such officers were mistaken in their notion that they were not masters in their own establishments and that they profess that they were unable to recognize individual apparent homosexuals cannot be accepted as an excuse. ABC agents, who have no special faculties in that respect, were readily able to ascertain and recognize the apparent homosexuals. In any event, any such problems must be solved by the licensee, which is under a strict obligation to conduct an orderly establishment.

Counsel for the licensee, when entering the plea in the case, represented that Mrs. Brown is a retired schoolteacher of 25 years service and is the principal stockholder, with all her life savings invested in the business. Mrs. Brown signed a representation that if given the opportunity to remain in business, she will conduct the premises as a neighborhood tavern and will not permit or allow or be subjected to any charges as presently set forth.

I shall accept her assurances for the present at face value and, under the circumstances of the case, will give her the benefit of the doubt and consider that the defendant-licensee did not intend deliberately to violate the injunction not to permit its licensed premises to be a haven for homosexuals. I shall, therefore, suspend its license for the period of one hundred eighty days.

Accordingly, it is on this 3rd day of November 1960,

ORDERED that Plenary Retail Consumption License C-31 issued by the City Council of the City of Asbury Park to The Paddock Bar, Inc., t/a Paddock Bar, for premises 1013 Main Street, Asbury Park, be and the same is hereby suspended for one hundred eighty (180) days, commencing at 3:00 a.m., Monday, November 14, 1960 and terminating at 3:00 a.m., Saturday, May 13, 1961.



William Howe Davis
Director