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

BULLETIN 2273 December 13, 1977

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - MXP CORPORATION v. PASSAIC.

MXP Corporation, t/a Virgo Lounge, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Passaic, Respondent.	)	On Appeal CONCLUSIONS AND ORDER

Jack Krakauer, Esq., Attorney for Appellant
Randolph Newman, 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 Municipal Board of Alcoholic Beverage Control of the City of Passaic (hereinafter Board) which, on March 14, 1977, suspended appellant's Plenary Retail Consumption License C-117, for premises 197 Monroe Street, Passaic, for twenty days following a finding that, on March 8, 1976, appellant violated Revised Ordinances, Section 5-4.1(a) and (c) of the City of Passaic, by permitting the licensed premises to be open after 3:00 a.m., and selling, serving or delivering alcoholic beverages after such time.

By its petition of appeal, appellant contends that the Board's action was arbitrary, capricious and not supported by the evidence. Appellant further asserts that the Board's action was illegal and contrary to law, in that the Ordinance upon which the Board based its suspension embodied no penalty provision authorizing a suspension of license. The Board answers that it considered all of the facts surrounding the charged incident, and that its action was reasonable and proper.

Upon filing of the appeal, the Director of this Division, by Order of March 18, 1977, stayed the effective dates of the suspension imposed by the Board, pending determination of this appeal.

A de novo appeal was heard in this Division, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses, pursuant to Rule 6 of State Regulation No. 15. However, by stipulation, the parties relied upon a transcript of the proceedings before the Board, which was introduced in evidence, in accordance with Rule 8 of State Regulation No. 15.

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

I.

Appellant's first contention, as set forth in its petition of appeal and in oral argument at the hearing, is that there was insufficient evidence to support a violation of the cited ordinance. (Section 5-4.1(a) and (c)). Municipal ordinance Section 5-4.1(a) prohibits the sale, service or delivery of alcoholic beverages on the licensed premises after specified closing hours. The applicable time sub judice is 3:00 a.m. A review of the transcript of testimony before the Board is devoid of any competent evidence or allowable inferences therefrom, upon which a charge of selling or serving alcoholic beverages can be maintained. The beverages, alleged to have been served, were not secured for testing or properly identified as alcoholic beverages.

However, the appellant was further charged with violation of Section 5-4.1(c), which provides that, the "entire licensed premises shall also be closed" during the time periods set forth in Section 5-4.1(a).

The appellant, in contending that the beverage served to a patron, with whom a scuffle with the police resulted, did not reflect its alcoholic quantity, can not now logically argue that the premises were entirely closed. Obviously a member of the public was present, and the remaining issue thus presented is the actual time of the viist by the police. Testimony before the Board, by the investigating police officer, indicated that he established the time by communication with the police desk. He described the time sequence to be 3:00 a.m. when he made exterior observations of patrons within the licensed premises, and 3:03 a.m. when he entered appellant's premises. No affirmative evidence was offered by appellant in rebuttal thereof.

The ultimate test in these matters is one of reasonableness. Could the members of the Board, acting as reasonable persons in a reasonable manner, have arrived at their determination based upon the evidence presented? The Board felt that the believable evidence established the truth of the charge.

The Director should not reverse unless he finds as a fact that there was a clear abuse of 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); Hudson Bergen, etc., Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Gach v. Irvington, Bulletin 2058, Item 1.

There is no evidence of any improper motivation on the part of the Board, or that it acted capriciously in reaching its determination.

An examination of the facts and applicable law leave no doubt that the charge requiring closure of premises by 3:00 a.m. was established by a preponderance of the believable evidence. The charge prohibiting the sale or service of alcoholic beverages was not established as previously discussed.

II.

Appellant's second contention is that since the ordinance fails to provide authority or procedure for the Board to conduct disciplinary proceedings for this ordinance violation, the Board lacked jurisdiction or power to impose any suspension of license. This contention arises from a reading of the subject ordinance where it refers to penalties for its breach. Section 5-7 states that penalties to be imposed for violation of Chapter 5, the local alcoholic beverage control section, shall be determined pursuant to Section 3-18.

Section 3-18.1 provides as follows:

> "Maximum Penalty. For violation of any provisions of this chapter, any other chapter of this revision, or any other ordinance of the township where no specific penalty is provided regarding the section violated, the maximum penalty, upon conviction, shall be a fine not exceeding $500.00 or imprisonment for a period not exceeding ninety days, or both."

Section 3-18.3 designated "Application" provides:

> "The maximum penalty stated in this section is not intended to state an appropriate penalty for each and every violation. Any lesser penalty or no penalty at all, may be appropriate for a particular case or violation."

The Board replies that the above section, permitting a lesser penalty than the maximum or, no penalty at all, is sufficient to empower the Board to impose a suspension of license.

The issue is thus narrowed to a singular question concerning the powers of the Board, or stated briefly, does the Board possess the power to suspend a license in a disciplinary matter absent a provision in the ordinance conferring such power?

To determine that issue, reference must be made to various statutory provisions of the Alcoholic Beverage Law. N.J.S.A. 33:1-5 and 1-5.1 permit the establishments of excise boards designated thereunder in certain classes of municipalities. The general powers of such Board of Alcoholic Beverage Control are conferred by N.J.S.A. 33:1-5.3, and state that "all the powers, duties and rights to administer the provisions of Title 33 of the Revised Statutes in respect of such municipality shall...be vested in such municipal excise commission." There is no dispute that the respondent herein is the lawful Board of Alcoholic Beverage Control of the City of Passaic.

In the absence of a clear mandate of the public by way of refendum (N.J.S.A. 33:1-47), the governing body is entitled to set hours of sale of alcoholic beverages.

N.J.S.A. 33:1-40 specifically confers upon a governing body of a municipality the authority to limit the hours of sale by ordinance, which the City of Passaic has done. Nothing in those statutory provisions require the governing body to enact penalty provisions or designate specific powers of suspension of licenses.

N.J.S.A. 33:1-24 provides in part that, the municipal authorities issuing licenses have the duty to "enforce primarily the provisions of this chapter (Title 33) and the rules and regulations so far as the same pertain or refer to or are in any way connected with retail licenses..."

Thus, the Board, has the power to regulate, and the obligation thereon, referable to the hours of sale or delivery of alcoholic beverages.

Concurrent with the powers vested in the Board, and their obligation to enforce Title 33, the Board is empowered by statute, N.J.S.A. 33:1-31, to suspend licenses for many causes. Hours violations are included in the statute under paragraph "h" thereof, which provides for suspension for:

> "Any violation of any ordinance, resolution or regulation of any other issuing authority or governing board or body;"

Hence, even in complete absence of any penalty reference contained in the City of Passaic ordinances, the Board has reposed in it, by virtue of N.J.S.A. 33:1-31, plenary power of suspension.

Accordingly, I find that appellant has failed to sustain its burden of establishing that the action of the Board is erroneous and should be reversed. I recommend that the action of the Board in its finding of guilt be affirmed and the appeal be dismissed. However, as the suspension imposed by the Board embraced findings of guilt under both Section 5-4.1(a) and (c), with a total of twenty days suspension for both offenses, and in the absence of proof that Section 5-4.1(a) was violated, it is further recommended that the penalty imposed be modified to a suspension of ten days. Upon such modification, the penalty imposed by the Board, and stayed by the Director pending this appeal, should be reimposed.

Conclusions and Order

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

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

Accordingly, it is, on this 20th day of July 1977,

ORDERED that the action of the respondent Board of Alcoholic Beverage Control of the City of Passaic finding appellant guilty of violation of Section 5-4.1(c) of the municipal ordinance of the City of Passaic be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the action of the respondent Board of Alcoholic Beverage Control of the City of Passaic finding appellant guilty of violation of Section 5-4.1(a) of the aforesaid ordinance be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed; and it is further

ORDERED that my Order of March 18, 1977 staying the Board's suspension pending determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-117 for premises 197 Monroe Street, Passaic, New Jersey be and the same is hereby suspended for ten (10) days commencing 3:00 a.m. Tuesday, August 2, 1977 and terminating 3:00 a.m. Friday, August 12,1977.

Joseph H. Lerner
Director

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

Rubin's Tavern, Inc., A New Jersey Corporation, Appellant, v. Municipal Board of Alcoholic Beverage Control for the City of Paterson, Respondent.	On Appeal CONCLUSIONS AND ORDER

Goodman & Rothenberg, Esqs., by Robert I. Goodman, Esq., Attorneys for Appellant
Joseph A. La Cava, Esq., by Ralph L. De Luccia, Jr., Esq., Attorneys 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 Municipal Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which, on February 23, 1977, suspended appellant's Plenary Retail Consumption License C-112, for premises 42 Paterson Street, Paterson, for ninety days, in consequence of a finding that, appellant had on February 9, 10 and 11, 1977, permitted the premises to be operated in such manner as to become a nuisance; in violation of Rules 4 and 5 of State Regulation No. 20.

Upon filing of the appeal, the Director of this Division, by Order dated March 2, 1977, stayed the effective date of the suspension imposed by the Board pending the determination of this appeal.

The appeal de novo was heard in this Division pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded the parties to present evidence, and to cross-examine witnesses. The stenographic transcript of the testimony before the Board was accepted in lieu of testimony, in accordance with Rule 8 of State Regulation No. 15. No further testimony was received in this Division other than that by respondent in connection with the submission of evidence examination reports from the State Police Laboratory.

The appellant contends that the evidence before the Board did not support its conclusions, because the narcotic drugs discovered in the premises were located in areas available to the patrons, and no proof was offered that appellant or its agents knew of the existence of such drugs. The Board answers that whether there was adequate proof of such knowledge on the part of the appellant's employees of the existence of such drugs, did not alter the conclusion that the premises were operated as a nuisance.

It appears from the transcript of the testimony before the Board that two members of the Paterson Police Department testified as to visits to and discoveries in appellant's premises of caches of narcotic drugs.

Detective Donald Rizzo described two visits in the company of fellow officers to appellant's premises on February 9, 1977. The first occurred about 8:45 p.m. From information received the presence of a person who was dealing in narcotic drugs was suspected. Upon entry the suspect was seen and a search was instituted which resulted in the discovery of sixteen silver bags containing cocaine. These were found on a ledge which bordered recessed ceiling lights in a public area of the barroom. In the lavatory another fifteen envelopes were discovered and a patron who was suspected of narcotic involvement was arrested. Seven or eight of the patrons were recognized by the police as having serious criminal records involving, among other offenses, the sale and possession of narcotic drugs.

Two hours later, Detective Rizzo and other police returned and again searched the premises upon receipt of additional information of contraband at the licensed premises. On this occasion a paper bag containing heroin was discovered in a hole underneath the ledge of the bar on the patrons' side. A further search disclosed a plastic bag behind the juke box containing a complete set of narcotic implements.

On February 11, 1977 about 10:30 p.m., appellant's premises was the subject of another police investigation. Detective Rizzo, with other detectives and ten uniformed policemen conducted a further search, at which time they discovered forty glassine envelopes on the floor of the ladies room and twenty-six packets containing brown heroin in a package of cigarettes on the top of the refrigerator located right next to the bar. Detective Michael Pasquale testified in corroboration of the aforesaid except that he placed the refrigerator where the cigarette package was located behind the bar.

The manager and bartender of appellant's premises, Gatewood Perkins, testified that he was unaware of the hidden supplies of narcotic drugs in the establishment, and that he never did any cleaning in connection with the licensed premises. With reference to one of the arrested patrons, he was asked "Did you ever see him use drugs?" to which he replied "I never

seen him high. I have seen him fall asleep. The say you sleep from narcotics...." He further admitted that he had heard rumors that people were selling drugs in his tavern.

A Paterson Police Detective assigned to the Narcotic Bureau, Alexander Clark, was called upon to testify on behalf of the appellant. He had not been a party to the present raids upon the premises, but was quite aware of the prevalent narcotic situation both in this tavern and in the area.

On cross examination Clark stated that he had made more than ten arrests for narcotic activity and confiscated contraband within appellant's premises. Although he denied that anyone from the licensed premises had visited him at Police Headquarters, he did testify that the principal holder of the corporate stock had, from time to time, addressed him in the vicinity of the premises with requests that the premises be placed under surveillance. It was his opinion that the tavern is "pretty open" for narcotic activity and that as the tavern is presently constituted as to ownership and personnel, they cannot control the "very heavy criminal traffic including narcotics."

The burden of establishing that the action of the Board was erroneous and should be reversed rests entirely upon the appellant, under Rule 6 of State Regulation No. 15. The Director's function is not to substitute his personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion, and, if so, to affirm, irrespective of his personal views. Broadley v. Clinton, Bulletin 1245, Item 1; Fanwood v. Rocco, 33 N.J. 404, 414 (1960).

I.

In adjudicating matters of this kind, it is observed that 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 Beverage Control, 20 N.J. 373 (1956).

In appraising the factual picture presented in these proceedings, the credibility of witnesses must be weighed. Testimony, to be believed must not only proceed from the mouth of credible witnesses 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); Freud v. Davis, 64 N.J. Super 242 (App. Div. 1960).

The general rule in these cases is that the finding must be based on competent legal evidence, and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042 (1964).

It is a well established and fundamental principle that a licensee is responsible for the misconduct of persons employed on the licensed premises. In re Olympic, Inc., 49 N.J. Super. 299 (App. Div. 1958); Rule 33 of State Regulation No. 20.

The appellant's basic defense to the charges is that its employee were not aware of the presence of the narcotic drugs or individuals dealing in narcotics within its premises, and further that, the drugs were brought in by patrons and were discovered principally in areas to which patrons had access, i.e., the lavatory and ledges. In refutation of such defense is the positive testimony of the police detectives. "Testimony is affirmative or positive if it consists of statements as to what a witness has heard or seen; it is negative if the witness states he did not hear or did not see the phenomenon in question." Honey v. Brown, 22 N.J. 433, 438 (1956). Positive testimony is preferred to negative testimony.

"The eradication of drug traffic and its promiscuous use is a matter of grave concern to society in general and to our courts and Legislature in particular." State v. One Ford Van Econoline, 143 N.J. Super. 512, 517 (Law Div. 1976). It is of similar grave concern to the Director of this Division who has assessed or affirmed a penalty of revocation in such matters. El Torero, Inc. v. Newark, Bulletin 1989, Item 1.

The testimony here is more than ample to find, as did the Board, that the heavy presence of narcotic traffic should have been known by the licensee and its employees, who admittedly had been forewarned of the continuing presence of narcotic users. The repeated visits, twice in one day, for example, of the Police detectives who found caches of drugs, belies the remonstrations of appellant that it could not have known of the criminal activities by the patrons. The Board did not accept such protestations. The flagrancy of the offenses amply support the charge that the premises were conducted as a nuisance.

II.

Reference has been made in the instant matter to the case of Ishmal v. Div. of Alcoholic Bev. Control, 58 N.J. 347 (1971), wherein due to huge narcotic traffic activity, the license was revoked by the local issuing authority. The Supreme Court was critical of the horrendous drug traffic present, but modified the penalty from outright revocation to permit an

application for a place-to-place transfer of the license. This was in consideration of the constant attempts of the licensee to obtain police aid in ridding the premises of the flow of drug addics, which they concluded supported a finding that the licensee did not allow or permit their presence within the licensed establishment.

In the instant matter, the appellant introduced the testimony of Police Detective Clark of the Narcotic Squad who described a cooperative attitude of the principal owner of appellant's corporate stock and the repeated suggestions given to him that the police "clean out" his establishment. Referring to the principal owner, Detective Clark responded to a question as follows:

> "He has never come to police headquarters. However, in the area of the tavern, he has approached me and asked for assistance. I sympathize with him because he has too many people within the vicinity of the tavern there trying things of an unlawful nature and this man just cannot handle it. But I told him he has to handle it because it is his responsibility. But we will do what we can and we will continue to do what we can. He does ask for assistance, I know. We just do what we can. There's just so much you can do. The place is overflooded with violatiors."

Had the Board revoked appellant's license, the doctrine of the Ishmal case might be applicable; however, the Board did not revoke the license but rather imposed a stern penalty for the obvious purpose of warning appellant that it shall not tolerate these premises to be a"drug supermarket" as was described in Ishmal.

I conclude that the findings' determination and penalty as set forth in the resolution of the Board is substantiated by the record and that the appellant has not sustained its burden of establishing that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

Accordingly, it is recommended, as hereinabove stated that the action of the Board be affirmed, and the appeal filed herein be dismissed.

Conclusions and Order

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

Appellant in its Exceptions, alleges that the imposed penalty of ninety days should be set aside or substantially reduced. It asserts the applicability of a defense predicated upon Ishmal v. Division of Alcoholic Beverage Control, 58 N.J. 347 (1971) to a suspension penalty per se, and by subsequent action of the Board in denying renewal of the subject license for the 1977-78 licensing year.

From my analysis of the record herein, I find that the only similarity between the Ishmal holding and the subject appeal is a high quantity of narcotics traffic in the licensed premises. In the instant matter, there is no convincing evidence, if at all, of a conscientious endeavor by the licensee to eradicate the drug problem by the appellant.

In Ishmal, the licensee called the police 75 to 100 times with narcotic related complaints, had a policy of refusing service and ejecting persons under the influence of drugs, provided information on specific drug suspects, and, in general, exhibited "good faith" efforts to prohibit the violative conduct.

In the matter sub judice, I note one direct call by the appellant to police requesting assistance. No one, other than appellant's attorney, approximately one week before the Board's hearing on these charges, ever went to Police Headquarters to seek aid. There was no testimony of any policy of refusing or ejecting patrons under the influence of drugs. The appellant's bartender testified he "didn't know nothing" about narcotic use in the tavern. He stated that you can't search people and "[what] they bring in their pockets, I don't know nothing about it." This blatant abdication of responsibility, supported by further expressions of ignorance of a drug situation called "pretty open" within the licensed premises, bespeaks "good faith" attempts to eradicate a serious drug problem, which resulted in more than ten arrests for drug activity in the past few years.

The testimony of a Paterson police officer, who indicates that the appellant's corporate stockholder approaches him while in the vicinity, or upon his visits to the tavern on his own intuition and initiative, to seek assistance, do not constitute serious endeavors to eradicate the drug problem in these premises.

I find, therefore, no warrant to support an Ishmal rationale herein. Thus, I find this exception, and the concomitant exception that, the appellant did not "permit, allow or suffer" the prohibited activity and the penalty is excessive, and without merit.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Hearer's report, and the Exceptions filed thereto by appellant, I concur in the findings and recommendations of the Hearer, and adopt them, as supplemented heretofore, as my conclusions herein.

Accordingly, it is, on this 2nd day of August 1977,

ORDERED that the action of the Board in finding appellant guilty of violations of Rules 4 and 5 of State Regulation No. 20 on February 9, 10 and 11, 1977, 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 March 2, 1977, staying the suspension imposed by the Board pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-112, which was not renewed by the Board of Alcoholic Beverage Control for the City of Paterson for the 1977-78 licensing year, but is currently extended upon appeal filed from the denial of the licensee's application for renewal of said license by the order of the Director of June 27, 1977, until September 15, 1977, the adjourned date of an Order to Show Cause, for premises 42 Paterson Street, Paterson, be and the same is hereby suspended for ninety (90) days commencing 3:00 a.m. Thursday, August 11, 1977 and terminating 3:00 a.m. Wednesday, November 9, 1977.

Joseph H. Lerner
Director

3. APPELLATE DECISIONS - WEBCO PRODUCTS, INC. v. EVESHAM.

Webco Products, Inc.,	)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS and ORDER
Township Council of the Township of Evesham,	)	
Respondent.	)	

Hersh Kozlov, Esq., Attorney for Appellant
Robert Wilinski, Esq., Attorney for Respondent

BY THE DIRECTOR:

This is an appeal from the action of the Township Council of the Township of Evesham (hereinafter Council) which, on June 21, 1977, denied renewal of appellant's Plenary Retail Consumption License, C-4, for premises to be constructed in accordance with proposals given to the Council when the license was initially issued at the commencement of the 1976-77 licensing year.

The Council's denial of renewal was based on the appellant's failure to complete construction of its proposed facility by the end of the licensing period.

Appellant contends that such denial was arbitrary and capricious, and that the Council's action was erroneous and should be reversed.

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

Testimony of William J. Barney, Chairman of the Planning Board of the Township of Evesham was adduced, and during the testimony of Thomas O. Marini, principal stockholder of appellant corporation, a conference between counsel ensued, which resulted in the following stipulation:

(1) Appellant shall and does hereby request dismissal of this appeal; and

(2) The Respondent Council upon entry of an Order by the Director of this Division dismissing this appeal, shall promptly

renew appellant's plenary retail consumption license for the 1977-78 licensing year, nunc pro tunc. Said license shall not be delivered to appellant, but shall be held by the Council pending the completion and available occupancy of the building proposed for the situs of the license, in accordance with all municipal approvals; and

(3) The parties hereto agree that, should appellant fail to have the building constructed in a manner agreeable to the municipality, with occupancy thereof approved, by the termination of the current licensing period, such license shall not be renewed for the 1978-79 licensing year.

Good cause appearing, and consistent with the conditions agreed to by the parties as set forth herein, I shall grant the request.

Accordingly, it is, on this 16th day of August 1977,

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

JOSEPH H. LERNER
DIRECTOR

4. ELIGIBILITY PROCEEDINGS - DIRECTOR'S ADVISORY OPINION - CONVICTION OF PHARMACIST FOR ILLEGAL SALE OF COUGH MEDICINES AND LIKE DRUGS DETERMINED NOT CRIME INVOLVING MORAL TURPITUDE.

ELIGIBILITY NO. 911

Applicant seeks an advisory opinion as to whether or not he is eligible to be associated with the alcoholic beverage industry in this State because of his conviction of a crime. N.J.S.A. 33:1-25.

Applicant pleaded guilty in Superior Court, Essex County on February 10, 1975 to two counts of an indictment alleging that he knowingly and intentionally did refuse and fail to take, keep and furnish records, order forms, invoices and information required to be kept under Title 24 of the New Jersey Statutes; and that he did knowingly distribute and dispense to numerous individuals controlled dangerous substance, more specifically, Robitussin A.C., Schedule V, and Terpin Hydrate with codeine without valid medical purpose. He was sentenced to one year in Essex County Correction Center, this custodial sentence being suspended, fined $1,000.00 and placed on probation for two (2) years.

The crimes to which applicant pleaded guilty may or may not involve moral turpitude depending upon whether or not there are aggravating circumstances present. Eligibility No. 77, Bulletin 387, Item 9.

At the hearing held herein, an opportunity was afforded applicant to present background facts and circumstances surrounding his conviction which the Director may take in consideration.

Applicant testified as follows: he had been a registered pharmacist for 40 years, having owned five pharmacies prior to his arrest and conviction. The pharmacy which he owned and operated was located at 248 Peshine Avenue, Newark, N.J., in a run-down neighborhood. A substantial percentage of his prescription business came from patrons on medicaid and welfare. He had experienced much pilferage in his business premises.

The drugs involved in his conviction were Schedule V drugs contained in pre-packaged four ounce bottles of cough syrup which may be dispensed without a prescription. He explained that the only form of control required is in the form of a ledger which the names of persons purchasing the cough mixture are kept, and each purchase is approved by a pharmacist who initials the ledger prior to the mixture being dispensed. There must be a period of at least 48 hours elapse between sales to the same person.

He employed one druggist; and the number of prescriptions filled daily ran between 150 to 200. This prescription business accounted for the major portion of the pharmacy's income.

As a result of the constant heavy traffic in prescriptions both the applicant and his pharmacist were often occupied when initialing approvals of cough mixture sales, which the clerks in the pharmacy made. As a result it was disclosed that the 48 hour requirement was not always followed.

On occasion, the sales of cough mixture were inadvertently not recorded again because of heavy pressure of other sales at those times. He readily admitted that he was guilty due to carelessness, but not because of any criminal intent.

After examining all the facts and circumstances connected with applicant's conviction, as disclosed at the hearing, and considering the arguments advanced in the memorandum submitted by the attorney for the applicant, which is attached hereto and made a part hereof, I find that there are no aggravating circumstances present which are connected with the said crimes of which applicant was convicted.

It is, therefore, my opinion that the said crimes do not involve the element of moral turpitude.

Dated: August 4, 1977

Joseph H. Lerner
Director

5. STATE LICENSES - NEW APPLICATIONS FILED.

Foreign Brands, Inc.
99 Hook Road
Bayonne, New Jersey
Application filed December 8, 1977
for wine wholesale license.

Hub Beer Distributors, Inc.
1181-1195 Fairview Street
Camden, New Jersey
Application filed December 12, 1977
for additional warehouse license
for premises 1102 Ferry Avenue,
Camden , New Jersey, under Limited
Wholesale License WL-43.

Joseph H. Lerner
Director