

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2444

DECEMBER 13, 1985

TABLE OF CONTENTS

ITEM

1. ANNOUNCEMENT: "ALCOHOLIC BEVERAGE CONTROL HANDBOOK FOR RETAIL LICENSEES" - AVAILABILITY - UPKEEP SERVICE.
2. NOTICE TO WHOLESALERS AND RETAILERS: CHARGING OF INTEREST - WHEN REQUIRED.
3. RECENT LEGISLATION: ALCOHOLIC BEVERAGES--SERVICE TO OR ENTICEMENT TO DRINK OF PERSONS UNDER THE LEGAL AGE--DISORDERLY PERSON OFFENSE.
4. NOTICE TO WHOLESALE LICENSEES AND SOLICITORS--REQUIREMENT TO MAINTAIN RECORDS OF OTHER COMPENSATION TO SOLICITORS (AWARDS, PRIZES AND OTHER MERCANTILE BONUSES).
5. STATE LICENSE TRANSACTIONS - SEPTEMBER 13, 1985 TO DATE.
6. NOTICE - SUBSCRIPTIONS FOR 1986 ALCOHOLIC BEVERAGE CONTROL BULLETINS.
7. APPELLATE DECISION - T.L.S., INC., T/A THE EVERGREEN LOUNGE V. CITY OF BAYONNE - ALLOWING, PERMITTING OR SUFFERING UNLAWFUL CONTROLLED DANGEROUS SUBSTANCE ACTIVITY ON LICENSED PREMISES - LICENSE SUSPENSION OF 60 DAYS AFFIRMED (DISCUSSION OF "SUFFERING" ILLEGAL ACTIVITIES BY A LICENSEE).

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December 13, 1985

1. ANNOUNCEMENT: "ALCOHOLIC BEVERAGE CONTROL HANDBOOK FOR RETAIL LICENSEES" - AVAILABILITY - UPKEEP SERVICE

The Division announces the publication of the Alcoholic Beverage Control Handbook for Retail Licensees, which is designed to provide retailers with a practical and convenient source for authoritative information and explanations in easy-to-understand language. The Handbook is being distributed by the Division to each licensee, and the Division hopes to complete the distribution by mid-January. The Handbook has been bound in a loose-leaf binder so that it can be updated and kept current.

Plans are underway to publish revisions and updates at least twice during 1986. Although the Division would also like to be able to distribute the revisions to all licensees, the cost would be prohibitive. Therefore, the updates and revisions will be on a subscription basis at a cost of \$6.00 for the 1986 revisions. Subscriptions may be ordered by sending a check or money order payable to the Division of Alcoholic Beverage Control for \$6.00 for each subscription to: Division of Alcoholic Beverage Control, Richard J. Hughes Justice Complex, CN-087, Trenton, NJ 08625-0087. Please include a clear mailing address.

Additional Handbooks are also available at a cost of \$5.00 if purchased at the Division's offices or \$7.00 if ordered by mail. Orders may be sent to the same address as for subscriptions, but please use separate checks.

2. NOTICE TO WHOLESALERS AND RETAILERS: CHARGING OF INTEREST - WHEN REQUIRED.

It has been reported to the Division that some wholesalers are waiving interest or finance charges for selected retailers even though the invoice has not been paid within 30 days or within a



State of New Jersey

Thomas H. Kean
Governor

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Irwin I. Kimmelman
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Director

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CN 087
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lesser period if established in the wholesaler's C.P.L. and on the invoice. This practice is not permissible and the interest must be charged and paid or the retailer is in default and subject to the provisions of N.J.A.C. 13:2-24.4 as to that invoice.

If the interest is not charged on overdue bills in accordance with the terms set forth both in the Current Price List [N.J.A.C. 13:2-24.6(a)3], and on the invoice, the wholesaler and retailer are in violation of both N.J.A.C. 13:2-24.6(a)6 and 13:2-39.1. Both these regulations will be strictly enforced to ensure that there is no discriminatory treatment by wholesalers.

Where interest or finance charges are added to the invoice which is not timely paid, such interest or finance charges do not increase the "cost" as defined in N.J.A.C. 13:2-24.8.

3. RECENT LEGISLATION: ALCOHOLIC BEVERAGES--SERVICE TO OR ENTICEMENT TO DRINK OF PERSONS UNDER THE LEGAL AGE--DISORDERLY PERSON OFFENSE

On August 28, 1985, Senate Bill No. 2312 was enacted into law as Chapter 311 of the Laws of 1985 and is codified at N.J.S.A. 2C:33-17. Existing laws prohibit the service to, purchase by or consumption of alcoholic beverages by persons under the legal age at retail liquor licensed premises. N.J.S.A. 33:1-77 and 1-81. The knowing possession without legal authority or the knowing consumption of alcoholic beverages by any person under the legal age in any school, public conveyance, public place or place of public assembly, or motor vehicle is also currently prohibited. N.J.S.A. 2C:33-15.

The new law adopted in August of 1985 further expands the public policy of this State against alcoholic beverage activity by persons under the legal age (21 years) by making it a Disorderly Person offense for anyone to purposely or knowingly offer, serve, make available to or entice a person under the legal age to consume an alcoholic beverage. Exceptions are made in this law where the alcoholic beverage is provided or made available to the person under the legal age:

(a) by a guardian or first cousin or closer relative by blood, marriage or adoption who is of legal drinking age; or

(b) as part of a religious observance, ceremony or rite; or

(c) at the home of a person of legal drinking age in the presence of and with the permission of that underage person's guardian or first cousin or closer relative by blood, marriage or adoption who must be of legal drinking age.

The introductory statement to this bill states that its purpose "... is to discourage drinking by persons under the legal age to consume alcoholic beverages by placing more responsibility on adults."

It is the Division's position that this law does not repeal, supersede or in any way change those laws and regulations under the Alcoholic Beverage Law which prohibit the sale to or for persons under the legal age and also prohibit the consumption by such persons on liquor licensed premises. N.J.S.A. 33:1-77, 1-81 and N.J.A.C. 13:2-23.1

The language of the new law follows:

"1. Anyone who purposely or knowingly offers or serves or makes available an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices that person to drink an alcoholic beverage is a disorderly person. This section shall not apply to a guardian or to a first cousin or closer relative by blood, marriage or adoption of the person under legal age for consuming alcoholic beverages if the guardian or relative is of the legal age to consume alcoholic beverages or to a religious observance, ceremony or rite. This section shall also not apply to any person in his home who is of the legal age to consume alcoholic beverages who offers or serves or makes available an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices that person to drink an alcoholic beverage in the presence of and with the permission of the guardian or first cousin or closer relative by blood, marriage or adoption of the person under the legal age for consuming alcoholic beverages if the guardian or relative is of the legal age to consume alcoholic beverages.

"2. This act shall take effect immediately."

4. NOTICE TO WHOLESALE LICENSEES AND SOLICITORS--REQUIREMENT TO MAINTAIN RECORDS OF OTHER COMPENSATION TO SOLICITORS (AWARDS, PRIZES AND OTHER MERCANTILE BONUSES).

Division regulations specifically require all licensees to maintain and keep true books of account which must include all monies received by or invested in the licensed business along with "... all moneys expended from such receipts and the name of the person receiving such moneys and the purpose for which such expenditures were made...". N.J.A.C. 13:2-23.32. Additionally, manufacturers or wholesalers who employed licensed solicitors must, on or before April 1, file with the Director a true statement listing "...all compensation, itemized as to salary, commission, reimbursed expenses or otherwise, paid to each such solicitor..." during the preceding calendar year. (Emphasis added) N.J.A.C. 13:2-37.2.

Recent Division investigations and a review of filed solicitor compensation statements have disclosed that wholesale licensees are not maintaining accurate and complete records concerning the payment to solicitors of compensation received other than salary, commissions or reimbursed expenses. Specifically, the awarding of cash or merchandise prizes or bonuses to salespersons as a result of sales contests or performance incentives are not being disclosed in reports to the Division and are not identifiable and traceable in the business records of the wholesaler.

Aside from the tax laws of the Federal and State governments which would consider these prizes and awards income to the recipient, the Division is reiterating and clarifying (if there was in fact any bona fide confusion) its requirements for full and accurate record keeping. Record entries must be maintained for each salesperson that identifies each and every merchandise prize with its equivalent cash value and each cash award provided as a result of wholesaler contests or incentive programs. If the funds utilized to finance or otherwise support the contest or program are acquired from distillers, vintners or other suppliers, the grantor company and the amounts received must also be separately identifiable on request.

The compensation statements required to be filed under N.J.A.C. 13:2-37.2 must separately identify the total value of prizes and awards given to each solicitor in the reporting calendar year, in addition to separate amounts for salary and/or commissions and for reimbursed expenses. If merchandise prizes or trips are purchased from outside vendors or businesses to be used in contests or incentive programs, the wholesaler must include in the disbursement ledgers not only the name of vendor, items purchased and amount expended, but must also have the capability of further identifying the purpose of the expenditure, i.e....., "used for Brand X rum incentive program - July - September, 1985".

The failure of a wholesaler to file or maintain appropriate reports or records as hereinabove identified may result in further administrative sanctions.

5. STATE LICENSE TRANSACTIONS - SEPTEMBER 13, 1985 TO DATE.

The following transactions have taken place with reference to State-issued licenses since September 13, 1985:

License Type:	Number #:	Status:
Plenary Wholesale license The Distillers Somerset Group, Inc. 1114 Avenue of the Americans New York, NY 10036 From: Somerset Importers Ltd.	3400-23-068-001	Change of Corp. Name iss. eff.: 08/06/85
Public Warehouse license Harbor Bay Warehouse Co., Inc. 104 Harbor Drive Jersey City, NJ 07305 From: Hudson Bay Warehouse Co., Inc.	3400-28-780-001	Change of Corp. Name iss. eff.: 09/03/85

License Type:	Number #:	Status:
State Beverage Distributors Beer City Inc. 3711 Dell Ave North Bergen NJ 07047 From: William Loshievo Jr. 194-198 Rt 17 No. Rochelle Pk, NJ 07662	3400-19-212-003	Person to Person & Pl to Pl iss. eff: 11/13/85
Transportation License Mushroom Transportation Co. Inc. 250 Patterson Plank Rd Carlstadt, NJ 07072 From: 37 Terminal Road Lyndhurst NJ C7071	3400-20-478-003	Place to Place & CSC eff; 11/18/85
Additional Warehouse Mushroom Transportation Co. Inc. Building 440 Reritan Center Edison, NJ 08817	3400-24-709-002	CSC eff: 11/18/85
Transportation license Laurence D'Alessandro Trucking Co., Inc. 4 Powerhorn Road Flemington, NJ 08822	3401-20-350-001	New lic. iss. eff.: 10/07/85
Limited Wholesale license Quattro Corporation 560 Sylvan Avenue Englewood Cliff, NJ 07632	3401-25-351-001	New lic. iss. eff.: 10/08/85
Con-Way Easter Express, Inc. 50 Kero Road Carlstadt, NJ 07072 From: Penn Yan Express, Inc. Same address	3400-20-491-001	Change of Corp. Name iss. eff. 09/27/85
Wine Wholesale license ISC Wines of California, Inc. Bldg. 12B, 321 Delsea Drive Deptford, NJ 08096 From: One B Colony Road Jersey City, NJ 07305	3401-26-162-002	Place to Place trans. iss. eff. 10/22/85
Transportation license T & S Transportation, Inc. 7420 Ranco Road, P.O. Box 9729 Richmond, VA 23228	3401-20-352-001	New lic. iss. eff. 10/22/85
Transportation license FTL Intermodal, Inc. 308 East Lancaster Avenue Wynnewood, PA 19096	3401-20-353-001	New lic. iss. eff. 10/22/85
Transportation license Staten Beverage, Inc. 14 W. 21st Street Linden, NJ 07036	3401-20-354-001	New lic. iss. eff. 10/22/85
Plenary Wholesale Whitbread No. America Inc. 333 Sylvan Ave Englewood Cliffs NJ 07632 From: 580 Sylvan Ave Englewood Cliffs NJ 07632	3400-23-028-004	Place to Place eff: 11/18/85
Wine Wholesale Wingate Importers Inc. 900 Passaic Ave Bldg 64 East Newark NJ 07029	3401-26-359-001	New License iss: eff: 11/20/85

License Type:	Number#:	Status:
Transportation License Sooner Transport Corporation 666 Grand Avenue Des Moines, IA 50309	3401-20-361-001	New License iss. eff: 11/26/85
Transportation License Bil-Ric Transport Systems Inc. Route 502 P.O. Box 3297 Scranton, PA 18505	3401-20-362-001	New License iss. eff: 11/26/85
Transportation License Transamerica Transport Inc. P.O. Box C 300 B Corporate Court South Plainfield, NJ 07080	3401-20-263-001	New License iss. eff: 12/4/85
New Plenary Wholesale License Dreyfus Ashby Inc. 60 East 42nd St. Rm 1901 New York, NY 10165	3401-23-364-001	New License iss. eff: 12/10/85
Plenary Wholesale license Nor-East Distributors, Inc. 369 Lexington Avenue Clifton, NJ 07011	3401-23-355-001	New lic. iss. eff. 10/22/85
Wine Wholesale license F.W. Langguth Wines, Inc. 2414 Morris Avenue Union, NJ 07083 FROM: 120 East 56th Street Suite 540 New York, NY 10022	3401-26-286-002	Place to Place trans. iss. eff.: 10/22/85
Wine Wholesale license Campari USA, Inc. 1290 Avenue of the Americas New York, NY 10104	3401-23-356-001	New lic. iss. eff.: 10/30/85
Transportation license Western Carriers, Inc. 2220 91st Street North Bergen, NJ 07047 From: 10 Meta Lane Lodi, NJ 07644	3400-20-900-002	Place to Place trans. iss. eff.: 10/29/85
Transportation license Midwest Grain Products, Inc. 1300 Main Street Atchison, KS 66002 From: Midwest Solvents Company, Inc.	3400-20-976-001	Change of Corp. Name iss. eff.: 11/02/85
Limited Wholesale license California Cooler Company Div. of Brown Forman Corporation 2601 Teepee Drive Stockton, CA 95205	3401-25-336-002	Person to Person trans. iss. eff.: 11/01/85
Plenary Wholesale license Beaver Wine Company Marlboro Industrial Park 228 Boundary Road Bldg. #ONE Marlboro, NJ 07746	3401-23-357-001	New lic. iss. eff. 10/29/85
Transportation license Cheetah Transfer Ltd., Inc. 1115 Clifton Avenue Clifton, NJ 07013	3401-20-358-001	New lic. iss. eff. 11/01/85

License Type:	Number#:	Status:
Wine Wholesale license The Wine Family, Inc. 65 Railroad Avenue Ridgefield, NJ 07657	3401-26-345-001	New lic. iss. eff. 09/10/85
Transportation license Smith's Transfer Corporation 21 Englehard Avenue Avenel, NJ 07001	3400-20-519-002	New lic. iss. eff. 09/05/85
Wine Wholesale license Elliott Fine & Company 150 Executive Park Blvd. Ste. #4500 San Francisco, CA 94134	3401-26-256-001	Will not renew for 1985/1986
Plenary Wholesale license Ancient Age Distilling Company, Inc. Leestown Road Frankfort, KY 40601	3401-23-344-001	New lic. iss. eff. 09/10/85
Farm Winery License Paul A. Tamuzza Cemetery Road P.O. BOX 247 Hope, NJ 07844	3401-22-346-001	New lic. iss. eff. 09/13/85
Transportation licens Harrah's Atlantic City, Inc. 840 West Delilah Raod Pleasantville, NJ 08232 Mailing address: 115 38th Street Brigantine, NJ 08203	3401-20-031-003	Place to Place transfer iss. eff. 09/17/85
Plenary Brewery Anheuser-Busch, Incorporated 200 U.S. Highway #1 ewark, NJ 07101	3400-10-380-002	Place to Place trans. to exp. of prem. iss. eff.: 09/20/85
Transportation license Tischler Express, Inc. 15th and Mickle Streets Camden, NJ 08105 From: 201 Heller Drive Bellmavr, NJ 08031	3401-20-079-002	Place to Place trans. 09/20/85
Limited Wholesale license George Lawrence Industries, Inc. 2050 Center Avenue Fort Lee, NJ 07024 From: 550 W. MT. Pleasant Ave. Livingston, NJ 07039	3401-25-324-002	Place to Place trans. iss. eff.: 09/19/85
Plenary Retail Transit license Ronald A. Haworth Boat My Lynne #3068CP 28 Peggy Lane Manahawkin, NJ 08050	3401-13-348-001	New lic. iss. eff. 09/23/85
Transportation license Sun Transportation, Inc. 40 Pullman Street Worcester, MA 01606	3401-20-349-001	New lic. iss. eff. 09/24/85

License Type:	Number#:	Status:
Plenary Wholesale license Modern Beverages, Inc. Squankum-Yellowbrook Road Farmingdale, NJ 07727	3401-23-294-002	Place to Place trans. to incl. exp. of prem. iss. eff.: 10/01/85
Additional Warehouse license Farber Distributing Corp. 209 Vanderpool Street Newark, NJ 07114 From: 203 Miller Street Newark, NJ 07114	3401-24-308-002	Place to Place trans. iss. eff.: 10/01/85
Transportation license Retail Express, Inc. 2480 Secaucus Road No. Bergen, NJ 07047	3401-20-347-001	New lic. iss. eff.: 10/04/85

6. NOTICE - SUBSCRIPTIONS FOR 1986 ALCOHOLIC BEVERAGE CONTROL BULLETINS

ABC Bulletins are published on an irregular basis throughout the calendar year. Subscriptions are \$25.00 per year and subscribers receive all copies of the bulletin published for that calendar year. To renew or begin a subscription, purchasers should send their check or money order for \$25.00 along with their name and full mailing address to: State of New Jersey, Department of Law and Public Safety, Division of Alcoholic Beverage Control, Richard J. Hughes Justice Complex, CN-087, Trenton, NJ 08625, Attention: George Lund, Deputy Director, Administration.

If you are a government official and are ordering in your official capacity, please include your title and jurisdiction.

7. APPELLATE DECISION - T.L.S., INC., T/A THE EVERGREEN LOUNGE V. CITY OF BAYONNE - ALLOWING, PERMITTING OR SUFFERING UNLAWFUL CONTROL DANGEROUS SUBSTANCE ACTIVITY ON LICENSED PREMISES - LICENSE SUSPENSION OF 60 DAYS AFFIRMED (DISCUSSION OF "SUFFERING" ILLEGAL ACTIVITIES BY A LICENSEE).

APPEAL NO. 5015)	
T.L.S., INC., t/a THE EVERGREEN LOUNGE,)	ON APPEAL
)	FINAL CONCLUSIONS AFFIRMING
PRCL NO. 0901-33-138-003)	GUILT BUT MODIFYING PENALTY
)	AND FINAL ORDER OF SUSPENSION
)	WITH LEAVE GRANTED TO MAKE
)	A MONETARY OFFER IN COMPROMISE
Appellant,)	IN LIEU OF SAME
)	OAL DKT. NO. ABC 1697-85
v.)	MUN. DIS. NO. 8475
MUNICIPAL COUNCIL OF THE)	
THE CITY OF BAYONNE,)	
)	
Respondents)	

Richard S. Hanlon, Esq., for Appellant

Christopher L. Patella, Assistant City Attorney, for Respondents
(Robert F. Sloan, City Attorney)

GERALD T. FOLEY, JR., Administrative Law Judge

Decided: June 13, 1985

Received: June 17, 1985

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were submitted on behalf of the Respondent Issuing Authority, as is permitted pursuant to N.J.A.C. 13:2-17.14. The Respondent takes Exception to the Administrative Law Judge's attempt to distinguish the Essex Holding Company v. Hock case (36 N.J.L. 28, (Sup. Ct. 1947)). Respondent argues that since it has conclusively shown that narcotic activity occurred on the licensed premises on the date in question and that Appellant failed to show that it attempted to take effectual measures to prevent the prohibited narcotic activity, Appellant therefore "suffered" the prohibited activity and it, therefore, is guilty of violating N.J.A.C. 13:2-23.5(b). I shall hereby accept these Exceptions and I shall, therefore, reject the Initial Decision of the Administrative Law Judge. Nevertheless, I shall further modify the action below with respect to the proper penalty to be imposed.

The Appellant was charged with violating N.J.A.C. 13:2-23.5(b) which states that: "No licensee shall allow, permit or suffer in or upon the licensed premises any unlawful possession of or unlawful activity pertaining to narcotic or other drugs, or other controlled dangerous substances as defined by New Jersey Controlled Dangerous Substances Act (N.J.S.A.24-21.1 et seq) or any prescription legend drug in any form, which is not a narcotic, depressant or stimulant drug, or controlled dangerous substance as so defined." Upon a finding of guilt to such charge, the Respondent Issuing

Authority imposed a suspension of license for six months. Thereafter the Appellant filed an appeal with this Division and, by Order dated February 27, 1985, I entered an Order staying the suspension pending the determination of this appeal.

Upon the de novo appeal held before the Office of Administrative Law, the Administrative Law Judge recommended that the Appellant be found not guilty of the charge. In doing so, the Judge appears to have attempted to distinguish and rationalize away the leading case concerning such matters, Essex Holding Corp. v. Hock, by apparently indicating same applies to merely "liquor traffic" violations. Initial Decision p. 10. Additionally, the Judge described the facts of the Hock case and, stating that it differed factually from the instant matter, found that its holding did not apply. The Judge, while properly noting that Essex imposes a responsibility upon a licensee regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with the licensee's authority, thereafter opined that in the instant matter there was no opportunity for Appellant's barmaid to observe and therefore prevent the prohibited conduct between Sadowski and Adelong (the drug traffickers). The Judge then found as fact that the barmaid did not observe the "brief unlawful sale" and, concluding that because there was a lack of certain documentary evidence, held there was nothing to put the Appellant on notice concerning any potential unlawful narcotic activity. Therefore, he found the Appellant-Licensee not guilty. I reject his findings of fact and conclusions of law.

Initially I must register my strong disapproval with any indication, whether expressed or implied, that Essex is limited to purely "liquor traffic" violations. Instead, I find no reason to so limit that holding. The principle articulated by that case has since been applied to other prohibited activities occurring on a licensed premises, whether purely "liquor traffic" matters or not. In Re Olympic Inc., 89 N.J. Super. 299 (App. Div. 1958), Mazza v. Cavicchia, 28 N.J. Super. 280 (App. Div. 1953) reversed on other grounds, but affirming the principle expressed, 15 N.J. 498 (1954). With respect to narcotic activity, the appropriateness of such a nonlimited rule could not be more apparent. The pernicious effects of the abuse of alcohol are well known. Similar effects of drugs are universally acknowledged. Drugs and alcohol when combined have even more extreme and adverse consequences both upon the users in particular and our society in general. Given that both are substances which are intoxicating by their very nature and easily susceptible to abuse, there is absolutely no rational reason to limit the holding of the Essex case to exclude narcotic activity.

As a preface to deciding this case, it is important to keep in mind the standard regarding conduct of a licensed premises, which has been set forth in Essex Holding Corp. v. Hock. In the Essex Holding Corp. case several minors (who were accompanying adults at a banquet) admitted drinking beer when the older men were not looking, and the waiters were not present. It was not shown that the waiters knew that they were drinking the beer. The court sustained the Division's suspension of the license, holding that knowledge is immaterial and that it is the responsibility of the licensee to prevent underage

persons from consuming any beer on a licensed premises. The court said:

"In construing this section consideration must be given to the legislative intent, and inquiry should be made to determine if it concluded to make the offense complete without guilty knowledge. The lawmakers may declare an act criminal irrespective of the knowledge or motive of the doer of such act and the court has no right to insert an element not intended by the legislature."

* * * * *

"The prevention of the sale to, or the consumption by, minors of liquor upon licensed premises is of the utmost importance. Its purpose is to protect our youth and thereby make more secure the foundation of society. The intent of the legislature and the rules and regulations of the department governing enforcement clearly encompass the responsibility of the licensee for the consumption of alcoholic beverages by minors under the circumstances complained of.

"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) 140."

In this regard please see, too, In re Gutman, 21 N.J. Super, 579 (App. Div. 1952) and Benedetti v. Bd. of Com'rs of Trenton, 35 N.J. Super. 30 (App. Div. 1955).

Recent cases decided by the Division have reviewed the development of the law regarding alcoholic beverage control and same have resulted in nearly strict liability being imposed upon a licensee for prohibited activities occurring on its licensed premises. Cf., 32 Broad, Inc. v. Keyport, OAL Dkt. No. ABC 6864-83, Appeal No. 4866 (decided July 13, 1984). See, too, In the Matter of Disciplinary Proceedings Against Vincent Romano, OAL Dkt. No. ABC 5257-83, Agency Dkt. No. S-13,868 (decided July 9, 1984) Bulletin _____ Item _____. Licensees have been held to have violated the instant regulation where the mere presence of marijuana is found on the premises by police during an investigation. 252 Stuyvesant Avenue Corp. vs. Mun. Bd. of ABC of Newark, OAL Dkt. No. ABC 2559-82 and 2560-82, Appeal Nos. 4677 and 4683 (Consolidated) (decided October 11, 1984) Bulletin _____ Item _____. Same has been held true even where the licensee has advised its bartenders to be especially observant to remove any drug violators from the premises, and if problems exist, to call the police. Stacy Float Association v. Mun. Bd. of ABC of Paterson, OAL Dkt. No. ABC 1479-84, Appeal No. 4919.

Additionally, licensees have been held responsible where such transactions, engaged in by an irregularly employed, off-duty employee, occurred on the licensed premises only because of the insistence of the investigator. In the Matter of Disciplinary Proceedings Against Mt Hope Inn, Inc., OAL Dkt. No. ABC 3489-84, Agency Dkt. S-14,483 (decided April 18, 1985). Moreover guilt has been established where the licensee has complained to and in good faith worked in concert with the police to stop drug trafficking. The particular drug transactions with which the licensee actually assisted the police thereafter were the basis for an offense which was ultimately sustained against the licensee. Snack Bar Inc. v. Borough of Mendam, OAL Dkt. No. ABC 4291-83, Appeal No. 4784 (decided April 26, 1984) Bulletin Item _____. Finally, a recent Appellate Division decision affirmed the finding of guilt where a patron, previously unknown to the licensee, entered the premises and through error immediately handed drugs over to an undercover officer who was on the premises. It was conceded that the licensee had virtually no chance to prevent that activity. This fortuitous, single instance still resulted in guilt being established of this regulatory prohibition. Leon's Palace v. Mun. Bd. of ABC of Paterson, OAL Dkt. No. ABC 4984-83, Appeal No. 4831, Appellate Division Docket No. A-1444-83 T3, (decided January 21, 1985) (unreported).

In the instant case testimony indicates that not one, but two transactions concerning the apparent sale and delivery of cocaine occurred within 15 minutes of each other on the licensed premises on the night in question. Testimony further indicates that there were only approximately seven people in the bar at the time the drug sales took place. Certainly it cannot be argued that the barmaid was overwhelmed by having to serve a multitude of customers so as to not be able to properly observe and prevent any prohibited activities from taking place upon the premises.

Finally, there is testimony by the arresting police detectives which described various instances when the burning of marijuana had been smelled on the licensed premises, that it was listed as a "persistent complaint area," and that drug arrests had previously taken place inside. While such testimony by the detectives was not corroborated by documentary evidence, because the police records bureau required the names of the arrested persons before arrest records could be obtained, such testimony is credible proof by itself. The detectives testified that they were at the licensed premises on the night in question because of a tip from a reliable informant who was a patron of this licensed premises. The informant had advised the detectives that numerous drug activities were taking place in and around the Evergreen Lounge and that a transaction would take place that night. (T. 2/6/85, pp. 4-8,10,12-13,22-32.)

In contrast, the Appellant, though its corporate president Mathew Wallace, testified that as far as he knew there had been no other arrests inside his premises other than this one. The Appellant further testified that he had no recollection of any employees ever giving him information concerning narcotic activity involving the two arrested patrons. From

such testimony the Judge apparently found that narcotic activities had not taken place previously on the licensed premises and that, therefore, the Appellant could not be aware of same. However, the Appellant also testified at the hearing before the local issuing authority that he was not surprised or shocked after having heard that the two people who were in his establishment pleaded guilty to possessing narcotics while in his licensed premises. I suggest that one could reasonably infer that his lack of surprise was due to his awareness that such activities were occurring in and around his premises. (T. 2/6/85, pp. 48-50, 55-58, 68-70)

Besides such a reasonable inference, I have also reviewed the entire record presented to me. I have particularly read and analyzed the testimony of the witnesses. Since the testimony herein presents certain factual conflicts, the credibility of the witnesses must be weighed. Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in and of itself and must be such as common experience and observation of mankind can approve as probable under the circumstances. Spagnuola v. Bonnet, 16 N.J. 546 (1954).

Giving due regard to the fact that the Administrative Law Judge had the opportunity to personally view two of the witnesses (Detective Gaulette and Appellant Wallace) and thereby assess their credibility in the context of an actual hearing, nevertheless I must disagree with his findings of fact in this case. The testimony of the detectives, I find, was clear and convincing. The reasons advanced concerning the inability to produce corroborative documentary evidence was realistic and believable. The answers produced by the detectives to questioning by both the Council as well as the Appellant's attorney were direct and specific. There was no showing of any improper motivation on their part, nor any bias against the Appellant.

In contrast, I find that the testimony of the Appellant could be more appropriately characterized as basically negative ("Not to my recollection") and evasive. In this latter regard I note that at one point Appellant Wallace answered a councilman as follows: "Have the police ever been called to your place because of a disturbance outside? THE WITNESS: Not that I know of." Later, when conflicting testimony is brought to his attention, he rationalizes his prior answer by using a symantical argument as follows: "Just for a point of clarification. I had asked you before if you had ever called the police about a disturbance outside and you said no. THE WITNESS: I said not a disturbance, I said a congregation." (T. 2/6/85, pp. 51-52)

Besides the above noted instance of conflicting testimony, I am not persuaded by Appellant Wallace's protestations that no narcotics activities transpired on the premises. The testimony of the detectives established it was a "persistent complaint area," and at previous times they had personally smelled marijuana on the premises. The tavern was known to them and their reliable informant as a place where narcotic activity occurred on a

regular basis. Moreover, while Wallace denies any drug activity, still of the two things he tells his employees in "training" them, one is ". . . don't let drugs in." (T. 2/6/85, p. 57.) Finally, common sense indicates the improbability of any assertion to the effect that, during the two years it has been owned by the Appellant, the only drug transaction which ever occurred on this premises, did so on the one time these undercover officers happened to be there on this particular assignment and that they happened to be fortunate enough to see it occur.

With respect to the credibility of the Appellant's other witness, while she was on the premises on the night in question as a patron, she has since been hired by the Appellant as a barmaid. Her mother lives above the tavern, her uncle owns the building in which the tavern is located, and she resides at the same address, albeit upstairs, as one of the persons arrested and found guilty of the underlying narcotic activity concerning this instant violation. Her motivation in the outcome of these proceedings is, therefore, quite apparent.

Given the totality of the evidence adduced in this matter, the lack of reason for the detectives to fabricate their testimony as opposed to the motive for the Appellant's witnesses (the president and his employee) to color their recollection concerning the facts at issue most favorably to their own interests, I as the ultimate finder of fact believe and find credible the testimony of the detectives as opposed to the testimony of the Appellant in this case. Therefore, I find that there was sufficient evidence to provide the Appellant with notice that narcotic activities were taking place on its licensed premises and therefore the Appellant had a duty to prevent same. Additionally, I find that two transactions occurred on the premises on the day in question, and the Appellant had sufficient opportunity to prevent at least the latter one, but did not do so. Thus I find the Appellant guilty of the charged violation.

As noted, the local issuing authority imposed a suspension of license for six months. The precedent penalty for such violation, however, would be suspension of license for 60 days. Generally, the extent of any penalty imposed for violation of the alcoholic beverage control regulation rests within the sound discretion of the adjudicating authority. Absent evidence that the Respondent acted unreasonably or abused its discretion, penalties should remain unchanged. Our cases have held that since the penalty to be imposed in disciplinary proceedings brought by a local issuing authority rests within its sound discretion, the power to reduce or modify the penalty on appeal is exercised sparingly, and only when the evidence clearly shows an abuse of such discretion. Barnes and Mazyck, t/a B & M Tavern v. Mun. Bd. of Alc. Bev. Control of Jersey City, Bulletin 2155, Item 4. The power of the Director to reduce the suspension is limited to those situations where it is manifestly unreasonable. Sventy and Wilson, Inc. t/a Frank's Riptide Bar v. Mayor and Council of Point Pleasant Beach, Bulletin No. 1930, Item 1.

In light of the disproportionate suspension imposed in consideration of the precedent penalty, I find that same was excessive, and I shall reduce same to coincide with the precedent penalty. Accordingly, I shall reduce the suspension to a term of 60 days. Since this is the Appellant's first apparent violation of same, I shall further allow it to submit appropriate financial documentation and to petition me to accept a monetary offer in compromise in lieu of the 60 day suspension of license.

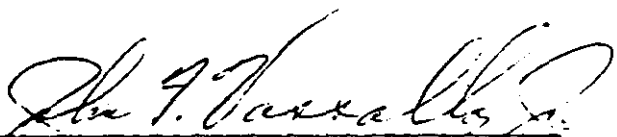
Accordingly, it is on this 31st day of July, 1985,

ORDERED that the action of the local issuing authority as modified below be and the same is hereby affirmed and the appeal therefrom be and is hereby dismissed; and it is further

ORDERED that the Order issued on February 27, 1985, staying the suspension pending determination of this appeal be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License No. 0901-33-138-003 issued by the Municipal Council of the City of Bayonne, to T.L.S., Inc., t/a Evergreen Lounge, for premises at 72-74 Evergreen and 169 Hobart Avenue, Bayonne, New Jersey, be and the same is hereby suspended commencing 2:00 A.M. Tuesday, October 1, 1985 and terminating on 2:00 A.M., Saturday, November 30, 1985; and it is further

ORDERED that the Appellant may apply to me to accept an offer in compromise in lieu of the 60 day suspension of license, in accordance with N.J.S.A. 33:1-31, provided that the Appellant shall promptly submit to me financial documentation to support said offer in sufficient time for payment to be made no later than September 16, 1985.


JOHN F. VASSALLO, JR.
DIRECTOR

APPENDIX: INITIAL DECISION BELOW



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ABC 1697-85

Agency Dkt. No. Appeal No. 5015, Mun.

Rev. No. 8475

**T.L.S., INC., A NEW JERSEY
CORP.,**

Petitioner,

v.

**CITY OF BAYONNE AND THE MUNICIPAL COUNCIL
OF THE CITY OF BAYONNE,**

Respondents.

Richard S. Hanlon, Esq., for petitioner

**Christopher L. Patella, Assistant City Attorney, for respondents
(Robert F. Sloan, City Attorney)**

Record Closed: May 20, 1985

Decided: June 13, 1985

BEFORE GERALD T. FOLEY, JR., ALJ:

On May 20, 1985, a hearing was held and concluded on an appeal de novo by petitioner, T.L.S., Inc., a New Jersey Corporation, to the Director of the Division of Alcoholic Beverage Control from a resolution and order of respondents, City of Bayonne and the Municipal Council of the City of Bayonne, dated February 6, 1985, which found

OAL DKT. NO. ABC 1697-85

the petitioner guilty, after a hearing on February 6, 1985, of violating N.J.A.C. 13:2-23.5(b) which states that:

No licensee shall allow, permit or suffer in or upon the licensed premises any unlawful possession of or any unlawful activity pertaining to narcotic or other drugs, or other controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substances Act (N.J.S.A. 24:21-1 et seq.) or any prescription legend drug, in any form, which is not a narcotic, depressant or stimulant drug, or controlled dangerous substance as so defined.

The Resolution and Order stated that plenary retail consumption license number 0901-33-138-00 held by petitioner be suspended for six months.

Procedurally, petitioner appealed to the Director on February 25, 1985 and, on February 27, 1985, the Director entered an order staying respondents' order of suspension pending determination of this appeal. The case was filed in the Office of Administrative Law on April 4, 1985. On May 6, 1985, counsel for respondents filed in the Office of Administrative Law an original and copy of the transcript of the proceedings below on February 6, 1985 and informed the undersigned that, pursuant to N.J.A.C. 13:2-17.8, respondents intended to offer the transcribed record in lieu of producing witnesses at the hearing de novo. A prehearing telephone conference was held on May 15, 1985 among counsel for the parties and the undersigned. Counsel indicated that they would rely on the transcript of the proceedings below at the hearing de novo and counsel for petitioner further indicated that he would call two witnesses at the hearing.

At the outset of the hearing on May 20, 1985, the transcript of the proceedings on February 6, 1985 was marked into evidence as a joint exhibit. The resolution and order appealed from was marked into evidence as the second joint exhibit.

At the hearing on February 6, 1985, the first witness for the City was Detective George Wanko. He testified that he was on duty on March 15, 1984, in a plainclothes assignment in the narcotics squad of the Bayonne Police Department. At approximately

OAL DKT. NO. ABC 1697-85

8:17 p.m., he was in the vicinity of Evergreen Street and Hobart Avenue, the location of the Evergreen Lounge, the petitioner licensee. Detective Wanko testified that he arrested individuals named Mark Sadowski, Nancy Kowalski and Jules Adelung.

Specifically, the witness testified that he and Detectives Gaulette and Kelly had received information from reliable informants that there was drug activity taking place in the Evergreen Lounge. The three set up a surveillance with the witness on foot and Kelly and Gaulette in a radio car. Wanko positioned himself by the bar and as patrons entered, he would step over and look inside to see what type of activity was taking place.

The witness stated that from his vantage point he observed Adelung get out of a vehicle with two men behind him and enter the tavern. Wanko positioned himself in front of the bar and looked in through the door. He observed Adelung hand money to Sadowski, seated with Kowalski at the bar, and receive small paper packets in exchange.

Wanko testified that as Adelung left the bar he radioed Gaulette and Kelly as to what he had seen. Adelung was arrested and taken into custody. Kelly and Gaulette entered the tavern and based on Wanko's description within three or four minutes arrested Sadowski and Kowalski as they were in the process of handing drugs and money back and forth.

Wanko, when asked if he recalled who the bartender was, stated that he did not, as he was not really watching the bartender. He had to watch the hands of Adelung and Sadowski. He was not certain whether a barmaid or bartender was on duty.

Wanko testified that the substance found on the defendants was placed in the Hudson County Prosecutor's Office. He was shown a copy of a laboratory report, and he indicated that it revealed that the drug analysis results proved positive for four grams of cocaine received that evening. When questioned by members of the council, the witness stated that the individual behind the bar did nothing to stop the sale or interfere with it. He said that anybody who was not unconscious at the time could observe what was going on at the time.

OAL DKT. NO. ABC 1697-85

On cross-examination, the witness testified that when he saw Adelung enter the tavern, he walked over to the window in the tavern door. He estimated that the window's dimensions were approximately 8 by 12 inches. He stated that Adelung walked up to the two parties who were seated at the bar and that the three appeared to be having a conversation. Wanko testified that this conversation was very brief, maybe 30 seconds. He stated that Adelung brought out money, more than one bill, and handed it to Sadowski, who gave him seven packets.

The witness said that Sadowski got the packets from the inside pocket in his pants. He stood up in order to reach into his pocket. When Adelung received the packets, he placed them in his pocket as he was standing. The witness testified that Sadowski was "bellied up to the bar" and he was standing right next to the bar when he stood up. He stated that he believed that Sadowski's pocket would be below the top of the bar. He testified that the packets were out long enough for Sadowski to count to seven and then hand them to Adelung.

Wanko, when asked where the bartender was when Sadowski counted out seven packets and handed them to Adelung, answered, "I imagine behind the bar. You have [to] understand the type of activity that I was observing. The only thing I can really watch was the person's hands." The witness stated that he was concentrating on the deal going down and, when asked whether he had any idea whether the bartender was watching the transaction or was elsewhere, Wanko answered, "The bartender was behind the bar. Whether there was a customer being served, I don't recall." Wanko testified that, if the bartender was right next to Sadowski at that point in time, he would have remembered that. However, he testified that he did not remember seeing the bartender next to Sadowski at that time.

Wanko testified that Adelung was not served anything when he came into the bar and he did not recall the bartender approaching Adelung at any time. He did not recall seeing Adelung and Sadowski converse with the bartender.

OAL DKT. NO. ABC 1697-85

Detective Kenneth Gaulette testified for the City that on March 15, 1984, he was on duty at approximately 8:17 p.m. in the area of the Evergreen Lounge. He assisted in the arrests of Sadowski, Kowalski and Adelung. After Adelung left the bar, the witness and Detective Kelly entered the bar and were seen by Sadowski and Kowalski. Sadowski handed Kowalski a packet and some money and the two officers arrested both individuals. The witness, who has been employed by the City as a police officer for approximately 14 years and who was a member of the narcotics squad for six years, but who at the time was assigned to the ABC squad, testified that during his employment on the narcotics squad, "we" made several arrests inside the Evergreen Lounge because of drug activities and also, at random times, "we" went into the tavern and smelled marijuana most recently, about two weeks before the hearing.

On cross-examination, the witness testified that although he made drug arrests inside the tavern, he was unable to recall the names of anyone he arrested as the arrests went back several years. Prior to the arrests on March 15, 1984, the most recent one was within the year. However, the witness did not recall the name of the person he arrested. He testified that when he smelled marijuana in the tavern about two weeks before the hearing, he did not file a complaint nor did he make a report, or call it in over the air, or call for assistance, or memorialize it in any way except for his testimony on February 6, 1985, before the City Council because it was an ongoing investigation. Additionally, he made no arrests. With the conclusion of Gaulette's testimony, the City rested.

Mona Kocherha testified for the licensee that on March 15, 1984, she arrived at the Evergreen Lounge at about 7:00 p.m. for the purpose of "hanging out." She described the bar as "L" shaped with three people able to sit at the bottom of the "L" and about ten along the length of the bar. She was sitting by the door near the window. Just before the entry of the police officers, she, a Mr. Bizecka, Sadowski, Kowalski, John Sidecki, the barmaid and her niece were in the bar. She said that the barmaid was behind the bar and she and Bizecka were sitting near the door by the window, at the lower part of the "L." One person was sitting in the middle of the bar and the remainder were down at the end of

OAL DKT. NO. ABC 1697-85

the bar where the cigarette machine was located. Those sitting down at the end of the bar were Sidecki, Sadowski and Kowalski.

Kocherha testified that Adelung entered the bar and, as he did, he said hello to her. Adelung walked to the end of the bar and walked out. He was not in the bar very long, a couple of seconds. She further testified she did not notice anything transpire between Adelung and Sadowski or anyone else. Further, she said that she did not remember what the barmaid was doing at that point in time, but that she was by the register located in the middle of the bar, or talking to her. She stated that she knew, however, that the barmaid was not down at the end of the bar. A few minutes after Adelung left, the officers entered the bar.

On cross-examination, Kocherha testified that, at present, she is employed at the Evergreen Lounge as a barmaid. In answer to the question, could a transaction have taken place and she did not notice it, she answered, "Maybe, I don't know." Kocherha stated that she was not working at the Evergreen on March 15, 1984. She was hanging out but did not start working, she thought, until April 1984 or the end of March 1984.

The first witness for the licensee was Matthew Wallace who testified that he is the president of T.L.S., Inc., and that the license at the Evergreen Lounge has been under his name for approximately two years. He testified that during that time, except for the incident on March 15, 1984, there have never been any arrests at the Evergreen Lounge relating either to possession or sale of drugs inside the tavern. Wallace testified that he is on the premises daily from approximately 11:00 a.m. to 1:00 p.m. He then returns to tend bar every night of the week and he closes the bar every night. He testified that on March 15, 1984, he was not at the tavern at the time of the arrests. He was at home. His barmaid called him and he went down to the tavern.

Asked by a councilman whether there had been any charges at all preferred against his establishment since he had been the licensed operator, Wallace testified that the only one was against one of his bartenders who sold, he thought, a six-pack of beer to a youth who was 20 years of age. This resulted in a two-day closing of the licensed

OAL DKT. NO. ABC 1697-85

premises. Wallace further stated that he knew Sadowski and Kowalski as frequenters of his tavern, maybe once or twice a week. He stated that they were not steady customers. He further testified that he never saw Adelung before he saw him in court.

On cross-examination, Wallace testified that Sadowski was a customer of his bar for a while, just on and off. He might see him on a Thursday night and then he would not see him for a month. Then he might see him on another Thursday night.

Wallace testified that he was not surprised or shocked after having heard that two people who were in his establishment pleaded guilty to possessing narcotics while in his licensed premises.

Following the summations of counsel, the licensee was found guilty as charged. The council then met in closed session and, based on the finding of guilty, petitioner's license was suspended for six months.

On May 20, 1985, Gaulette testified that he has been a Bayonne police officer for about 14 years. He stated that he was given a subpoena duces tecum to produce, at the hearing de novo, police reports and arrests reports for any persons arrested for drug or drug-related offenses within the last three years on the premises of the Evergreen Lounge. He went to Bayonne's BCI and was told that he would have to have the name of the individual before he could get an arrest report. A mere location was not sufficient. From his search, he was unable to produce any arrest report, other than the one for March 15, 1984 in the instant matter, where he arrested someone inside the premises of the Evergreen Lounge for drug or drug activity.

The witness did, however, bring some reports with him including the one associated with the three arrests in this case. He had a report dated August 24, 1984, where a drug arrest was made on an individual before he returned to the Evergreen Lounge. The witness conceded that this arrest was subsequent to the three arrests in the instant matter on March 15, 1984.

OAL DKT. NO. ABC 1697-85

Gaulette stated that the three individuals arrested on March 15, 1984 were Sadowski, Kowalski and Adelung. These three were not the subject of the August 24, 1984 report. Of the reports he brought with him to the hearing, there were no others involving drug activity on the licensed premises. The tavern was not mentioned.

Gaulette testified that he did not bring to the hearing any arrest reports of the City of Bayonne concerning Sadowski, Kowalski or Adelung with respect to any illegal narcotic activity that they may have had with regard to the Evergreen Lounge. He referred to the incident report of March 15, 1984, but he had no arrest reports concerning these three individuals with drug activity involving the Evergreen Lounge prior to March 15, 1984 and no documentary evidence to show a connection between these three individuals and the licensee with regard to narcotics activity prior to March 15, 1984.

On cross-examination, the witness stated that in order to obtain police reports from BCI, he would need the names of the particular individuals arrested.

Matthew Wallace testified that he is president of T.L.S., Inc., and he has been the licensee since September 1982. He said that other than the arrests on March 15, 1984, there have been no other arrests inside his premises for drug-related activity.

Wallace said that the first time he met Adelung was at the City Council meeting on February 6, 1985. He knew Sadowski and Kowalski before March 15, 1984 as they stopped in his tavern every now and then, maybe once or twice a month. He said he was unaware of any narcotic activity with respect to Sadowski or Kowalski, either on or off his premises. None of his employees ever gave him information concerning narcotic activity involving Sadowski or Kowalski.

On cross-examination, Wallace said he recalled testifying on February 6, 1985, before the municipal council. He said he did not recall that he said he was not surprised or shocked when asked if he were surprised or shocked after he heard that two people, who were in his establishment, had pleaded guilty to possessing narcotics while in his

OAL DKT. NO. ABC 1697-85

establishment. He was not present at the licensed premises at 8:15 p.m. on March 15, 1984 when the arrests were made. At present, however, he works the bar every night.

With the conclusion of Wallace's testimony, the petitioner rested. The respondents rested on the transcript of the proceedings on February 6, 1985, after moving into evidence as R-1, the report of the March 15, 1985 police investigation. Counsel for respondents indicated that of the 11 reports that Gaulette brought with him to the hearing de novo, only R-1 was relevant to the issue to be determined.

Initially, I have listened to the testimony of the two witnesses, have observed their demeanor, have assessed their credibility, have reviewed the exhibits, including the transcript of the proceedings before the Bayonne City Council on February 6, 1985, and having considered the arguments of counsel. In this appeal, which was heard de novo, the burden of establishing that the action of the respondent issuing authority was erroneous and should therefore be reversed rests with the petitioner, N.J.A.C. 13:2-17.6. Petitioner's contention, which respondents dispute, is that the proofs on behalf of the City of Bayonne, before the Bayonne City Council, failed to support the charge of a violation of N.J.A.C. 13:2-23.5(b) by petitioner, by a preponderance of the believable evidence. This is the standard which guides me, the initial trier and finder of the facts, in measuring the adequacy of proof to sustain guilt in disciplinary proceedings instituted against licensees for violation of the Division's regulation, Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 503 (App. Div. 1956). Additionally, the choice of accepting or rejecting the testimony of witnesses rests with me, the initial trier and finder of the facts. I must make a reasonable choice. Hornauer at 506. This is a disciplinary proceeding in which I must decide disputed questions of fact. Discretion is not involved and has nothing to do with my findings of the underlying facts. In short, if the evidence is not there, no amount of discretion can supply the deficiency. The applicable regulation, N.J.A.C. 13:2-23.5(b), has been set forth. In the instant matter, petitioner concedes that there was a passing of cocaine from Sadowski to Adelung in the Evergreen Lounge on March 15, 1984. What he correctly contends is in dispute is whether the petitioner licensee or his agent, the barmaid on March 15, 1984, was aware of this sale or distribution of cocaine. In other words, the question is whether the licensee allowed,

OAL DKT. NO. ABC 1697-85

permitted or suffered, in or upon its licensed premises, any unlawful possession of or any unlawful activity pertaining to narcotic or other drugs or other controlled dangerous substances in violation of N.J.A.C. 13:2-23.5(b).

The testimony of Detectives Wanko and Gaulette is dispositive of this issue. The conclusion is inescapable that the petitioner licensee did not allow, permit or suffer in or upon its licensed premises the unlawful narcotic activity of which it was charged and of which it was found guilty below. The proofs of the City of Bayonne clearly show that the licensee did not allow, permit or suffer the drug distribution and sale in and/or upon the premises on March 15, 1984. In other words, the licensee was found guilty on insufficient testimony. The evidence of guilt by a preponderance of the believable evidence was not there, Fanwood v. Rocco, 59 N.J. Super. 306, 317 (App. Div. 1960), aff'd 33 N.J. 404 (1960). In short, the City's proofs failed to support the charge by a preponderance of the believable evidence, Hornauer, at 503.

The World Book Dictionary (1979) defines "allow" as let (someone) do something; permit (something) to be done;" "permit, a synonym of allow, as to allow (a person) to do something; to provide opportunity for; allow, to let something be done or occur; authorize;" and "suffer" as to allow; permit; to bear (something) with patience; endure, tolerate." Although it would appear to be axiomatic and, in the sense that a licensee cannot allow, permit or suffer in or upon its licensed premises any unlawful narcotic activity, because 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, our courts have held that the word "suffer" imposes the responsibility on a licensee, regardless of knowledge, where there is a failure to prevent prohibited conduct by those occupying the premises with his authority. Essex Holding Corp. v. Hock, 136 N.J.L. 28, 31 (Sup. Ct. 1947). It is clear, however, from the testimony of Wanko that he was not really watching the bartender when the transaction took place on March 15, 1984. Rather, he had to watch the hands of Adelung and Sadowski. As a matter of fact, although someone was tending bar, Wanko did not know it was a barmaid or a bartender, male or female. The fact is that the conversation between Adelung and Sadowski was very brief, maybe 30 seconds. Adelung brought out the money and handed more than one bill to Sadowski. As Adelung

OAL DKT. NO. ABC 1697-85

handed the money to Sadowski, the latter handed the seven packets of cocaine to Adelung. Sadowski had gotten the packets from his pants pocket when he stood up. When Adelung received the packet, he placed them in his pockets, as he was standing. Sadowski was "bellied up" to the bar and he was standing right next to the bar with his pocket below the top of the bar. While Sadowski counted the seven packets and then handed them to Adelung, Wanko "imagined" that the bartender was behind the bar. Wanko said that the only thing he could really watch was the "person's" hands as he was concentrating on the transaction. Although the bartender was behind the bar, the fact is that Wanko did not know where the bartender was located and he did not know whether the bartender observed the illegal sale or whether he was serving a customer or whether he was elsewhere. The additional fact is that the bartender was not right next to Sadowski when the sale was made because Wanko would have remembered this and he did not remember seeing the bartender next to Sadowski at the time of the illegal sale. From these facts, it is clear that Wanko was unable to testify as to where the barmaid was when the illegal sale occurred. I am convinced from the testimony of Wanko that the barmaid did not observe the illegal sale and that the barmaid did not have knowledge that it occurred.

Detective Gaulette testified that he did not bring to the hearing of the appeal de novo any arrest reports of the City of Bayonne concerning Sadowski, Kowalski or Adelung, concerning any unlawful narcotic activity that they may have had concerning the Evergreen Lounge. The only investigation report he brought to the hearing was that regarding the incident in question on March 15, 1984 which was marked into evidence as the respondents' sole exhibit and which its counsel indicated was the only one of the 11 reports that Gaulette brought to the hearing that was relevant to the issue to be determined in this case. Gaulette had no arrest reports concerning Sadowski, Kowalski or Adelung concerning drug activity involving the Evergreen Lounge prior to March 15, 1984 and no documentary evidence to show a connection between Sadowski, Kowalski and Adelung and the petitioner-licensee as to narcotics activity prior to March 15, 1984. Thus, it is clear that, in addition to the fact that the petitioner-licensee, from the testimony of Wanko, did not have knowledge of the approximately half-minute transaction between Adelung and Sadowski on March 15, 1984, it is equally clear that there was nothing in the record to have indicated that the petitioner-licensee should have known

OAL DKT. NO. ABC 1697-85

that unlawful narcotic activity might have occurred between Sadowski and Adelung on March 15, 1984.

In view of the foregoing, petitioner-licensee, through its barmaid had no knowledge, from the testimony of Detective Wanko, of the illegal sale and, through the testimony of Detective Gaulette, as to the lack of arrest reports and documentary evidence involving Adelung, Sadowski and Kowalski prior to March 15, 1984 of which the petitioner licensee should have known, I, therefore, CONCLUDE that the City of Bayonne failed below to successfully shoulder its burden of proving by a preponderance of the believable evidence that the petitioner-licensee, through its barmaid on March 15, 1984, allowed, permitted or suffered in or upon its licensed premises unlawful possession of cocaine or unlawful activity pertaining to cocaine in violation of N.J.A.C. 13:2-23.5(b).

Neither case cited by counsel for the parties is factual apposite. Petitioner cites Ishmal v. Division of Alcoholic Beverage Control, 58 N.J. 347 (1971) and respondents cite Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947). In Ishmal our Supreme Court held that it was error to revoke Mrs. Ishmal's plenary liquor consumption license because her conduct was not culpable and she did not allow, permit or suffer the drug problem at her tavern because the record was clear that she seriously endeavored to eradicate the drug problem in and around the tavern property and her efforts to eliminate the tavern's difficulties were attested to by two Newark City police officers, one of whom indicated that Mrs. Ishmal or her employees called on 50 occasions and requested assistance in helping get rid of the narcotic problem. Further, Mrs. Ishmal fully cooperated with this Newark detective by instructing her son, a bartender on the premises, to render him assistance whenever it was necessary. A second detective also received numerous calls from Mrs. Ishmal that drug addicts were ruining her business and that she made good faith attempts and cooperated with the police to prohibit regulatory violations and criminal offense.

Respondents rely on Essex Holding Corp. and the definition of the word of "suffer" as it applies to liquor traffic which admittedly is a subject by itself, to the

OAL DKT. NO. ABC 1697-85

treatment of which all of the analogies of the law, appropriate to other topics, cannot be applied. In Essex, "suffer" imposed 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. Essex is essentially different factually from the instant matter. There the prosecutor-licensee held a plenary retail consumption license in Newark which license was located in a large hotel consisting of many sleeping rooms, public bar, restaurant, night club and a number of large rooms and halls which were rented on special occasions for weddings and banquets. The hotel had a general manager, a banquet manager and a maitre d'hotel and it employed a few regular waiters and also extra waiters. On December 15, 1945, in the Terrace Annex, a Christmas banquet had been arranged for a paint company. When the reservation was sought an inquiry was made as to whether there were going to be any minors and the plant manager replied that he doubted it. The waiters were instructed to place pitchers of beer on side tables so that the guests could help themselves. The guests were screened to see if any were minors. The fact is, however, that ten minors attended the dinner and were seated at tables with adults. The instructions given some of the waiters apparently were disregarded and they placed pitchers of beer on the tables they were serving. Four of the minors admitted consuming a number of glasses of beer and the evidence was that the waiters were not present when this occurred. Additionally, some of the youngsters sneaked the beer when the older men were not looking. Although the Commissioner exonerated the prosecutor licensee of the charge of selling to minors he found it guilty of permitting and allowing the consumption of alcoholic beverages upon licensed premises. The applicable regulation stated that "No licensee shall sell, serve, deliver or allow, permit or suffer. . . consumption of alcoholic beverages by any such person up on the licensed premises at 30. Essex's main contention was that unless there was knowledge of the facts complained of, it did not come within the prohibition of allowed, permitted or suffered.

Our Supreme Court disagreed and concluded that the legislative intent was to make the offense complete without guilty knowledge. It held that the intent of the legislature and the rules and regulations of the department governing enforcement clearly encompass the responsibility of the licensee for the consumption of alcoholic beverages by

OAL DKT. NO. ABC 1697-85

minors under the circumstances complained and that although the word "suffer" may require a different interpretation in 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. In my judgment, Essex is distinguishable from the instant matter. The court in Essex was saying that N.J.A.C. 13:2-23.28 applied, in that the regulation states that:

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 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.

I do not read Essex as imposing a strict or absolute liability upon a licensee with respect to the words allowed, permitted or suffered. Essex 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. In the instant matter, from testimony of Wanko, there was no opportunity for petitioner-licensee's barmaid to prevent the prohibited conduct between Sadowski and Adelung. I FIND as a FACT, from the whole of Wanko's testimony, that the barmaid did not observe the brief unlawful sale. I FURTHER FIND as a FACT from the lack of documentary evidence as testified to by Gaulette that there was nothing to put the petitioner-licensee on notice prior to March 15, 1984 that Sadowski, Kowalski or Adelung were involved in any manner in unlawful narcotic activity and, therefore, the City's case was devoid of proofs that the petitioner-licensee should have known, on March 15, 1984, with these three individuals on the licensed premises, that the unlawful sale was likely to occur. One might say that common sense dictates that, in this small bar as described by Kocherha and from the general statement by Wanko that anybody who was not unconscious at the time could observe what was going on, the obvious inference was that the barmaid had to have observed the sale. However, the fact is that the City's case and its proofs were woefully weak on this crucial point. In short, the evidence was just not there and no amount of discretion can

OAL DKT. NO. ABC 1697-85

supply the deficiency, Fanwood at 317. The City's proofs failed to support the charge by a fair preponderance of the believable evidence. A licensee cannot allow, permit or suffer in or upon its licensed premises any unlawful drug activity unless it knows (which, from the testimony of Wanko, it did not) or should know (which, from the testimony of Gaulette, it did not) that such activity is likely to occur. One cannot prevent prohibited conduct by those occupying its premises with its authority unless it knows or, is on notice, that the prohibited conduct will occur.

I therefore **ORDER** that the resolution and order, which found petitioner guilty and which suspended its license for six months, be **REVERSED** and that the charge levelled against petitioner be **DISMISSED WITH PREJUDICE**.

This recommended decision may be affirmed, modified or rejected by the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.**, who by law is empowered to make a final decision in this matter. However, if John F. Vassallo, Jr. 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** my Initial Decision with **JOHN F. VASSALLO, JR.** for consideration.

June 13, 1985
DATE

Gerald T. Foley, Jr.
GERALD T. FOLEY, JR., ALJ

6/17/85
DATE

Receipt Acknowledged:
John F. Vassallo, Jr.
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

June 18, 1985
DATE
D&R

Mailed To Parties:
Ronald J. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. ABC 1697-85

APPENDIX

EXHIBITS MARKED IN EVIDENCE

J-1 Transcript of proceeding below

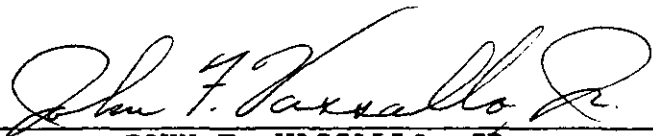
J-2 Resolution and Order, Municipal Council of the City of Bayonne

R-1 Investigation report

* * * * *

PUBLICATION OF BULLETIN 2444 IS HEREBY DIRECTED THIS

13TH DAY OF DECEMBER, 1985.



JOHN F. VASSALLO, JR.
DIRECTOR