MR. ZEMEL

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTRO
1100 Raymond Blvd. Newark, N. J. 07102

BULLETIN 1584 October 28, 1964

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 1584 October 28, 1964

1. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALER - IMPORTER ORDERED TO SUPPLY WHOLESALER.

HOFFMAN IMPORT & DISTRIBUTING COMPANY, A CORPORATION,	)	
Petitioner,	)	ON PETITION
v.	)	CONCLUSIONS AND ORDER
PEERLESS IMPORTERS, INC.	)	
Respondent.	)	

Lamb, Blake, Hutchinson & Dunne, Esqs., by Raymond J. Lamb, Esq., Attorneys for Petitioner.
Martin Simon, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Hoffman Import & Distributing Company (Hoffman) is a duly licensed New Jersey wholesaler of alcoholic beverages with offices in Jersey City. Respondent Peerless Importers, Inc. (Peerless), an importer of alcoholic beverages with offices in New York, is and has been since 1953 the exclusive importer and distributor in the United States of a scotch whisky known as Hankey Bannister.

In its petition, Hoffman alleges that on February 27, 1963, it placed an order for twenty-five cases of Hankey Bannister with Peerless; that on March 2, 1963, Peerless advised Hoffman by letter that it would not fulfill said order because it had entered into an exclusive distributing agreement with another company, namely, Garden State Liquor Wholesalers, Inc. Hoffman alleges that, by its action, Peerless has discriminated against it and requests relief under the provisions of R.S. 33:1-93.1-5 which prohibits an importer of alcoholic beverages from arbitrarily refusing to sell to any licensed wholesaler nationally advertised brands of alcoholic liquors.

The petition further alleges that, by reason of such discrimination, Hoffman is unable to purchase Hankey Bannister; is therefore unable to supply its customers with said liquor; and will lose not only that business but may well lose other accounts because of such alleged discrimination. It, therefore, seeks an order directing Peerless "to sell and continue to sell to Petitioner Bannister on terms usually and normally required by Respondent."

The answer of Peerless denies that it arbitrarily refused to sell to the petitioner in violation of the statute, and puts the petitioner to its proof on such matters not strictly procedural in nature.

After the original hearing in this case, but before this Report was prepared, a decision of the Appellate Division of the Superior Court, which considered the basic legal issues herein involved, was rendered in the case of James McCunn & Co. v. Fleming & McCaig, 81 N.J.Super. 97 (reprinted in Bulletin 1541, Item 1).

In order to afford both Hoffman and Peerless an opportunity to present additional testimony with respect to certain relevant matters which I thought were necessary to complete the record and to present additional proofs consistent with the sense of the decision in McCunn, this matter was set down for supplemental hearing on February 3, 1964. At the supplemental hearing, counsel presented further argument in support of their respective positions, but declined to offer additional testimony to buttress the record.

The essential facts necessary for a determination of the issues herein, as reflected in the transcript, are as follows: Hoffman and its predecessor Philip Hoffman, an individual, have been engaged in the wholesale liquor distributing business in New Jersey since 1945. It employs five solicitors, services approximately two thousand accounts throughout the State, and operates three trucks plus other trucking facilities in making its deliveries. It is one of four distributors of the Hankey Bannister products in the State of New Jersey. Hoffman has been distributing and selling Hankey Bannister in New Jersey since June 30, 1950, purchasing its items from Peerless from 1953 to 1962. A breakdown of the numbers of cases purchased during these years is as follows:

Year	Number of Cases
1953	25
1954	25
1955	45
1956	25
1957	25
1958	110
1959	25
1960	80
1961	45
1962	25

Martin Hoffman (the manager and vice-president of Hoffman) testified that all the items were paid for, and the issue of payment or ability to pay was not raised or challenged, and is not involved in these proceedings. He further testified that on October 24, 1962, Peerless notified Hoffman that it had concluded an arrangement with Garden State Liquor Wholesalers to handle Hankey Bannister products as its sold agent for the State of New Jersey beginning December 1, 1962.

On February 27, 1963, Hoffman placed an order for twenty-five cases of Hankey Bannister with Peerless, and on March 2, 1963, Hoffman received a letter from Peerless advising that it would no longer honor any of Hoffman's orders, nor would it honor that particular order. He immediately contacted Mr. Boguski (manager of Peerless) and was advised that the said order could not be fulfilled because the management of Peerless had adopted a new policy of dealing exclusively with Garden State Liquor Wholesalers.

He further stated that, as a result of the failure and refusal of Peerless to honor this order and future orders, Hoffman has lost a number of accounts. He knew that at least seven accounts were now obtaining Hankey Bannister from another suppliers, and at least four accounts had left Hoffman completely.

On cross examination, he was asked about the method used by Hoffman to promote the sale of Hankey Bannister. He stated that he had advertised in the New Jersey edition of the Beverage Retailer Weekly, a trade paper circulated to retailers in the State of New Jersey. It was also admitted at the supplemental hearing that advertisements seeking to promote the sale of Hankey Bannister were carried in the New York Times and the New York Herald Tribune.

Anthony Boguski (sales manager of Peerless) denied that Hankey Bannister is distributed nationally but, rather, that it is distributed "sectionally. We have markets in states other than monopolies. Upstate New York, New Jersey, Kentucky, Texas" and so forth. He asserted that Peerless has no agreement with Hoffman, and it was the decision of Peerless to give Garden State Liquor Wholesalers the exclusive distributorship of Hankey Bannister.

The reason for this was explained in the following language: "Well, we felt that we were spending a considerable amount of money in the New York metropolitan area, which we feel takes in part of Jersey, particularly this area of Jersey, and we felt we were not getting enough sales here." Further, "We feel they (Garden State) are in a better position. There are more boxes we are interested in." He was then asked the following question by counsel for Peerless:

"Q What has been your experience with it? What has been your sales record?

A Well, they have been running about the same as they have in the past."

He was then asked the following question:

"Q Do you now sell to any other distributors in the state of New Jersey besides Garden State?

A No, we do not."

He further admitted that Peerless has merely an oral agreement with Garden State Liquor Wholesalers and there is no undertaking on the part of Garden State to promote its product through advertising. He also stated that the product is distributed in the following states: Massachusetts, Rhode Island, Connecticut, New York, Kentucky, Texas, New Mexico and Colorado and some additional states, making a total of about a dozen states.

No other witnesses were produced by either side.

Before discussing the primary issue herein involved, it might be well to discuss two other jurisdictional issues herein. Counsel for Peerless in his summation argues that the Director does not have jurisdiction in this matter because Hankey Bannister is not a nationally advertised brand of alcoholic liquor as contemplated by the aforementioned statute. The evidence clearly

discloses that the product is distributed in about a dozen states throughout the country; that advertisements are carried in the New York Times and New York Herald Tribune, which have wide circulation. It is not necessary for products to be advertised in every State in order for them to be considered as nationally advertised brands. The intent of the Legislature, as I interpret the Introductory Statement to relevant provisions of this statute, is that widely known brands of alcoholic beverages, as distinguished from local brands, shall be embraced within the sweep of its provisions, where the same are nationally advertised. I therefore find as a fact that Hankey Bannister is a nationally advertised brand of alcoholic liquor, as contemplated in the statute.

The testimony also supports the additional jurisdictional requirement that Hoffman had the ability to pay for such merchandise as ordered and, indeed, has made prompt payment upon all prior orders.

Thus our inquiry is directed to the decisive issue in this case, namely, whether Peerless' decision to drop Hoffman as one of its distributors and engage Garden State Liquor Wholesalers as its sole distributor in this State constitutes an act of discrimination in the sale of alcoholic beverages. And, more particularly, whether its refusal to honor the order of February 27, 1963, was an act of discrimination enjoined by R.S. 33:1-93.1-5.

In Canada Dry Ginger Ale, Inc. v. F. & A Distrib. Co., 28 N.J. 444, the principle was reiterated that the question of whether respondent has justifiably discriminated against petitioner "in each case is to be determined in the first instance by the Director." In that case the court, at p. 456, defined the word "arbitrary" in the following language:

> "'Arbitrary' means '[d]epending on will or discretion,' that is, not governed by any fixed rules or standards. Paul v. Board of Zoning Appeals, 142 Conn. 40, 110 A.2d 619, 621 (Sup. Ct. Err. 1955); see also State v. Then, 114 N.J.L. 413, 418-419 (Sup. Ct. 1935)."

An act is arbitrary when it is supported by mere option or discretion of the actor. Bedford Inv. Co. v. Folb, 180 Pac. 2d 361 (D.C.A. 2d Dist.Cal. 1947). Arbitrary discrimination exists where conditions and restrictions are placed on one and not on all the others in a like situation, giving advantage to one over the other. McCraney v. City of Leeds, 241 Ala. 198, 1 So. 2d 894, 897. Arbitrary means not governed by an objective standard. Hundley v. McCune, 6 Ohio L.A. 186. A discrimination made without adequate principles is arbitrary. Re Housing Authority of the City of Salisbury, 235 N.C. 463, 70 S.E. 2d 500, 503. Where a decision is dependent entirely upon the will of the actor without adequate determining principles, it is arbitrary. Zweig v. U.S., (D.C.Tex. 1945) 60 Fed. Supp. 785. In Zweig the court further defined "arbitrary" as "independent of law or rule; discretionary; capricious, or, despotic. It may mean, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

The basic issue presented in this case is similar to that considered and disposed of in Canada Dry. In that case, a distiller determined to reduce the number of New Jersey

wholesalers from eleven to five and, accordingly, six wholesalers were eliminated. A petition was filed under the statute by some of the wholesalers who had been dropped. The Supreme Court held that, where it is shown that a distiller or importer has eliminated a wholesaler while continuing to sell to other wholesalers, it is reasonable to require the distiller to come forward with an explanation and factual statement so that the Director may effectively fulfill his statutory duty and determine whether the refusal to sell was the result of a decision fairly arrived at, or was arbitrary within the statutory prohibition. It held further that the Director was empowered to determine whether a reasonable method has been employed by a distiller in the selection of wholesalers with whom he will or will not deal. The court added that there must be a showing that the selection of certain wholesalers to the exclusion of otherswas made on the basis of a standard reasonably related to the legitimate business goal sought to be achieved and not conducive to the evils which the Act is designed to prevent.

The standard must be of such a tangible or objective nature as will enable the Director to determine from the proofs whether its application to the wholesalers in question could reasonably result in the distinction which a distiller has made. In other words, the distiller must document its "objective criteria" so that the Director could evaluate the reasonableness of the distiller's actions.

Justice Francis filed a separate opinion in which he concurred in the result, but on the ground that the impact of the statute under ordinary circumstances is that any reasonably competent and financially capable wholesaler is entitled to be served and cannot be discriminated against arbitrarily. However, the majority of the court did not adopt this construction and, as heretofore noted, held that the Director is not authorized to command a distiller to distribute his product to every wholesaler who desires to purchase it and that the statute condemns a refusal to sell only when it is found to be arbitrary.

In this case, the only basis upon which Hoffman was eliminated as a distributor and the exclusive distributorship given to Garden State Liquor Wholesalers is contained in the statement by Boguski that "we feel they (Garden State) are in a better position. There are more boxes we are interested in."

There is no suggestion that Peerless cannot deal with Garden State as its initial distributor. The overriding and decisive inquiry must, however, be whether the refusal to honor the order of Hoffman was arbitrary. There is nothing in the record to demonstrate that any action on the part of Hoffman supported the determination of Peerless to dishonor or refuse to fulfill its order. There has been no showing that Hoffman did not meet the statutory requirements; there is no showing that Hoffman in any way performed any act which would cause Peerless to refuse to sell to it.

It might also be added that there was no showing in the case that Garden State Liquor Wholesalers is better equipped to handle the products of Peerless; that it has a better sales record, or that it has done anything which would justify its becoming the sole distributor of Peerless.

Furthermore, regardless of what the organizational strength or capability of Garden State Liquor Wholesalers may

be, the record is barren of any demonstrable evidence to show what the respondent relied upon in its decision to reduce the number of distributors from four to one, i.e., to invest the exclusive distributorship of its products in Garden State Liquor Wholesalers. More particularly, there has been no objective criteria documented to justify the elimination of petitioner as a distributor of respondent's products, in accordance with the principle enunciated in Canada Dry, supra.

Counsel for Peerless advocates that the decision to eliminate Hoffman and to refuse to fulfill its order was based upon ordinary business judgment. This might be valid in any other industry. "However, in the alcoholic beverage field this cannot be so. It must 'bow to the heavy and pervasive hand of the police power--if the Legislature wills it.'" Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 384 (1956); Eskridge v. Division of Alcoholic Beverage Control, 30 N.J. Super. 472 (App.Div. 1954); James McCunn & Co. v. Fleming & McCaig, supra.

I wish additionally to note that, at the commencement of the supplemental hearing in this case, I referred to this in the following language:

> "In my letter I told you that I wanted to give both sides an opportunity to present additional testimony with respect to certain relevant matters which I thought were necessary in order to complete the record, certain matters which I think I indicated in the letter were pointed out by this decision in order to make a determination. I stated there:
>
> > 'My examination of the record herein fails to disclose any valid objective criterion upon which the decision of your client to discontinue the petitioner as a distributor of its products was based'
>
> and that we should have such additional testimony, if you can offer such testimony, as to the objective criterion which was described in the decision which I just referred to."

As was noted hereinabove, no additional testimony was offered by the respondent with respect thereto.

For the sake of clarity it should be emphasized that the respondent is entitled to deal with Garden State as its distributor if it so desires. On the other hand, by the clear interdict of the statute Peerless is enjoined from arbitrarily discriminating against Hoffman as a distributor of its products since the record clearly shows that Hoffman has met the jurisdictional requirements. If the statute has any meaning, it has direct and appropriate application in this case. The decision in Canada Dry is clearly controlling on the issues herein.

It should finally be noted that the introducer's statement to this statute declares as follows:

> "The purpose of this act is to insure an equitable basis for competition between all licensed wholesalers of alcoholic beverages in New Jersey and to prevent any monopolistic freezing-out of one wholesaler by another by preventing the sale of certain products to him." (emphasis added)

I am therefore persuaded, and find as a fact, that the respondent has not established any objective criteria consistent with the imperative statutory language in its decision to refuse to fulfill the order of Hoffman. Therefore the action of Peerless was clearly arbitrary and discriminatory.

Under all the facts and circumstances herein, it is recommended that an order be entered determining that the action of the respondent is arbitrary and discriminatory, and directing respondent to fulfill the order hereinabove referred to and to continue to sell to the petitioner alcoholic beverages on terms usually and normally required by the respondent; and that, in the event respondent refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.4.

Conclusions and Order

No exceptions to the Hearer's Report were filed within the time limited by Rule 5 of State Regulation No. 15A.

I have given careful consideration to the evidence, the exhibits, the argument of counsel and the Hearer's Report, I concur in the conclusions and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 8th day of September 1964,

ORDERED that the respondent sell and continue to sell to the petitioner alcoholic beverages on terms usually and normally required by the respondent.

JOSEPH P. LORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - INDECENT ENTERTAINMENT - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against 500 Cafe, Inc., t/a 500 Cafe 4-6-8-10 S. Missouri Avenue Atlantic City, N. J. Holder of Plenary Retail Consumption License C-207 (for the 1963-64 licensing year) and C-27 (for the 1964-65 licensing year), issued by the Board of Commissioners of the City of Atlantic City.	CONCLUSIONS AND ORDER

Angelo D. Malandra, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensee has pleaded not guilty to the following charge:

> "On Sunday night April 21, and early Monday morning April 22, 1963, you allowed, permitted and suffered lewdness and immoral activity and foul, filthy and obscene language and conduct in and upon your licensed premises, in that a female performed for the entertainment of your customers and patrons in a lewd, indecent and immoral manner; in violation of Rule 5 of State Regulation No. 20."

The Division's case was established through the testimony of two ABC agents, and the factual substance was essentially undenied by the licensee.

The licensee operates a large night club which consists of a barroom in the front and an adjoining night club area in the rear of the premises, which can accommodate over eight hundred persons. On the evening of Sunday, April 21 and early morning of Monday, April 22, 1963, Agents S and B arrived at the premises pursuant to a specific assignment to investigate a well advertised floor show featuring a well known entertainer who had a reputation for giving allegedly lewd performances. They engaged in a conversation with the bartender in the main barroom who informed them that the local branch of a national organization was sponsoring this floor show which was due to start at 10:30 p.m. on April 21, and that this show would feature this female entertainer who "sings risque songs and tells risque jokes." They proceeded to the rear room, paid $5 for two admission tickets to a member of the committee of that organization, and were directed to a table in the center of this room. They observed that there were approximately eight hundred males and females who had paid admission to this show and, during the entertainment, food and alcoholic beverages were sold and served to the patrons.

At 10:30 p.m. the show commenced, and Joey Stevens (the master of ceremonies and an employee of the licensee) introduced

several acts. After several performers completed their acts, he then introduced the feature female entertainer as "The Show You Can't See on TV." This entertainer then proceeded with her act which consisted of unquestionably obscene, vulgar and disgusting references to sex and sexual behavior which were described at this hearing in great detail. No purpose would be served in repeating herein the language, expressions and comments which punctuated the performance, except to state that the entertainer expressed indecorous language to impart indecorous concepts, clearly catering to the prurient interests of the patrons, and her performance was geared on a pornographic level with "dirt for dirt's sake." This performance lasted for approximately one and one-half hours, and the agents departed the premises at about 12:45 a.m.

Continuing their investigation they returned to the licensed premises on May 19, 1963, and interviewed Adolph Marks (the maitre d' and manager of these premises). He admitted that, on the night referred to in the charge herein, he was in charge and went in and out of the room in which the performance took place, but he "didn't bother looking at what the show was about." He also stated that he was in charge of the waiters who served the patrons in that room. The agents also spoke on this occasion to Joey Stevens (the master of ceremonies) who stated that he just introduced the entertainer but he "didn't bother listening to it."

While talking to these individuals, Herbert Friedman (who identified himself as the secretary-treasurer of the corporate licensee) entered the room and was questioned. He stated that he was out of town on the date in question but stated that he was well aware of the fact that this entertainer had been engaged to perform at the licensed premises on the date charged herein. He stated further "I knew we would have trouble with that pig. We don't need a pig in this place. We have top entertainment. We have a good reputation throughout the country." He explained that she had been booked by a local "organization" and the organization made all the profit. However, all the other entertainers that performed on that evening were employed by the licensee. He also admitted that, according to the arrangement made with this organization, the licensee would provide the drinks and would profit therefrom. On cross examination it was developed that a billboard located across the street from these premises had featured the name of this entertainer for some time prior to the night in question.

At the conclusion of the Division's case a motion for dismissal of the charge was made by counsel for the licensee on the ground that the licensee did not "participate" in this affair and therefore was not answerable for same. I recommend that this motion be denied.

The licensee produced several officers of the sponsoring organization who described in detail the arrangements for that evening and the agreement entered into with the female entertainer. They admitted, however, that the alcoholic beverages served were those owned by the licensee, and a cash settlement based upon the receipts was made with the licensee several days after this event. One of the witnesses stated that the licensee was also reimbursed for the expenses of the waiters and bartenders who were on the licensee's payroll. They also admitted that there was considerable advertising in the local press, in

addition to the billboard, prior to this event and that the admission to this affair was open to the general public. One of the witnesses also admitted that this group was operating under the license of the licensee and "We were supposed to pay for what the liquor cost them. In other words, the profits were supposed to be ours. In other words, we didn't know ahead of time how much we would or wouldn't make."

Adolph Marks, testifying in behalf of the licensee, stated that both principal officers of the corporate licensee were out of State on the date alleged in the charge and that he was actually the manager of these premises. He denied that the licensee had made any profit form the sale of the alcoholic beverages; that it charged just its actual cost of said beverages.

On cross examination he admitted that he saw the billboard advertising the feature entertainer but didn't know the exact nature of her act. He reiterated that, although he went into the room where the show was taking place, during the performance he didn't see anything wrong, but most of his time was spent in the front barroom of the premises. He agreed that it was his obligation to supervise the entire premises even though it was rented out to an organization. He also admitted that the liquor was sold through the authority of the licensee.

The witness was asked whether he considered it his responsibility, as the manager, to go into the room when this entertainer started her performance to see what kind of an act she did. His revealing reply was, "To tell you the truth, the first time I heard, when this gentleman (ABC agent) read certain things, if I had gone in there and had heard that, I would have chased even all the eight hundred people."

> "Q Is that the reason you didn't go in, you felt that the performance would be shocking to you?
>
> A I'm sorry, sir. I did not know that. If I would go in and hear that, I would make it my business to chase it."

I have carefully considered the testimony presented both on behalf of the Division and the licensee, and I am persuaded that the ABC agents have given a credible and forthright story of what transpired on the date and at the time alleged in the said charge. Indeed, the sense of the charge, namely, that the lewd and indecent performance took place on the licensed premises on the night in question, has not been denied either by the defense witnesses or by licensee's counsel. With commendable frankness, counsel in his brief, submitted in lieu of summation at the conclusion of this case, uses the following language:

> "It is not disputed that the 'entertainment' by ... was of such lewdness, filthy, vulgarity (as set forth in the charge) and that if she were hired by the licensee, the license should and would properly be suspended...."

However, he advocates that the licensee did not "suffer" or "permit" such activity. In support of that argument he states that both of the "owners" were out of town on the night in question and the person left in charge was Adolph Marks. It is difficult to understand what counsel means by the "owners" since

this is a corporate licensee and D'Amato and Friedman, referred to by counsel, are its principal officers.

Counsel further maintains that the room was rented to a charitable organization and that Marks entered that room occasionally "but not during the objectionable performance." The testimony is to the contrary. Both agents have testified to the fact that Marks did come into the room during the performance on several occasions, and Marks admits that he was "in and out" of the room during that time. He only denied that he observed the performance because, as he stated, if he had carefully observed the objectionable performance, as the agents did, he would have "chased" them even though it meant ridding the place of the eight hundred patrons.

is no valid justification for permitting the use of part of the licensed premises for an admittedly lewd, indecent or immoral performance. In the present case it is quite evident that the licensee "allowed," "permitted" and "suffered" such undertaking.

Rule 33 of State Regulation No. 20 provides:

> "In disciplinary proceedings brought pursuant to the Alcoholic Beverage Law, it shall be sufficient, in order to establish the guilt of the licensee, to show that the violation was committed by an agent, servant or employee of the licensee. The fact that the licensee did not participate in the violation or that his agent, servant or employee acted contrary to instructions given to him by the licensee or that the violation did not occur in the licensee's presence shall constitute no defense to the charges preferred in such disciplinary proceedings."

See Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947). As the Director stated in Re Belair Inn, Inc., Bulletin 981, Item 1:

> "Manifestly, the Rule and its upholding are essential to proper and effective enforcement in protection of the public welfare. Without it the State would be rendered impotent and licensees would enjoy an immunity through the simple expediency of making sure that individual licensees (and members of licensee corporations) absent themselves from the licensed premises....
>
> "As our courts have held, the liquor traffic is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied. Paul v. Gloucester, 50 N.J.L. 585 (E. & A. 1888); Essex Holding Corp. v. Hock, supra; ... Crowley v. Christensen, 137 U.S. 86; 34 L. Ed. 620."

The argument advanced (that two of the principal officers were out of town, that only the manager was in charge of the premises, and thus the corporate licensee was not at fault) must be summarily rejected. The licensee's responsibility is clear even though the licensee, its agents or employees did not know what kind of show was contemplated by this organization. The fact of the matter is that the manager was on the premises

at the time of the alleged acts. As the then Director stated, with respect to the licensee's responsibility for conduct occurring on its licensed premises, in Re Paton, Bulletin 898, Item 3:

> "...even in the absence of actual knowledge, a licensee cannot escape the consequences of the occurrence of incidents, such as are hereinabove related, on his licensed premises. He cannot hide behind his employees. Not only is it no defense that the violations may have been committed in his absence or by his agent, servant or employee, or that he did not participate in the violations, or that they were committed contrary to his instructions (Rule 33 of State Regulations No. 20; Stein v. Passaic, Bulletin 451, Item 5) but, in addition, 'licensees may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees must use their eyes and ears, and use them effectively, to prevent the improper use of their premises'. Bilowith v. Passaic, Bulletin 527, Item 3. See also Re One-thirty-five Mulberry St. Corp., Bulletin 892, Item 2..."

Marks (the manager) had ample opportunity to observe the performance during the hour-and-a-half in which this female entertainer performed. For him to say that he did not see or observe the nature of the act is preposterous and pure sophistry. In any event, I am persuaded that he was fully aware of the nature of the interdicted performance.

The contention that an organization had rented part of these premises and therefore negates the responsibility of the licensee is equally without merit. The fact is that the employees of the licensee were engaged in serving alcoholic beverages and food to the patrons at this show and, indeed, all of the other acts were employed by and paid for by the licensee. It certainly makes no difference whether the licensee charged the wholesale or retail cost for the alcoholic beverages. The beverages were admittedly dispensed under the authority of the licensee since it is clear that only the licensee may exercise the privilege of the license; anyone else who seeks to do so would be guilty of a misdemeanor. R.S. 33:1-26.

It is therefore clear that the licensee permitted and suffered the complained of activity, as charged. As the Supreme Court said in Essex Holding Corp. v. Hock, supra:

> "Although the word 'suffer' may require a different interpretation in the case of a trespasser, it imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority. Guastamachio v. Brennan, 128 Conn. 356; 23 Atl. Rep. (2d) 1940."

Finally, as the court stated in Greenbrier, Inc. v. Hock, supra:

> "When a privilege to enter is given, whether general, conditional or restricted, the licensee has the duty of taking such measures as the circumstances of the particular case require to prevent prohibited conduct on the licensed premises arising out of the grant of the privilege...."

It is obvious from the admitted facts herein that the licensee had unilaterally abrogated its clear duty.

Accordingly, I am persuaded by the overwhelming testimony and the clear and convincing proof in this case that the charge has been established by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the said charge.

The licensee has no prior adjudicated record. I recommend that an order be entered herein suspending its license for sixty days. Re Beef & Bird, Inc., Bulletin 1556, Item 2 (involving the same entertainer); Re Jeanne's Enterprises, Inc., Bulletin 1422, Item 2 (involving similar entertainment).

Conclusions and Order

Written exceptions to the Hearer's Report and argument with reference thereto were filed with me by the attorney for the licensee within the time limited by Rule 6 of State Regulation No. 16.

Having carefully considered the entire record, including the transcript of testimony, the Hearer's Report and the exceptions and arguments filed with reference thereto, I concur in the Hearer's findings and conclusions and adopt his recommendations.

Hence I find the licensee guilty as charged. I shall suspend the license for a period of sixty days.

Accordingly, it is, on this 10th day of September 1964,

ORDERED that Plenary Retail Consumption License C-27, issued by the Board of Commissioners of the City of Atlantic City to 500 Cafe, Inc., t/a 500 Cafe, for premises 4-6-8-10 S. Missouri Avenue, Atlantic City, be and the same is hereby suspended for sixty (60) days, commencing at 7 a.m. Thursday, September 17, 1964, and terminating at 7 a.m. Monday, November 16, 1964.

JOSEPH P. LORDI
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - HOSTESS ACTIVITY - AGGRAVATING CIRCUMSTANCES - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 35 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
JAMAICA ROOM, INC. 517 Paterson Plank Rd. Union City, N. J.	) CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-165, issued by the Board of Commissioners of the City of Union City.	)

Licensee, by Joseph Tann, President, Pro se.
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that on July 18 and August 7, 1964, it permitted females employed on the licensed premises and unescorted females to solicit male patrons to purchase drinks for them and to accept such drinks at their expense, in violation of Rules 5 and 22 of State Regulation No. 20.

Reports of investigation disclose that on the latter date two females, one a part-time entertainer and another not ostensibly employed on the licensed premises, within the short space of fifty minutes from 10:15 to 11:05 p.m. promoted the purchase by the participating agents of five rounds of drinks for themselves, each round consisting of two champagne "cocktails" (champagne over ice), each drink consisting of half of a six-ounce split of domestic champagne retailing at 69¢ for the bottle. The charge for the "cocktail" was $2.50 each; total charge for the fifty minutes twenty-five dollars!

Licensee has a previous record of suspension of license by the municipal issuing authority for thirty days effective October 1, 1962, for conducting the licensed business as a nuisance, permitting indecent entertainment and a brawl and disturbance on the licensed premises, and employing a bartender without locally required work permit.

Deeming the violation to be aggravated, the license will be suspended for thirty days (Re Frankie's Nomad Club, Inc., Bulletin 1481, Item 4), to which will be added five days by reason of the record of suspension for prior dissimilar violation occurring within the past five years (Re Reilly & Hart, Bulletin 1577, Item 10), or a total of thirty-five days, with remission of five days for the plea entered, leaving a net suspension of thirty days.

Accordingly, it is, on this 9th day of September 1964,

ORDERED that Plenary Retail Consumption License C-165, issued by the Board of Commissioners of the City of Union City to Jamaica Room, Inc., for premises 517 Paterson Plank Road, Union City, be and the same is hereby suspended for thirty (30) days, commencing at 3 a.m. Wednesday, September 16, 1964, and terminating at 3 a.m. Friday, October 16, 1964.

JOSEPH P. LORDI
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 45 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against ORLANDO BARONE, HARRY BARONE & JOSEPH BARONE, t/a BARONE'S TAVERN 94-6-8 Logan Avenue Jersey City, N. J. Holders of Plenary Retail Consumption License C-483, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	CONCLUSIONS AND ORDER

Licensees, Pro se.
Harry Gross, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensees plead non vult to a charge alleging that on August 29, 1964, they sold a pint bottle of whiskey for off-premises consumption during prohibited hours, in violation of Rule 1 of State Regulation No. 38.

Licensees have a previous record of suspension of license by the Director (1) for ten days effective January 18, 1960, for similar violation (Re Barone, Bulletin 1326, Item 9) and (2) for thirty days effective July 19, 1962, for similar violation and false statement in license application (Re Barone, Bulletin 1470, Item 2).

The prior record of suspension of license for two similar violations occurring within the past five years considered, the license will be suspended for forty-five days, with remission of five days for the plea entered, leaving a net suspension of forty days.

Accordingly, it is, on this 10th day of September, 1964,

ORDERED that Plenary Retail Consumption License C-483, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Orlando Barone, Harry Barone and Joseph Barone, t/a Barone's Tavern, for premises 94-96-98 Logan Avenue, Jersey City, be and the same is hereby suspended for forty (40) days, commencing at 2:00 a.m. Wednesday, September 16, 1964, and terminating at 2:00 a.m. Monday, October 26, 1964.

JOSEPH P. LORDI
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - GAMBLING (HORSERACE BETS) - LICENSE SUSPENDED FOR 60 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
PAUL AND EVA WELCHES t/a PAUL'S TAVERN 35 Throop Avenue New Brunswick, N. J.	)	CONCLUSIONS AND ORDER
Holders of Plenary Retail Consumption License C-42, issued by the Board of Commissioners of the City of New Brunswick.	)	

G. A. Stemberger, Jr., Esq., Attorney for Licensees
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensees plead non vult to a charge alleging that on April 9, 14, 30 and May 11 and 26, 1964, they permitted acceptance of horse race bets on the licensed premises, in violation of Rule 7 of State Regulation No. 20.

Absent prior record, and considering the case as unaggravated, the license will be suspended for sixty days, with remission of five days for the plea entered, leaving a net suspension of fifty-five days. Re Mellolark, Inc., Bulletin 1573, Item 2.

Accordingly, it is, on this 3rd day of September 1964,

ORDERED that Plenary Retail Consumption License C-42, issued by the Board of Commissioners of the City of New Brunswick, to Paul & Eva Welches, t/a Paul's Tavern, for premises 35 Throop Avenue, New Brunswick, be and the same is hereby suspended for fifty-five (55) days, commencing at 2 a.m. Thursday, September 10, 1964, and terminating at 2 a.m. Wednesday, November 4, 1964.

JOSEPH P. LORDI
DIRECTOR

6. STATE LICENSE - NEW APPLICATION FILED.

Kasser Distillers Products Corp.
Third and Luzerne Streets
Philadelphia, Pennsylvania
Application filed October 23, 1964
for place-to-place transfer of
Plenary Wholesale License W-3 to
maintain a warehouse at 161 Frelinghuysen
Avenue, Newark, New Jersey.

Joseph P. Lordi
Director