

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

BULLETIN 2396

April 23, 1981

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - JOLLY TINKER, INC. v. UNION CITY.
2. DISCIPLINARY PROCEEDINGS (Princeton) - SERVICE OF AN ALCOHOLIC BEVERAGE TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - HEARER RECOMMENDED 10 DAY SUSPENSION - REJECTED BY DIRECTOR WHO SUSPENDED LICENSE FOR 25 DAYS.
3. STATE LICENSES - NEW APPLICATIONS FILED.

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1. APPELLATE DECISIONS - JOLLY TINKER, INC. v. UNION CITY.
#4333

Jolly Tinker, Inc.,	:	CONCLUSIONS
	:	
Appellant,	:	AND
	:	
vs.	:	ORDER
	:	
Board of Commissioners of the	:	OAL Dkt. No. ABC 1554-79
City of Union City,	:	
	:	Mun. Rev. No. 7359
Respondent.	:	

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

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: March 20, 1980

Received: March 24, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision Below were filed by the parties hereto pursuant to N.J.A.C. 13:2-17.14.

I agree with the Administrative Law Judge, and with the respondent that these licensed premises are a trouble spot. The record indicates that between June 1, 1977 and December 31, 1978, there was a total of 71 logged calls for assistance of the police authorities at the licensed premises. The incidents include disturbance calls, possession of stolen property, liquor law violations, sale and service to intoxicated persons, atrocious assaults and narcotic activity.

A Petition dated September 21, 1978 signed by 52 area residents was submitted to this Division requesting that this license be revoked because of the nuisance conditions at these premises.

In addition, during the past three years, the subject license had the following adjudicated record of liquor law violations:

- 1 - Sale in violation of local "hours", payment of fine accepted by the Director, by Order dated November 4, 1977;
- 2 - Violation of local "hours", license suspended for 30 days, effective September 19, 1978;

- 3 - Three charges of controlled dangerous substance activity on licensed premises; suffered use of premises in furtherance and in aid of an illegal activity; unlawful sale of firearm; sale beyond scope of license; sale in violation of Rule 1 of State Regulation 38, now N.J.A.C. 13:2-38.1; license suspended for 80 days, effective January 26, 1979; and finally
- 4 - The matter sub judice: Nuisance, acts of violence, hindering investigation, minor on premises without guardian, license revoked effective May 4, 1979; on appeal to the Director on revocation of license; the revocation was stayed May 15, 1979 pending the determination of this appeal.

As was pointed out in the Initial Decision, the principal officer of the corporate appellant frankly admitted that she could no longer control the patronage. It is also clear as crystal that these premises are not being operated in a responsible manner, are a trouble spot, and, indeed constitute a nuisance. cf. Nordco, Inc. v. State, 43 N.J. Super. 277, 281 (App. Div. 1957); Kravis v. Hock, 137 N.J.L. 252; Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 1956, affirming 36 N.J. Super. 512.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits and the Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge, and adopt them as my conclusions herein.

Accordingly, it is, on this 24th day of April, 1980,

ORDERED that Plenary Retail Consumption License No. 0910-33-101-001 issued by the Board of Commissioners of the City of Union City to Jolly Tinker, Inc., for premises 1906 Bergenline Avenue, Union City, be and the same is hereby revoked, effective 2:00 a.m. on Friday, May 2, 1980.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

In the Matter of:)	<u>INITIAL DECISION</u>
)	
JOLLY TINKER, INC.)	O.A.L. DKT. # A.B.C. 1554-79
v.)	
BOARD OF COMMISSIONERS)	Agency Dkt. # Appeal 4333
OF THE CITY OF UNION CITY)	Mun. Rev. 7359

APPEARANCES:

Santo Calarco, Esq., attorney for Petitioner

Edward J. Lynch, Esq., attorney for Respondent,
City of Union City

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is an appeal from the action of the City Board of Alcoholic Beverage Control of the City of Union City, by resolution and order dated May 3, 1979, revoking Petitioner's plenary retail consumption license #0910-33-101-001 for the premises located at 1906 Bergenline Avenue, Union City, New Jersey. Said revocation was to become effective May 4, 1979. Upon the filing on May 10, 1979, of the Petition of Appeal, the Director of the Division of Alcoholic Beverage Control granted a stay of the Order of Revocation pending the determination of this appeal. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

The Petitioner contends that the action of the council was arbitrary, capricious, unreasonable, that the evidence admitted at the hearing was improper and contrary to the Rules of Evidence, and that the findings were against the weight of the evidence. The City Board of Alcoholic Beverage Control in its answers indicate that the Petitioner received timely notice of the charges against it and that a full preliminary hearing was held in this matter at which time testimony was taken. They also contend that the Petitioner had full opportunity to cross-examine the witnesses and present evidence. The Council therefore contends that there is more than sufficient competent evidence on the record to support its resolution to ask that the license revocation be affirmed. The appeal was heard de novo on February 13, 1980.

O.A.L. DKT. # A.B.C. 1554-79

The City presented four (4) witnesses, Det. Samuel C. Stephens, Det. Ronald C. Karabatsos, Ptl. Robert Rupprecht and Sgt. Raymond F. Eland.

Det. Stephens testified that on November 24, 1978, while on duty he received a dispatch to respond to the Palisades General Hospital where he spoke to an S. Rubinaccia who informed him that he had been cut by the bartender, Brian Thompson, in the backyard of the Jolly Tinker, Inc. The stabbing was a result of an argument between himself and the bartender after he had been invited by the bartender to enter the backyard to settle the matter. After entering the backyard, a scuffle ensued at which time the bartender picked up a beer bottle and slashed his face. The Detective then submitted what has been marked R-1(a) Police Report of November 24, 1978 as well as R-2, an Affidavit of Mr. S. Rubinaccia which outlined what had occurred on the date in question.

Under cross-examination, the Detective stated that he had been dispatched from headquarters at approximately 0019 hours to respond to the Hospital and upon arriving, he found Mr. Rubinaccia with a cut which required three sutures. He also detected that Mr. Rubinaccia had an odor of an alcoholic beverage on his breath and in his opinion, was under the influence of an alcoholic beverage. He then spoke with Mr. Rubinaccio and advised him that he would have to report to the Detective Bureau upon his release from the hospital and he left same between 1:30 and 1:45 a.m. The Officer then responded to the Jolly Tinker tavern where he arrested Mr. Brian Thompson who was tending the bar.

When questioned whether or not the owner, Mrs. Vaccaro, was on the premises at the time, he stated he did not observe her there nor had he ever observed her on the premises. He then submitted an arrest report of Brian Thompson which was marked R-3 into evidence.

Sgt. Raymond F. Eland testified that on January 16, 1979, he responded to the Jolly Tinker as a result of receiving a dispatch from headquarters to investigate a stabbing. When he arrived he found an individual laying in front of the bar area on his back with a stab wound in his chest and abdomen. He identified the victim as being one Gary Cook and also noted that one of the parties present was a Sharon Litchfield who later was determined to be 17 years of age. He then submitted into evidence what was marked R-4, a report of said incident dated January 17, 1979.

Under cross-examination, he admitted that he did not personally know the age of Miss Litchfield but had been informed by someone subsequent thereto.

O.A.L. DKT. # A.B.C. 1554-79

Det. Ronald C. Karabatsos testified that he was on duty on January 16, 1979 and responded to the Jolly Tinker as the result of a radio call and found one Gary Cook on the floor, stabbed in the stomach and chest. He noted that three persons were present and that the licensee was not. The persons present were Marco Fuggerio, the bartender, Sharon Litchfield, a juvenile, 17 years of age and Mr. Cook. He submitted into evidence R-5, Sharon Litchfield's juvenile release papers.

He stated that upon interviewing the bartender, Mr. Fuggerio advised him that he did not know what happened and became belligerent. He told the Detective that he went blind and deaf for approximately one-half hour.

The next morning, Mr. Fuggerio gave a statement after consulting with his father. He stated that two men had entered the bar, became involved in an altercation with Mr. Cook and ultimately, Mr. Cook was stabbed. He alleged that he did not know the identity of the individuals and in fact gave a description of the individuals which did not correspond with their actual description upon their apprehension. It was also determined by the Officers that Mr. Fuggerio was actually an acquaintance of the individuals involved in the stabbing. The statement of Mr. Fuggerio was entered into evidence and marked R-6.

A statement marked R-7, given by Raymond Rushin was submitted. Mr. Rushin stated that he was in the bathroom when the fight occurred and did not know the assailant. It was later determined that he was acquainted with said individuals.

The Detective stated that though he did not see the licensee on the premises on the date in question, he had seen her on the premises on other occasions when making tavern checks.

Under cross-examination the officer stated that he arrived approximately a few minutes before 3:00 a.m., found no glasses upon the bar, and upon speaking to Mr. Fuggerio, was refused a statement by him.

Ptl. Robert Rupprecht testified that on January 16, 1979, he was on duty and responded to the Jolly Tinker. He observed a Gary Cook who advised him that he did not know his assailants. He submitted what was marked R-8 into evidence, an incident report of January 16, 1979 consisting of two pages and R-9, the Officer's report of the incident. He testified that when he responded to the address, he observed an individual later identified as Gary Cook seated at the bar in a semi-conscious state, drinking a glass of water. He approached the individual who advised him that he had been stabbed. He then questioned the bartender, Mr. Fuggerio as to the description of the individuals but received a vague answer. At this time, the victim indicated that he was about to pass out and was helped to the floor where he awaited the arrival of the ambulance.

O.A.L. DKT. # A.B.C. 1554-79

He said that the description given to him by Mr. Fuggerio was that one of the individuals was wearing blue jeans and a blue denim jacket, had long hair, and that the second individual was wearing blue jeans and a denim jacket and had short hair.

Under cross-examination, he admitted that the bartender had initially been cooperative but that his answers were vague. The State then rested its case.

Petitioner, Dorothy Vaccaro, testified that the license is held by a corporation in which she and her husband are the principal owners. They have held such license in this corporation for the past five years. She testified that she is acquainted with Mr. Rubinaccia and has known him for the past three years and throughout that period of time, he has been repeatedly removed from the premises for being drunk and disorderly. His reputation is that of a troublemaker and he has started numerous fights on the premises.

The tavern is opened at 7:00 a.m. by her husband who works until 6:00 p.m. at which time a bartender takes over and works until 3:00 a.m. when Mrs. Vaccaro arrives to collect the receipts and close the tavern. In addition, she works for the APA Trucking Company from 9:00 p.m. until 5:00 a.m. and leaves her job at her 3:00 a.m. lunch hour to close the tavern. At present, she does not know the whereabouts of her husband and stated that he abandoned her approximately two years ago.

With regard to the incident involving Mr. Rubinaccia, she stated that she had informed the bartender not to serve Mr. Rubbinaccia and was unaware that he was being served upon her premises. She did not find out about the incident involving her bartender and Mr. Rubinaccia until 3:00 a.m. on the date in question when she responded to the tavern to lock same up and was informed by a police officer on the corner what had occurred, but had been advised by him that the tavern was not involved. It was her understanding that Mr. Rubinaccia was not stabbed by a bartender but had in fact been stabbed by his wife somewhere else prior to his entering the tavern.

She denied having any knowledge with regard to the Gary Cook stabbing and is not acquainted with Sharon Litchfield. However, she is familiar with Marc Fuggerio, her bartender, and stated that his father is a police officer with the Union City Police Department.

Under cross-examination, she admitted that she had informed the Union City Alcoholic Beverage Control Board that she could not handle the bar and wanted to sell same if she could find a buyer. In addition, she stated that the tavern had been closed 10 days in 1977, 30 days in January of 1979 and an additional 80 days in January 1979, but was not aware of what the closings were for.

O.A.L. DKT. # A.B.C. 1554-79

Under re-direct examination, she stated that she and her husband had purchased the tavern for \$28,000 with their life savings and originally had been advised by the Board that if she could find a buyer, they would permit her to sell same but when she did find a bona fide purchaser, the Board refused to release her license.

There was no additional testimony by any individuals in this matter.

After having observed all the witnesses for both sides and having considered the entire record including the testimony and exhibits submitted in evidence, together with the arguments of counsel, the Court makes the following findings of fact:

1. That petitioner, Jolly Tinker, Inc. t/a Gus' Tavern is the owner of plenary retail consumption license #0910-33-101-001 for the premises located at 1906 Bergenline Avenue, Union City, New Jersey.
2. That the premises were so owned on the various occasions of the incident heretofore reported.
3. That the premises were closed in November of 1977 for 10 days, January of 1979 for 30 days and January 1979, an additional 80 days.
4. That on November 24, 1978, Stephen Rubinaccia was stabbed by Brian Thompson, a bartender, at the Jolly Tinker, Inc. while on duty.
5. That on January 16, 1979, Gary Cook was stabbed by two patrons while in the Jolly Tinker, Inc. premises.
6. That Sharon Litchfield was on the premises when the Officers arrived to investigate the stabbing of Gary Cook and that Sharon Litchfield is 17 years of age.
7. That Marco Fuggerio was the bartender for the Jolly Tinker, Inc. on January 16, when the stabbing took place.
8. That Mr. Fuggerio was totally uncooperative with the police in their investigation of the matter and was subsequently arrested as a material witness.

O.A.L. DKT. # A.B.C. 1554-79

9. That Raymond Rushin, the janitor or clean-up man was on duty on January 16, 1979 and was also familiar with the parties who perpetrated the stabbing upon Gary Cook and he too was uncooperative with the police in their investigation.
10. That there have been numerous occasions that the police have responded to the premises as a result of complaints.
11. That there is sufficient evidence to conclude that the owners of the premises are improperly managing their establishment.
12. That Mrs. Vaccaro admitted to the Union City Board of Alcoholic Beverage Control that she could not handle the bar and wanted to sell same.
13. That the Union City Alcoholic Beverage Control Board did not act arbitrary and capricious in revoking the license of the premises.

The grant or denial of an alcoholic beverage license rests in the sound discretion of the Union City Alcoholic Beverage Control Board in the first instance. In order for the appellant to prevail, he must show unreasonable action upon the part of the local board constituting a clear abuse of discretion. The burden of proof in establishing that the action of the council was erroneous rests entirely with the appellant in the decision of the Municipal Board of Alcoholic Beverage Control for the City of Union City and should not be reversed unless the Court finds that there was not a preponderance of the evidence in establishing the facts to warrant a revocation of the license.

Pursuant to N.J.S.A. 33:1-31, the issuing authority must find a preponderance of the credible evidence only that the licensee is guilty of the alleged violation. Butler Oak Tavern vs. Division of Alcoholic Beverage Control, 20 N.J. 373, 1956. There is no discretion in such a determination, Fanwood vs. Rocco, 59 N.J. Super. 306, 317 (App. Div. 1960). Upon review of same by the Division of Alcoholic Beverage Control the Director's function on appeal is to affirm the determination if there is a reasonable support from the competent evidence presented to support the findings below. Nordco Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957).

In this particular instance, the Municipal Board for the Alcoholic Beverage Control of Union City has established that several stabbings have occurred on the premises and that the premises have been closed on numerous occasions. In addition,

they have established that the licensee admitted she is unable to handle the bar. Therefore, it is the decision of this Court, that the revocation of the license of Jolly Tinker, Inc. t/a Gus' Tavern BE AFFIRMED.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. DISCIPLINARY PROCEEDINGS - SERVICE OF AN ALCOHOLIC BEVERAGE TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - HEARER RECOMMENDED 10 DAY SUSPENSION - REJECTED BY DIRECTOR WHO SUSPENDED LICENSE FOR 25 DAYS.

In the Matter of Disciplinary
Proceedings against

L.D.M.
t/a The Ivy Inn
248-250 Nassau Street
Princeton, N.J.

S-12,448

H-7079-233

OAL DKT. NO. ABC 5866-79

CONCLUSIONS

AND

ORDER

Holder of Plenary Retail Consumption
License No. 1109-33-006-001 issued by
the Mayor and Council of the Borough
of Princeton.

McCarthy & Hicks, Esqs., by F. Patrick McManimon, Esq., Attorneys
for Licensee.

Charles J. Mysak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Sybil R. Moses, Administrative Law Judge

Dated: March 18, 1980 = Received: March 19, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were filed by the parties hereto pursuant to N.J.A.C. 13:2-19.6.

Having considered the entire record herein including the transcript of the testimony, the exhibits and the Initial Decision below, I concur in the findings and conclusions of the Administrative Law Judge, except that I reject the recommended penalty for the reason hereinafter set forth.

The Administrative Law Judge concludes that the charge herein was proved by "a preponderance of the believable and competent evidence that N.J.A.C. 13:2-23.1(b) was violated since the bartender did serve a mug of beer to a patron, Mr. Hegerty, who was either actually or apparently intoxicated." Nevertheless, in light of "mitigating circumstances," she determined to disregard the precedential penalty of license suspension for 25 days, recommended by the Deputy Attorney General representing this Division, which has been the long established minimum penalty for offenses of this type, absent prior record and aggravated circumstances.

The Judge explains the mitigating circumstances by the following statement, "although the violation has been established by the credible testimony of Agent W., it was not an egregious violation and did not establish, by any stretch of the imagination a pattern of such violation by this licensee." The testimony in the record and, as set forth in the findings of fact, manifest that the patron was clearly intoxicated. While seated at the bar, his head was drooping. His eyes were drooping and blood shot. His nose was running. He was mumbling and talking to himself. He had difficulty in reaching the beer mug in front of him, grabbing the handle and putting it to his mouth. His clothes were disheveled. He had difficulty in standing straight when leaving the bar and had been served at least four beers. In addition to that, the Judge stated it was imminently clear that, as borne out by the reasonable testimony of Agent W., he was served beer while he was actually or apparently intoxicated.

In fact, the agent testified that when he returned to the tavern the licensee told him that this (patron) is here all the time, and whenever he (Hegerty) does get drunk I usually take him home."

Given the above, I disagree with the Administrative Law Judge's assertion that this was not an egregious situation, since the licensee knew that this man had been drunk in these premises on previous occasions. Of course, if the licensee had a prior record of violations, the penalty would have reflected the aggravated circumstance. I shall impose a suspension of license for 25 days.

Accordingly, it is, on this 18th day of April, 1980,

ORDERED that Plenary Retail Consumption License No. 1109-33-006-001 issued by the Mayor and Council of the Borough of Princeton to L.D.M., t/a The Ivy Inn for premises 248-250 Nassau Street, Princeton be and the same is hereby suspended for twenty-five (25) days commencing 12:01 a.m., Monday, April 28, 1980 and terminating 2:00 a.m., Friday, May 23, 1980.

JOSEPH H. LERNER
DIRECTOR

In the Matter of:

L.D.M., t/a
THE IVY INNINITIAL DECISIONOAL DKT. NO. A.B.C. 5866-79
AGENCY DKT. NO. S-12,448; H-7079-233

APPEARANCES:

Charles Mysak, Deputy Attorney General
on behalf of the Division of Alcoholic Beverage ControlF. Patrick McManimon, Esq.
McCARTHY & HICKS
on behalf of the licensee, L.D.M., t/a THE IVY INN

BEFORE THE HONORABLE SYBIL R. MOSES, A.L.J.:

This matter was brought before the Office of Administrative Law as the result of a complaint filed against L.D.M., t/a The Ivy Inn, by the Director of the Division of Alcoholic Beverage Control, pursuant to N.J.S.A. 33:1-31. Said complaint charged that:

"On Friday, October 12, 1979, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person actually or apparently intoxicated and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises, in violation of N.J.A.C. 13:3-23.1(b)".

The licensee entered a plea of not guilty on November 19, 1979.

Notice of a hearing to be held on Tuesday, February 19, 1980, was received by all parties. Said hearing was held on Tuesday, February 19, 1980. Appearances are noted above.

OAL DKT. NO. ABC 5866-79

The Division relied on the testimony of Alcoholic Beverage Control undercover agent, Inspector W., who has been with the Division for nine years. Inspector W. testified that on October 12, 1979, he was assigned to go to the Ivy Inn, 248-250 Nassau St., Princeton, New Jersey. He entered at approximately 11:05 p.m., with another Inspector, Agent N. Waiting outside the premises were two ATRA personnel, as well as two members of the State Police. Inspector W. testified that he leaned against a partition, 10 to 12 feet from the bar, and saw about 15 persons at the bar and 25 persons in the table service area. He observed an elderly man seated at the bar whose head was dropping and whose eyes were drooping and blood-shot. He observed this man from approximately 11:07 p.m. to approximately 11:40 p.m.. The man's nose was running, he was mumbling and talking to himself, and his clothes were dishevelled. There was a beer mug in front of him and he had great difficulty in reaching the mug, grabbing the handle and putting it to his mouth. The Inspector noticed that the man mumbled to passersby, as well as the woman next to him, who found him hard to understand.

At approximately 11:20 p.m., Agent W. noticed the bartender pointing to the empty mug in front of the man, who nodded "yes", at which point the bartender filled the mug from the beer tap and placed it in front of him. Agent W. then noticed that the man had difficulty in aligning the mug to his lips and in handling the mug. He also noticed that the man took one of the woman's cigarettes, put it in his lips and attempted to spin the wheel of a cigarette lighter. However, he could not do so because he had the wrong end of the lighter by his thumb. He tried it that way for about 30 seconds. He then spun the lighter around and around for 20 seconds until he finally lit the flame. He then had difficulty in lighting his cigarette.

At approximately 11:40 p.m., Inspector W. told Inspector N. to tell the State Police and ATRA personnel to enter. Inspector W. then went up to the man at the bar and told him he had had enough to drink. He testified that the man agreed with him. The man was subsequently turned over to ATRA personnel, and identified as John J. Hegerty. Agent W. took the remaining liquid in the mug after identifying himself to the bartender.

The liquid was analyzed by a chemist of the Division of Alcoholic Beverage Control to be an alcoholic beverage. Both counsel stipulated to the analysis and to the liquid itself and the following were marked into evidence.

OAL DKT. NO. ABC 5866-79

P-1 Bottle containing the remains of the seized liquid.

P-2 Certification as to the findings of an analysis made by a chemist of the item seized on October 12, 1979.

Agent W. testified further that when the two ATRA personnel escorted Mr. Hegerty out of the bar he was leaning on them and he had some difficulty in standing straight. He also testified that he smelled the odor of alcohol from his breath when he approached him. Agent W. testified that, during his nine years as a member of the N.J. State Police Bureau of Alcoholic Beverage Control, he has observed intoxicated persons on many occasions. In his opinion, John J. Hegerty was apparently intoxicated when the bartender served him another mug of beer. Agent W. also testified that the licensee, Richard McClusky, was called to come back to the Ivy Inn and told him, "This man is in here all the time. Whenever he does get drunk, I usually take him home." (T14, L 4-8).

Cross examination of the agent centered on an attack on his credibility. It also revealed that other apparently intoxicated persons on the premises were served only ginger ale.

Both counsel stipulated that the testimony of Agent N., who was ill and could not be present in Court, would be almost identical to that of Agent W.

The licensee-respondent, Richard McClusky, owner of the Ivy Inn, presented four witnesses. The first was John J. Hegerty of Princeton Junction, New Jersey. Mr. Hegerty testified that he works at Princeton University in landscaping and heavy machinery. He remembers that on October 12, 1979 he did not wear an overcoat, (as described by Agent W.) but wore a dark jacket over a sweater. Mr. Hegerty asserted that he was as sober at the bar that night as he was in Court. The witness conceded that he had been drinking beer from a mug. He said he was chatting with a Mr. Murphy, who was sitting on his left side, and that the woman on his right was sleeping. He said he was smoking his own brown cigarettes which were on the bar in front of him and not those of the woman next to him. Mr. Hegerty testified that he had had a hard day and was on medication for emphysema. The Court noted that Mr. Hegerty has a thick brogue, a weatherbeaten face with heavy pouches under his eyes, and gnarled, red hands.

Cross examination revealed that Mr. Hegerty admitted he had "about four beers" (T30, L 9). He testified he was not drinking heavily that night and was completely sober because

he was frightened due to the medicine he was taking (two tablets four times a day). He testified that the doctor didn't know he was a drinker when he gave him the medicine. Mr. Hegerty asserted he might have had difficulty grasping the beer mug because it was "too light" for him as he uses heavy equipment all the time. He denied having difficulty using the cigarette lighter that night. Mr. Hegerty said that if he were really intoxicated, he would manifest bad habits, he would not be able to hold the glass or lighter at all and would not remember anything. Mr. Hegerty said that, after being brought to his son's house by the State Police, he walked back to the bar and asked to be served a beer or to purchase a six-pack, which request was refused by the bartender.

The second witness on behalf of the licensee was the bartender on October 12, 1979, Raymond Pettus. Mr. Pettus said he remembered the evening well as it was a very hectic night because of all the people in the bar and because the World Series was on T.V. He knows Jack Hegerty as he is a customer on occasion. He was not aware of the agents being in the bar until they identified themselves. However, Pettus tried to indicate that the agents were not near the partition. He said one was in the table section and one was near a game section. He then conceded he did not really take notice of what they were doing.

Mr. Pettus described Jack Hegerty as being difficult to understand, due to his Irish brogue, with saggy eyes, a "W.C. Fields nose", and a weatherbeaten face. He said that his hands were not real flexible. He insisted that Mr. Hegerty was normal that night and had been there about 1½ hours, drinking draft beer out of the ten-ounce mug. He served him approximately three glasses but noticed he did not drink his whole glass. He corroborated Hegerty's testimony in regard to a girl sleeping next to him. Bartender Pettus testified that he is aware that he should not serve intoxicated people. In support of that he pointed out that when the sleeping girl awoke and wanted a grapefruit juice and vodka, he only gave her grapefruit juice.

Cross examination revealed that Mr. Pettus would not sell beer to anyone who had "a load on". (T52 L 12). He has seen Hegerty intoxicated, when he becomes rowdy, his speech is slurred, he staggers, and his dexterity is affected. In his opinion, Mr. Hegerty was not intoxicated.

Also testifying was Joseph Czeslowski of Princeton Junction, who was in the Ivy Inn on October 12, 1979. In his opinion, as the result of a conversation with Mr. Hegerty in the men's room approximately 30 minutes before the police came, Mr. Hegerty did not appear intoxicated. He corroborated Hegerty's

testimony that he was wearing a sports jacket over a sweater. However, Mr. Czeslowski testified that his main purpose in going to the bar that night was to watch the baseball game and that he really did not take too much notice of what was going on.

Mr. McClusky testified on his own behalf that he has been the owner and licensee of the Ivy Inn for 14 years and has never been charged with a violation of the regulations of the Division of Alcoholic Beverage Control. (Counsel for the Division confirmed that fact.) On October 12, 1979, he left the premises about 11:00 p.m. and was called back approximately 45 minutes later. He had seen Jack Hegerty come in that night. He knows Mr. Hegerty, not only because he is a patron, but because he does his landscaping. Hegerty comes to the Ivy Inn two or three times a month. Mr. McClusky described Mr. Hegerty as having a weatherbeaten, seamantype complexion, baggy eyes and a thick Irish brogue, and as a man who leans when he walks and who has working man's hands with deformed knuckles. Mr. McClusky testified he watches what Hegerty drinks and does not allow him to be served whiskey. He indicated that on the night in question Mr. Hegerty was in good shape when he left. He was not loud or insulting as he was drinking beer that night.

McClusky testified that he was very angry about the incident when he returned and spoke vehemently to the inspectors. He conceded that, although he doesn't remember specifically what was said to Agent W. that night, he might have said that he'd take Hegerty home when he gets drunk. Mr. McClusky testified that Hegerty is a priority person to be watched when he is drinking but that he did not appear intoxicated that night.

Cross examination revealed that Mr. McClusky did not observe Hegerty when he left the bar. He acknowledged that the agents were conscientious and courteous. Mr. McClusky is a business man anxious to protect his interests and anxious to prove that he complies with the regulations of the Division of Alcoholic Beverage Control.

The Deputy Attorney General, on behalf of the Division, asked the court to impose a penalty of a 25 day suspension if the charge was proved.

In mitigation of punishment, the licensee presented testimony that Mr. Hegerty's appearance could give a reasonable person a basis to believe that he was intoxicated when, in fact, he was not. The licensee stressed the ruddy, weather-beaten nature of the man's face, the gnarled arthritic hands and the thick Irish brogue. The licensee, also in mitigation of punishment, pointed out that there have been no violations whatsoever of the regulations of the Division for the 14 years he had held that license. The licensee further pointed out that,

in regard to people who were actually intoxicated that night, he refused to serve alcoholic beverages to those persons. In further mitigation, the licensee pointed out that there were no aggravating circumstances and the offense involved only one patron.

All the witnesses were sincere. However, Agent W. on behalf of the Division, presented the most objective and unbiased view of what happened in the Ivy Inn on October 12, 1979. The other witnesses, by reason of their association with the Ivy Inn either as patrons or employees, were not as objective in their testimony. After having observed all the witnesses and having considered the entire record, including the testimony and exhibits submitted in evidence, together with the arguments of counsel, the Court makes the following findings of fact:

1. L.D.M., t/a the Ivy Inn, is a bar and tavern located at 248-250 Nassau Street, Princeton, New Jersey, license # 1109-33-006-001.
2. The Ivy Inn has no prior violations of A.B.C. regulations and has been under the same owner and at the same location for 14 years.
3. Agent W. testified to the following acts, which I find to be facts:
 - a. Inspector W. was in the Ivy Inn on October 12, 1979 from 11:07 p.m. to 11:40 p.m.
 - b. An elderly man, subsequently identified as John J. Hegerty, was seated at the bar. His head was dropping, his eyes were drooping and bloodshot, his nose was running, and he was mumbling and talking to himself.
 - c. Mr. Hegerty had difficulty in reaching the beer mug in front of him, grabbing the handle and putting it to his mouth.
 - d. Mr. Hegerty's clothes were dishevelled.
 - e. Mr. Hegerty had difficulty in lighting a cigarette, and in putting the cigarette into his mouth.

- f. Mr. Hegerty had some difficulty in standing straight when leaving the bar.
- g. Mr. Hegerty had the odor of alcohol on his breath.
- 4. These facts form a reasonable basis to believe Mr. Hegerty was actually or apparently intoxicated.
- 5. Agent N., who was with Agent W. on October 12, 1979 in the Ivy Inn, was too ill to testify. However, his testimony would be almost identical to that of Agent W.
- 6. Mr. Hegerty had at least four beers on October 12, 1979.
- 7. Mr. Hegerty has a thick Irish brogue, a ruddy, weatherbeaten face with heavy pouches under his eyes and gnarled, red hands.
- 8. Mr. Hegerty was taking medication on October 12, 1979.
- 9. The liquid seized from the beer mug in front of Mr. Hegerty was an alcoholic beverage as per the analysis of Penelope A. Moore, chemist for the Division of Alcoholic Beverage Control.
- 10. No other person was involved in the incident concerning Mr. Hegerty.
- 11. The licensee did not serve alcoholic beverages to any other apparently intoxicated person on October 12, 1979.

In determining these facts to be what actually occurred on October 12, 1979 in the Ivy Inn, I have carefully weighed the credibility of all the witnesses. It is the unique responsibility of the trier of fact to determine if the testimony comes from credible witnesses and is credible in and of itself. See Spagnuolo v. Bonnett, 16 N.J. 546, 1954, Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960). I have viewed all the facts and circumstances which show the witnesses' relation to the case and to the parties and have evaluated any possible interest or bias of each witness who has testified. See In re Hamilton State Bank, 106 N.J. Super. 285 (App. Div. 1969). In evaluating such testimony, I am 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. See Freud v. Davis, supra, and Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 1956.

As a result of said evaluation, it is eminently clear that Agent W. was reasonable in his belief, based on his observations, that Mr. Hegerty was being served beer by an employee of the Ivy Inn while he (Hegerty) was actually or apparently intoxicated. See Division of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196 (App. Div. 1968). Agent W. has more than sufficient experience and training to determine if a person exhibits the indicia of apparent intoxication. In addition, the licensee's witnesses corroborated his observations in many respects.

Although the violation has been established by the credible testimony of Agent W., it was not an egregious violation and did not establish, by any stretch of the imagination, a pattern of such violations by this licensee.

I therefore CONCLUDE that the Division of Alcoholic Beverage Control has proved, by a preponderance of the believable and competent evidence, that N.J.A.C. 13:2-23.1(b) was violated, since the bartender did serve a mug of beer to a patron, Mr. Hegerty, who was either actually or apparently intoxicated.

I further CONCLUDE that, in light of all the mitigating circumstances established by this licensee, a sentence of 25 days could be considered manifestly excessive in the instant matter.

Therefore, I CONCLUDE that the license of L.D.M., t/a The Ivy Inn, be suspended for the October 12, 1979 violation, for a period of 10 days.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

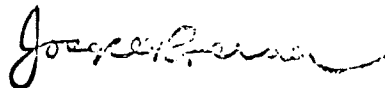
I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

3. STATE LICENSES - NEW APPLICATIONS FILED.

Chatam Pennsylvania Incorporated
735 Commercial Avenue
Carlstadt, New Jersey
Application filed March 30, 1981
for person-to-person transfer of
a plenary wholesale license from
Charles Jacquin et Cie., Inc.

Phillip W. Silverstone
4445 Baker Avenue
Pennsauken, New Jersey
Application filed March 31, 1981
for limited wholesale license.

Viva Vino Import Corp.
PO Box 151
Glenolden, Pennsylvania
Application filed April 8, 1981
for limited wholesale license.



Joseph H. Lerner
Director