

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

BULLETIN 2262

August 12, 1977

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STATE OF NEW JERSEY
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BULLETIN 2262

August 12, 1977

1. APPELLATE DECISIONS - THE VILLAS LIQUOR STORE, INC. and CAPE MAY FISHERIES, INC. v. BUCK and TOWNSHIP OF LOWER.

The Villas Liquor Store, Incorporated
t/a Villas Liquor Store and Cape May
Fisheries, Inc. t/a Bayshore Lounge,

Appellants,

v.

Carl V. Buck and Jane A. Buck, his
wife, and Township Committee of the
Township of Lower,

Respondents.

On Appeal

.....
#4049

The Villas Liquor Store, Incorporated
t/a Villas Liquor Store and Cape May
Fisheries, Inc. t/a Bayshore Lounge,

Appellants,

v.

Carl V. Buck and Jane A. Buck, his
wife, and Township Committee of the
Township of Lower,

Respondents.

.....
Hayman, Gorelick and Groon, Esqs., by Henry Gorelick, Esq.,
Attorneys for Appellants

Valore, McAllister, DeBrier, Aron and Westmoreland, Esqs.,
by Carl A. Valore, Jr., Esq., Attorneys for
Respondents, Carl and Jane Buck

Alan I. Gould, Esq., Attorney for Respondent, Township of Lower

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

The subject matters are inter-related, involve substantially common issues of fact, and thus, will be the subject of and consolidated in a single hearer's report.

CONCLUSIONS

And

ORDER

In case #4023, appellants, who own and operate separate liquor licensed establishments in the Township of Lower, appeal from the action of the Township Committee which, by resolution adopted on March 10, 1976, approved an application for a person-to-person transfer of Plenary Retail Consumption License No. C-13, for premises located at Schellenger's Landing, Route 9, from Neptune Bar, Inc. to respondents Carl and Jane Buck.

Appellants allege that the action of the Council was erroneous for the following reasons:

"A. Appellants were denied a fair and impartial hearing by reason of the fact, inter alia, that the issuing authority had prejudged the merits of the controversy without hearing or considering the merits of the objections.

B. Appellants were further denied a fair and impartial hearing in that they were denied the right to present their objections in an orderly, judicial fashion, but rather were limited in terms of time and manner, all of which deprived them of due process of law.

C. The application was tainted by collusive communications and agreements between the applicant and the issuing authority which renders the application invalid, illegal and void.

D. The application was tainted by an illegal conflict of interest which renders void the resolution purportedly granting municipal approval to the application.

E. Applicant failed to establish any valid reason other than commercial, economic aggrandizement for granting of the license."

In their respective answers, respondents deny the substantive matters set forth in the petition of appeal.

At the de novo hearing appellants raised additional issues without objection from respondents. These are: (1) The application for person-to-person transfer is deficient because it is unverified; and (2) There was a total absence of a meaningful investigation by the issuing authority.

In case #4049 appellants appeal from the action of the Committee in approving a place-to-place transfer of subject license from Schellenger's Landing at Route 9 to South East Corner of Breakwater and Bayshore Road.

Appellants allege in their petition of appeal that the action of Council was erroneous for the following reasons:

"A. Applicants' application was deficient as a matter of law and inconsistent.

B. Applicants' purported plans were inadequate and deficient as a matter of law.

C. Appellants were denied a fair hearing by reason of the fact that the application was not judged by the full membership of the issuing authority, which deprived them of due process of law.

D. The application was tainted by an illegal conflict of interest which renders void the action purportedly granting municipal approval to the application.

E. Applicant failed to establish any valid reason other than commercial economic aggrandizement for granting of the transfer.

F. The proceedings were defective on their face by reason inter alia of the failure of the issuing authority to adopt or reject a valid resolution."

In their respective answers, the respondents deny the substantive matters set forth in the petition of appeal.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

The following chronological summary of events is pertinent to an understanding and determination of the issues involved herein.

On November 6, 1975 an application for "person-to-person and place-to-place transfer" was filed on behalf of Carl and Jane Buck by their attorney, George M. James of Wildwood. Employed at that time as an associate by James was a recently admitted member of the New Jersey bar, Bruce M. Gorman. Gorman had never met the Bucks, nor was he familiar with their application or its contents as submitted by his employer, James.

As a result of an unexpected shift of political winds in Lower Township, Bruce M. Gorman was appointed (in his individual capacity) Township Solicitor. This appointment did not become effective until after January 1, 1976.

On December 8, 1975, James applied to the Chancery Division of the Superior Court for a order restraining, and prohibiting the respondent Township of Lower from holding a public hearing on the matter. Said order was granted on December 9, 1975, for reasons not pertinent to this action.

On February 20, 1976, an application for a person-to-person transfer was filed on behalf of the Bucks by Carl Valore, Jr. Esq.

A public meeting was held relative to this application on March 10, 1976, at which time Gorman advised the Committee of the circumstances of the prior application and of his professional relationship with James who had represented the Bucks at a prior time. He prepared a form of resolution affirming the transfer, in the event that the Committee took such action. He did not prepare a negative one since he felt none was necessary if the transfer application were to be rejected since there would then be no change in the status-quo.

Gorman's presence was objected to by appellants' attorney, and he requested an adjournment to enable the Committee time to obtain other counsel. Gorman stated it was not necessary, and the hearing was held, which resulted in the affirmative action taken on the application.

On May 25th, 1976, an application for place-to-place transfer was filed on behalf of the Buck's by Valore.

At a public meeting held June 9, 1976, the objectors were afforded an opportunity to be heard; and at the conclusion, a vote was taken granting the application. At that hearing, Alan J. Gould represented the Committee because Gorman disqualified himself in advance thereof.

At the de novo hearing appellants' attorney specifically narrowed the issues presenting argument and evidence addressed to the following points only:

- (1) the application for person-to-person transfer was deficient on its face because it was unverified;
- (2) the proceedings for person-to-person transfer were tainted by an illegal conflict of interest involving the attorney for the issuing authority;
- (3) there was an absence of meaningful investigation by the issuing authority;
- (4) the place-to-place transfer was invalid because of a variance between the application and the plans; and because the facilities were not sited on the eight acre parcel.

I, therefore, find the issues which were not pursued, are now abandoned.

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

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

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

I

Applications for place-to-place or person-to-person transfers of licenses must be verified, under the regulations of the Division, as evidenced by the prescribed application uniformly employed by all local issuing authorities throughout the state. The reasons for this requirement are obvious and need not be reiterated. It is uncontroverted that the applicants' person-to-person application was unverified. The Township Clerk and Solicitor both reviewed the application as to form and overlooked this omission. Indeed, it was not raised at the Township hearing, due probably to its not being discovered until a subsequent date.

I find it inconceivable that the applicants would invest the sums of money necessary here, if there existed some disqualification in their backgrounds which would have required a deliberate misstatement on the application thereby giving rise to a fear of penalty if the instrument were verified. It should be noted that the original application for both place-to-place and person-to-person transfer (later enjoined by the Superior Court) as well as the two place-to-place applications filed were verified, and they all contained essentially the same information. The "remedy" sought by the objectors for this oversight is punitive in nature, and uncalled for in this case. I find as a fact, that this contention lacks merit.

II

With respect to the possible conflict of interest, the following principles are pertinent in the determination of this facet of the appeal.

The granting of a liquor license has been held to involve action quasi-judicial in nature. Dufford v. Nolan, 46 N.J.L. 87 (1884). Thus, the standards of disqualifying interest applicable in the instant matter can be no less exacting than in the case of purely judicial action. Freehold v. Gelber, 26 N.J. Super. 388 (App. Div. 1953).

It is a well-established legal principle that a quasi-judicial action of a municipal body is rendered voidable by the participation of a member thereof, who is, at the time, subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty. Aldom v. Roseland, 42 N.J. Super. 495 (App. Div. 1956).

The rule of law governing "disqualifying interest" is set forth in McNamara v. Saddle River Borough, 64 N.J. Super. 426, 429 (App. Div. 1960) wherein it was held:

"If there is 'interest' there is disqualification automatically, entirely without regard to actual motive, as the purpose of the rule is prophylactic, that is, to prevent the possibility of an official in a position of self-interest being influenced thereby to deviate from his sworn duty to be guided only by the public interest in voting as such official. Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958); Griggs v. Princeton Borough, 33 N.J. 207, 219 (1960)."

The issue of disqualification of municipal officials because of a conflict of interest is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it (Emphasis added), Griggs v. Princeton Borough, supra. In all of these cited cases, the persons were men of integrity and were motivated by sincerity of purpose. Nevertheless, the court held that it was the existence of such interest which was decisive, not whether such interest was actually influential. Zell v. Roseland, 42 N.J. Super. 75, 82 (App. Div. 1956).

The above cited cases, and legal principles set forth therein pertain to the possible conflicts which members of municipal bodies may have, not with possible conflicts of their counsel.

On October 22, 1976, the Appellate Division handed down its decision in the case of Tyrone's Haven, Inc. v. Borough Council of the Borough of South River (not approved for publication), Bulletin 2214, Item 1, in which it dealt with this very question.

It said, in part:

"As stated in Paitakis v. City Council, New Brunswick, 126 N.J. Super. 233, 237 (App. Div. 1974), it is '...the strong policy of the administration of law pertaining to the control of alcoholic beverages that the appearance of objectivity and impartiality as well as their actuality be maintained.' The facts, however, in the instant case are substantially different from the facts in Paitakis, supra, and the other cases cited by plaintiff in support of its contentions. Plaintiff relies upon cases dealing with conflicts of interest between councilmen in their official capacity and their private interests. Here, we perceive no true conflict of interest. In Griggs v. Princeton Borough, 33 N.J. 207 (1960); Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 555 (1952); and Paitakis v. City Council, New Brunswick, supra, the self-interest of the borough councilmen deemed sufficient to void municipal action was of a more direct pecuniary nature. In each case the municipal official's financial self-interest was in apparent conflict with what may have been the best interest of the municipality each served. In the instant case there is very little that is factually

in dispute. A close examination of the record reveals no bias, prejudice, impropriety or prejudgment on the part of the Borough Council. In our view, plaintiff must demonstrate not only the impropriety of defendant's actions, but also some harm arising from that impropriety. The appearance of impropriety by the Borough Council's retention of an attorney for the complainants does not warrant reversal in the instant case. See, New Jersey Board of Optometrists v. Nemitz, 21 N.J. Super. 18 (App. Div. 1952). We repeat for the sake of emphasis that while a reversal is not here warranted, a public body should be more sensitive to the probability of an appearance of impropriety than is this one. In this respect the Council demonstrated a remarkable absence of foresight and judgment."

The sentiments of the Court expressed in the above cited case apply equally in the matter sub judice. I, therefore, find, as a fact, that no conflict of interest existed in this case.

III

Appellants argue, in opposition to the person-to-person transfer, that there was a total absence of a meaningful investigation by the issuing authority.

The transcript clearly shows that the Committeemen had the application before them and read the contents prior to their decision. Furthermore, due to the rather small population and physical area of the township, they were familiar with the reputation of the applicants; and with the site of the licensed premises.

N.J.S.A. 33:1-25 provides that no license shall issue (which includes a transfer) to any person under the age of twenty-one years (now eighteen years) of age or to any person who has been convicted of a crime involving moral turpitude.

I note that there has been no issue raised in this appeal concerning either the age or the moral character of Carl or Jane Buck. The application indicates that they are over the minimum age and have not been adjudged guilty of any crime.

If, in fact, subsequent investigation discloses that either had been convicted of a crime of the nature referred to in the cited section, the quoted statute contains a provision for the cancellation of the license. See N.J.S.A. 33:1-31 (i)

While it is the better practice to obtain State Police and Federal clearances before the final approval of the application, the failure to do so in this case does not provide a valid basis to reverse the action of the local issuing authority. I, therefore, find this objection to be without merit.

IV

Appellants allege that the approval of the application for a place-to-place transfer was invalid because of a variance between the application and the plans, and because the facilities were not located on the eight acre parcel,

Attached to one of the exhibits is a photocopy of the proposed facilities showing the location of the food market, liquor store, parking spaces, plantings and an area reserved for future expansion. It clearly indicates the proposed location of the liquor store in relationship to Breakwater Road, the food market, parking facilities etc. While it does not locate the liquor store in metes and bounds specificity, it is apparent that no local official would be misled as to the situs of the facilities.

Any approval to locate a new license, or the transfer of an existing one is subject to compliance with all local ordinances as well as zoning restrictions, whether or not it is specifically set forth in the resolution of approval. Zoning matters are not justiciable by a local alcoholic beverage control authority. Imbliner v. Paterson, 59 N.J. Super 419 (App. Div. 1960).

My examination of the facts and the applicable principles of law, leads me to the conclusion that the appellants have failed to meet the burden of establishing by a fair preponderance of the credible evidence that the actions of the Committee were erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that the actions of the Committee be affirmed, and the appeals be dismissed.

Conclusions and Order

Written Exceptions to the Hearer's report were filed by the appellants, in this consolidated appeal, pursuant to Rule 14 of State Regulation No. 15.

The Exceptions proffered had been previously advanced in summation argument by letter dated November 29, 1976 to the Hearing Officer and are identical to the issues considered in the Hearer's report. I find that these Exceptions have been correctly resolved in the Hearer's report, and are lacking in merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Written Exceptions 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 7th day of April 1977,

ORDERED that the actions of respondent, Township Committee of the Township of Lower be and the same are hereby affirmed, and the appeals herein be and the same are hereby dismissed.

Joseph H. Lerner
Director

2. APPELLATE DECISIONS - MY DADDY'S BUDDY, INC. v. PERTH AMBOY ET AL.

My Daddy's Buddy, Inc., a
Corporation of New Jersey,

Appellant,

v.

The Mayor and City Council
of the City of Perth Amboy
and King Arthur's Boulevard
Inn,

Respondents.

William J. Rokos, Jr., Esq., Attorney for Appellant
Eugene L. Goceljack, Esq., Attorney for Respondent, Mayor and
City Council

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Mayor and City Council of the City of Perth Amboy who refused to act upon appellant's application for a person-to-person transfer of Plenary Retail Consumption License C-10, issued to King Arthur's Boulevard Inn, for premises at 751 Convery Boulevard, Perth Amboy.

Appellant contends that the failure of the Council to act on petition filed on or about September 29, 1976 is tantamount to a denial and is based upon an improper condition irrelevant to the issue before the council, i.e., whether the prospective transferee is qualified under Title 33 and the Rules and Regulations of the Division, to hold a liquor license. Appellant asserts the improper condition, a long existing flooding problem near the licensed premises, lacks any legally cognizable basis for a denial.

The Council, in its Answer, defends its action as justifiable stating:

"The Mayor and City Council of the City of Perth Amboy have a duty to insure that the public health, welfare and public safety of the City are protected. This duty extends to insuring that premises licensed for sale of

alcoholic beverages are not a threat to the health, welfare and safety of the public who are customers of the establishment and also to the public who are in proximity of the establishment licensed. A water drainage problem which is a public nuisance exists on these premises and effects (sic) the general health, welfare and safety of the City and therefore, since not completely corrected, the application of the appellant was denied by these respondents."

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

Briefly the factual background can be summarized and is not disputed. Convery Boulevard, upon which the licensed premises is located, is approximately seventeen feet higher than Hommann Avenue, where certain citizen objectors resided. The topography slopes sharply and as a result rain water flows upon the lower properties. This condition has existed for many years.

The current licensee leases the premises from the land owner, and the proposed transferee intends to continue the same lease arrangements.

The land owner, in an endeavor to resolve the matter, hired an engineering firm who studied the problem, ordered test borings, designed and installed a drainage pit on the licensed building premises which has, thus far, functioned properly.

That engineer (Mr. Mackle) averred that, in his professional opinion, any water now flowing from Convery Boulevard to the lower lying properties on Hommann Avenue, emanates from properties other than the one upon which the licensed premises are located.

The following letter of the City Engineer of Perth Amboy is significant and quoted in its entirety:

"October 27, 1976

Mr. Harold Augustine, City Clerk
City of Perth Amboy
City Hall-High and Market Street
Perth Amboy, New Jersey 08861

Re: King Arthur Boulevard Inn, Drainage

Dear Harold:

On October 27th I inspected the parking area within which a seepage basin had been recently constructed. According to the plan from the Engineer, Mackle Associates, it is designed to allow the storm water to be disbursed through a white sand layer at the bottom of the pit.

When we inspected the pit we found it was filled with water to approximately 6 feet and it had not rained for at least 24 hours. Whether this water will percolate out of the basin or whether it is ground water infiltrating back into the basin is unknown at this time and can only be ascertained by continued observation. As I have previously advised you, I feel that this is a private civil matter between property owners and I am not clear as to the role of the City Engineer or City Officials.

Whether the system will eventually solve the problem or not, I feel that the land owners of the Tavern have attempted to minimize if not eliminate this drainage problem and if they are not successful with this present device, then it should be made clear to them that they will have to propose some other method. The maintenance and ultimate solution of this problem is still the responsibility of the land owners and I have so informed their Attorney and Engineer. Their Engineer is of the opinion that the system will work and that the only other solution is to pipe the water through adjoining private properties to Carson Avenue.

Very truly yours,

H. Thomas Carr
City Engineer

HTC:p"

In its pleadings and oral argument, the appellant contends that there is no legal authority for a municipality to use the approval or denial of a transfer of a plenary retail consumption license as a means of resolving drainage problems existing in the area of the subject licensed premises.

The sole question posed in this appeal is whether or not this is a valid exercise of the Mayor and City Council's discretion.

On several occasions an analogous question (collection of taxes) was considered in this Division. In re Sofield, Bulletin 28, Item 1, then Commissioner D. Frederick Burnett stated:

"I am in hearty sympathy with the natural desire of your Township Committee to use every proper means to force the payment of taxes in your municipality. The question before me however, is not the worthiness of the motive but whether the power exists...the collection of municipal taxes which objective, however laudable, has nothing in common with Liquor Control."

The succeeding Director (then Commissioner) Alfred E. Driscoll, in a parallel matter ruled:

"Failure to pay real estate taxes due upon premises occupied by a licensee is not sufficient reason for denial of a license. Re Sofield, Bulletin 28, Item 1. Since on the record herein, no other issue now appears to be involved, I must reverse the action of respondent."

Bettlewood Republican Club, Inc. v. Haddon, Bulletin 527, Item 2.

Similarly, a few years later, the principle was repeated "...it has been long established that the collection of taxes has nothing to do with liquor control." Rockaway Township Tavern Association et al v. Rockaway, Bulletin 714, Item 6. The principle remains unchanged to date.

Hence, for the past forty years, all efforts to condition the issuance of alcoholic beverage licenses with factors outside the scope of relevant licensing standards has been vigorously resisted.

The burden of establishing that the action of the municipal issuing authority is erroneous and should be reversed, rests with appellant, pursuant to Rule 6 of State Regulation No. 15. Since the action of the present Council has no legal basis, that burden has been met by appellant.

It is, thus, recommended that the action of the Mayor and City Council be reversed, and it be ordered to grant appellant's application for person-to-person transfer of subject alcoholic beverage license, in accordance with the application filed therefore.

Conclusions and Order

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

Having fully 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 13th day of April 1977,

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

ORDERED that the Mayor and Council of the City of Perth Amboy, be and the same are hereby directed to grant appellant's application for a person-to-person transfer of Plenary Retail Consumption License C-10, in accordance with the application filed therefor.

JOSEPH H. LERNER
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - FRONT - UNDISCLOSED INTEREST - DISQUALIFIED PERSON CONDUCTING LICENSED BUSINESS - FAILURE TO KEEP PROPER BOOKS - LICENSE SUSPENDED FOR BALANCE OF TERM UNTIL IMPROPER SITUATION IS CORRECTED - NOT LESS THAN 90 DAYS.

In the Matter of Disciplinary :
Proceedings against :

Spilled Inc. :
t/a Rocky's West :
1379 White Horse Pike :
Galloway Township, :
Absecon, New Jersey :

CONCLUSIONS
AND
ORDER

Holder of Plenary Retail Con- :
sumption License, C-5, issued :
by the Township Committee of :
the Township of Galloway. :

Charles H. Nugent, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleads "not guilty" to charges alleging that, in its application for its plenary retail consumption license, it failed to disclose that: (1) Attilio "Rocky" Castellani is the real and beneficial owner of all of the shares listed in the name of Deane Rock Castellani; (2) Attilio "Rocky" Castellani has an interest in the license applied for and the business conducted under said license; (3) Attilio "Rocky" Castellani retained the profits and income derived from the license business; (4) from June 1, 1971 to date, the licensee knowingly aided and abetted Attilio "Rocky" Castellani in the exercise, contrary to N.J.S.A. 33:1-26, of the rights and privileges of the license; in violation of N.J.S.A. 33:1-52; (5) from March 1, 1972 to date, the licensee failed to keep proper books of account for the licensed

business, in violation of Rule 36 of State Regulation No. 20; and (6) in its short form application aforesaid, it failed to disclose in response to Question #30, that Attilio "Rocky" Castellani had been convicted of a crime involving moral turpitude, i.e. possession of a weapon without a permit; in violation of N.J.S.A. 33:1-25,26.

In substantiation of the charges, testimony was elicited from ABC Inspector C, who reviewed the results of his investigation concerning the licensee and the alleged party in interest. The licensee stipulated that the testimony of ABC Inspector G would be corroborative of C's testimony.

From the testimony of ABC Inspector C and witnesses offered by the licensee, Mrs. DiNoto and Rocky Castellani, the following picture emerges which is substantially uncontroverted: In 1971 Castellani and his wife learned of a bar then for sale, negotiated to purchase it and did so in the name of Mrs. DiNoto (then Guariglia). This occurred in 1971 and, in that same year, the subject corporation was formed with Mrs. DiNoto being the sole stockholder. She had no interest in the licensed business whatever, she explained that: "my uncle, Rocky Castellani, asked if he could use my name for the bar".

In 1973 the entire capital stock of the subject corporation was transferred to Castellani's son, Deane Castellani.

It was admitted by Rocky Castellani that the licensed establishment is treated as his own in respect to the general business, but he insists that the title to the business is in his son, as he, Rocky, will not have businesses in his own name. He admitted that his son receives nothing from the business and would not, except, in the event of Rocky's death. In that event, his son would have to divide the business among his mother and brothers and sisters.

Castellani admitted that he treated all monies of the business as his own. He drew monies from the corporate account for his personal expenses but no records were readily available to affirm payment to him of salary or wages from the business. In response to questioning pertinent to the business, his responses were:

"Q. Isn't it a fact----you have treated all of the monies of Spilled, Inc., as if they were your own?

A. Of course."

Further, he gave varied and conflicting reasons for not having the business in his own name, both to the agents during their investigation and at the subject hearing. Placing aside his motivations, none of the licenses were in his name, and a prior license had been in the name of his father and his wife. The present license, as indicated, is in the name of the corporation, and all of the capital stock are owned by his college-student son.

I.

Preliminarily, 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. Div. of Alcoholic Bev. Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

In appraising the factual picture in this proceeding, the credibility of witnesses must be weighed. Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself and must be such as 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 single defense to the primary charges is that Castellani is merely a "manager" within the licensed establishment and is unconnected with the ownership. It is to be noted that in this connection neither the son Deane Castellani nor the mother, Mary Castellani were produced as witnesses to establish ownership as contended.

Castellani's explanation of the ownership of the business and realty was made as follows:

"A. Property is hers and the sons owns the business and when this is all through you see, my son Michael will get twenty-five shares of this business. He will get his stocks as they get old enough; they will get their twenty-five shares apiece. I have four children."

At best, the placement of Deane's name on the shares was an apparent substitute for testamentary disposition of the business interest; it was patently not intended to vest an ongoing right to own, manage and sell the business by the son.

"The very nature and characteristics of a 'front' is concealment and subterfuge. Very rarely is such proof buttressed with confessions and/or affirmative admissions. Thus the testimonial presentation must be largely circumstantial and documentary." Sharp's Lodge, Inc. v. Lakewood, Bulletin 1842, Item 1.

I, therefore, find that the interest of Deane Rock Castellani, the son, as stockholder in the corporate licensee, was held by him as a "front" for his father, Attilio "Rocky" Castellani, and I, conclude that the Division has established the truth of Charges (1), (2), (3) and (4), by a preponderance of the credible evidence and recommend that the licensee be found guilty of those charges.

II.

Charge (5), charges a violation of Rule 36 of State Regulation No. 20 because the licensee failed to keep proper books of account. The licensee's defense to this charge is that the account books had been impounded by the Federal authorities in connection with another charge against Castellani, and they had never been returned.

Nonetheless, current books which followed those taken were examined by the Division auditor who testified that the sum of about \$20,000, which was admittedly borrowed at the time of the purchase of the property, was never properly shown in the said books, nor did the accounts reveal the full receipts or expenditures of the business. In short, there were gaps or holes which the Auditor attributed to the failure of the licensee to have its accountant apprised thereof.

Therefore, the books did not truly reflect the totality of the business operation and were not "true books of account" of the licensed business.

I, thus, conclude that the Division has established the truth of charge (5), supra, by a preponderance of the credible evidence and recommend that the licensee be found guilty of the said charge.

III.

In a written statement submitted in lieu of oral summation, the licensee avers that Castellani did not "knowingly" make any false or misleading statements. It asserts that the facts have been available to the Division Agents and no intention was exhibited by which a violation was suggested.

These arguments are not persuasive. Rather, the ample proof offered by the Division, substantiated, in part, by the admissions in the testimony of Castellani, establish that the business was unquestionably the property of Castellani; and, despite his motivation, the ownership of the corporate stock was placed in a name other than his own. In this sense, the statements of the application referred to were unquestionably false and misleading.

Licensee has no prior adjudicated record. It is recommended that the license be suspended for the balance of its term, with leave to the licensee or any bona fide transferee of the license, to apply to the Director, by verified petition, for the lifting of the suspension whenever the unlawful situations have been corrected, but, in no event sooner than ninety days from the commencement of the suspension.

CONCLUSIONS AND ORDER

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 6th day of April 1977,


ORDERED that Plenary Retail Consumption License C-5, issued by the Township Committee of the Township of Galloway to Spilled Inc., t/a Rocky's West, for premises 1379 White Horse Pike, Galloway Township, Absecon, New Jersey be and the same is hereby suspended for the balance of its term, viz., midnight, June 30, 1977, effective 3:00 a.m. on Monday, April 18, 1977, and for the term of renewal of said license which may be granted, with leave to the licensee, or any bona fide transferee of the license, or of any renewal of the said license which may be granted, to apply to the Director, by verified petition, for the lifting of the suspension whenever the unlawful situation has been corrected; but in no event shall the lifting of said suspension be sooner than ninety(90) days from the commencement of the suspension herein.

JOSEPH H. LERNER
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Franche Comte, Ltd.
428 Old Hook Road
Emerson, New Jersey

Application filed August 9, 1977 for wine wholesale license.



Joseph H. Lerner
Director