Director

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

July 7, 1970

ULLETIN 1915

TABLE OF CONTENTS

TEM

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

July 7, 1970

BULLETIN 1915

1. COURT DECISIONS - AMERICAN B. D. COMPANY v. HOUSE OF SEAGRAMS, INC.; NATIONAL WINE & LIQUOR CO. v. HOUSE OF SEAGRAMS, INC.; FLAGSTAFF LIQUOR CO. v. BROWNE-VINTNERS COMPANY; JOELI WINE DISTRIBUTORS, INC. v. BROWNE-VINTNERS COMPANY - DIRECTOR AFFIRMED.

SUPREME COURT OF NEW JERSEY
A-115/116/117 September Term 1969

(A-115)

AMERICAN B. D. COMPANY,
a New Jersey Corporation,

Respondent,

v.

HOUSE OF SEAGRAMS, INC.,
t/a BROWNE-VINTNERS COMPANY,

Appellant.

NATIONAL WINE & LIQUOR CO.,
a New Jersey Corporation,

Respondent,

v.

HOUSE OF SEAGRAMS, INC.,
t/a BROWNE-VINTNERS COMPANY,

Appellant.

(A-116)

FLAGSTAFF LIQUOR CO.,
a corporation,

Respondent,

v.

BROWNE-VINTNERS COMPANY, a
division of House of Seagrams,
Inc., a corporation,

Appellant.

(A-117)

JOELI WINE DISTRIBUTORS, INC.,
t/a PERRONE WINES & SPIRITS,
560 Bercik Street, Elizabeth,
New Jersey,

Respondent,

v.

BROWNE-VINTNERS COMPANY,
375 Park Avenue, New York, N. Y.,

Appellant.

Argued April 7, 1970 -- Decided June 1, 1970

On appeals from the Superior Court, Appellate Division.

Mr. Philip Lindeman, II, argued the cause for appellants (Mr. Stephen H. Roth, on the brief; Messrs. Hellring, Lindeman & Landau, attorneys).

Mr. Joseph M. Jacobs argued the cause for respondents American B. D. Company and National Wine & Liquor Co. (Messrs. Harrison and Jacobs, attorneys).

Mr. Sidney Berg argued the cause for respondent Flagstaff Liquor Co.

Mr. Meyer Sugarman argued the cause for respondent Joeli Wine Distributors, Inc., t/a Perrone Wines & Spirits.

Mr. Philip S. Carchman, Deputy Attorney General, argued the cause for Division of Alcoholic Beverage Control (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

PER CURIAM.

The judgments in American B. D. Company v. House of Seagrams, Inc. and in National Wine & Liquor Co. v. House of Seagrams, Inc. are affirmed for the reasons expressed by Judge Sullivan in the Appellate Division, 107 N. J. Super.264 (App. Div. 1969), certification granted 55 N. J. 166 (1969). The judgments in Flagstaff Liquor Co. v. Browne-Vintners Company, and in Joeli Wine Distributors, Inc. v. Browne-Vintners Company are affirmed for the reasons expressed in the unreported opinions of the Appellate Division, certification granted in the former 55 N. J. 167 (1969) and in the latter 55 N. J. 311 (1970).

---

2. APPELLATE DECISIONS - CRESPO v. HOBOKEN.

Domingo Crespo,

Appellant,

-vs-

Municipal Board of Alcoholic Beverage Control of the City of Hoboken,

Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Thomas P. Calligy, Esq., Attorney for Appellant.
E. Norman Wilson, Esq., by William J. Miller, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent whereby it suspended appellant's plenary retail consumption license for a period of twenty days effective October 13, 1969. Appellant was

adjudged guilty in disciplinary proceedings on a charge alleging that on May 3, 1969 he sold, served and delivered alcoholic beverages, directly or indirectly, and permitted the consumption thereof by a minor, in violation of Rule 1 of State Regulation No. 20 and a local ordinance. The licensed premises are located at 165-167-169 First Street, Hoboken.

Appellant's petition of appeal alleges that the action of respondent was erroneous as the appellant was denied a fair trial because cross examination of witnesses was prohibited, the finding of guilt was against the weight of the evidence, and that the procedure violated due process of law.

Upon the filing of the appeal an order was entered on October 10, 1969, staying respondent's order of suspension until further order of the Director.

The hearing on appeal was de novo, pursuant to Rule 6 of State Regulation No. 15.

Ruben --- testified that at about 1:00 a.m. on May 3, 1969, in the company of two companions he visited appellant's licensed premises; that at the time he was fifteen years of age, having been born October 4, 1953; that, when he entered the subject premises, he was carrying a can of beer which he had obtained in another tavern when he was approached by the appellant who, after being told by Ruben that he was eighteen years of age, took the can of beer from him. Ruben testified that during the time he was there he was served with three bottles of beer -- one by appellant and two by "Mr. Rosario" (Francisco Rosario), both of whom were tending bar. Ruben further testified, in answer to a question on cross examination, he had visited the appellant's tavern during August 1969 but was asked by the appellant to leave.

Appellant testified that at 1:45 a.m. on May 3, 1969, Ruben and "two other guys" came into his licensed premises each carrying a can of beer; that Ruben appeared to be a minor and, upon questioning him about his age, was told by Ruben that he was eighteen years old; that he took the can of beer from Ruben and emptied the contents into the sink; that both of Ruben's companions appeared to be adults and drank the beer from their respective cans. They and Ruben then left the tavern.

Appellant further testified that Ruben and another man came into the licensed premises in August 1969 but "I told him to get out the place."

Francisco Rosario (hereinafter Rosario) testified that he and the appellant were tending bar on May 3, 1969 when Ruben and two other persons entered, each carrying a can of beer; that he saw the appellant talking to Ruben and his two companions and then he observed appellant take the can of beer from Ruben; that he (Rosario) did not serve Ruben any beer nor did he see any beer being served.

Nemesio Crespo (hereinafter Nemesio), brother of appellant, testified that, although not on duty as a bartender on May 3, 1969, he saw Ruben and two other persons enter the licensed premises, each carrying a can of beer; that the appellant asked Ruben about his age and then took the can of beer from Ruben and poured it in the sink; that he (Nemesio) was arrested by the police after Ruben identified him "at City Hall" as one of the persons who sold him beer.

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

Although the testimony of the minor and that of appellant's witnesses is in conflict, I am satisfied, after careful consideration, with the authenticity of the testimony of the witnesses presented by the appellant. In the first instance the testimony of the appellant discloses that he spoke to Ruben when he entered the licensed premises carrying a can of beer which Ruben alleged he had obtained from another licensed premises; that he questioned Ruben concerning his age and, when Ruben said he was eighteen years old, the appellant took the can of beer from him and emptied the contents into the sink. Bartender Rosario, and Nemesio who was present at the time in question, corroborated the testimony of the licensee that such had occurred. Ruben also testified that, when he told the appellant that he was eighteen years old, the appellant took the can of beer from him.

In so far as Ruben's testimony is concerned, he stated to appellant that he was eighteen years of age although fifteen at the time, and at police headquarters identified Nemesio as serving him. At the instant hearing Ruben identified the appellant and Rosario as the bartenders who had served him on the morning in question.

I find that the uncorroborated testimony of the minor is vague and unreliable, and gives a suspicion of being contrived. The minor's testimony is neither clear nor convincing nor does it meet the measure of credible proof by a fair preponderance of the believable evidence.

The rule in a case such as this is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042. While there is no set formula for determining the quantum of evidence required, each case is governed by its own circumstances and the verdict must be supported by substantial evidence. Cf. Walter v. Alt, 152 S.W. 2nd, 135, 141.

Thus we have the testimony of the minor standing alone and affirmatively contradicted by the testimony of the appellant and two other witnesses. I cannot conceive that appellant, when Ruben told him he was eighteen years of age (which prompted him to take the can of beer from Ruben) would serve him a bottle of beer thereafter.

Under the circumstances appearing herein, I conclude that the finding of guilt by the respondent in this matter is not supported by a fair preponderance of the believable evidence. Ondina Corp. v. Newark, Bulletin 1826, Item 1, and cases cited therein. I therefore recommend that an order be entered reversing the action of respondent and dismissing the said charges.

Conclusions and Order

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

Having carefully considered the record herein, including the transcript of the testimony, the exhibit and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 11th day of May, 1970,

ORDERED that the action of the respondent be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed.

Richard C. McDonough
Director.

3. APPELLATE DECISIONS - A. & N. ENTERPRISES, INC. v. PATERSON.

A. & N. Enterprises, Inc.,
Appellant,
-vs-
Board of Alcoholic Beverage Control for the City of Paterson,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Raff and Passero, Esqs., by Robert J. Passero, Esq., Attorneys for Appellant.
Joseph L. Conn, Esq., by Samuel K. Yucht, Esq., Attorney for Respondent.
Evans, Hand, Allabough & Amoresano, Esqs., by Douglas C. Borchard, Jr., Esq., Attorneys for Objector Henry Sgrosso.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the respondent Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which by resolution dated November 25, 1969 denied appellant's application for a person-to-person and place-to-place transfer of a plenary retail distribution license from Louis Cofrancesco to appellant and from premises 49-51 Graham Avenue to premises 424 Sixth Avenue, Paterson.

The resolution in pertinent part states:

"WHEREAS, an application has been filed for a person-to-person and a place-to-place transfer of Plenary Retail Distribution License D-12, heretofore issued to Louis Cofrancesco, 49-51 Graham Avenue, Paterson, New Jersey, to A. & N. Enterprises, Inc., 424 - 6th Avenue, Paterson, New Jersey; and

"WHEREAS, a survey conducted by this Board reveals that there are 28 Plenary Retail Consumption Licenses and 6 Plenary Retail Distribution Licenses situated within a 6 to 8 block radius of the premises sought to be licensed; and,

WHEREAS, it appears that there are more than sufficient licensed premises to satisfy the needs of

the residents of said area; NOW, THEREFORE,

"BE IT RESOLVED, that the transfer of said license be and the same is hereby denied."

In its petition of appeal appellant contends that the action of the Board in denying the application was "arbitrary, capricious and constituted an abuse of discretion."

The answer of the Board denies the substantive allegations of the said petition.

The hearing on appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded counsel to present testimony and cross-examine witnesses.

It appears from the minutes of the meeting of November 25, 1969, at which this application was considered by the Board, that Anthony De Nova, Jr. (president of the corporate appellant) testified, and appellant was represented by counsel. Counsel stated that appellant presently operates a grocery and delicatessen store and proposes to operate a package liquor department in conjunction therewith. He submitted a copy of a determination by the Board of Adjustment of that municipality granting appellant's application for a variance to conduct a liquor facility, and a copy of the opinion of Superior Court Judge Mountain which affirmed the grant of the said variance. Of course, it was understood that the only municipal body authorized to issue a liquor license was the respondent herein.

Several objectors appeared to protest the said application primarily because it was their contention that there was no need or necessity for the grant of a license transfer at the said premises.

Commissioner Holloway (a member of the Board) stated at that time that the Board had theretofore obtained a survey which disclosed that there are twenty-eight tavern and six package store licenses in a six-to-eight block area of the proposed licensed premises and therefore there was no need established for an additional license in that area. The aforementioned resolution was thereupon approved unanimously by the Board.

At this plenary de novo hearing De Nova testified that the appellant is an experienced licensee and presently operates another liquor licensed facility. It desires to have the subject license transferred to the premises which are now being operated as a grocery and delicatessen store. He stated that the license sought to be transferred is not in active operation; that the transfer to his present premises would serve the needs and convenience of his patrons and the residents of the area. He asserted that the premises to which this license is sought to be transferred are presently being operated in a residential neighborhood, and that the patrons would be accommodated because they could perform a one-stop shopping operation. Also, he felt that his grocery and delicatessen business could not be profitably operated at the present time unless it added a package liquor department thereto.

On cross-examination he acknowledged that there are thirty-two plenary retail consumption and distribution licenses in the Third Ward (in which his premises are located) and he also admitted that he has no facility for off-street parking.

However, he maintained that this was true of many other similar liquor licensed facilities in thearea.

Arthur W. Holloway (a member of the Board) gave his reasons for voting to deny the said application: There are a total of twenty-eight taverns and six plenary retail distribution licenses within a radius of six-to-eight blocks so that the area is adequately serviced. Also objectors appeared at the hearing before the Board and stated that the transfer of the license would create a traffic hazard and would constitute a general nuisance. He was influenced by a survey which had been made in the late part of 1968 "which showed that there were sufficient number of licenses in the area to serve the population of that area at that time.".

On cross examination he explained that, although he was aware of the fact that the variance had been granted by the zoning board, he nevertheless voted to deny this application for the reasons expressed hereinabove.

William W. Harris (Secretary of the Board) testified that there has been no substantial change in the number of licenses issued since the survey was prepared. Furthermore, there have been no place-to-place transfer applications issued or approved by the Board during the licensing year of 1969-70 so that the survey at the time of hearing accurately reflected the number of licenses then existing and operating in the area in which the proposed licensed premises are located.

The decisive issue in my view is whether the area to which this license was proposed to be transferred was sufficiently serviced by existing liquor outlets and whether the Board acted reasonably in deciding that there was no need for said transfer. The determination as to whether or not a license will be transferred to a particular location is a matter confided to the sound discretion of the issuing authority, and its action will not be disturbed in the absence of a clear abuse of discretion. Blanck v. Magnolia, 38 N. J. 484; Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N. J. Super. 598.

It has been consistently held by this Division and the courts that the transfer of a liquor license is not an inherent or automatic right. The issuing authority may grant or deny a transfer in the exercise of reasonable discretion. If denied on reasonable grounds, such action will be affirmed. Andrew C. Kless Enterprises, Inc. v. East Orange, Bulletin 1588, Item 2. See also Biscamp v. Twp. Committee of the Township of Teaneck, 5 N. J. Super. 172 (App. Div. 1949), where the issuing authority was upheld in denying a transfer of a liquor license because it was of the opinion that no need existed for a liquor license in that location of the municipality.

As the court stated in Fanwood v. Rocco, 59 N. J. Super. 306, 320:

> "...No person is entitled to either [transfer of a license] as a matter of law....If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial...."

Said the court further at p. 323:

> "...The Director may not compel a municipality to transfer licensed premises to an area in which the municipality does not want them, because there more people would be able to buy liquor more easily. Such 'convenience' may in a proper case be a reason for a municipality's granting a transfer but it is rarely, if ever, a valid basis upon which the Director may compel the municipality to do so."

And, further, the court added:

> "The primary purpose of the act is to promote temperance (R.S. 33:1-3) and 'to be remedial of abuses inherent in liquor traffic and shall be liberally construed' to effect those purposes. R. S. 33:1-73; Hudson Bergen County Retail Liquor Stores Ass'n, Inc. v. Board of Com'rs. of City of Hoboken, supra. Because these are the purposes there is a sharp and fundamental distinction between the power of the Director when a license is denied by the municipality and when one is granted, because refusing a license cannot lead to intemperance or to any of the other evils the act is intended to prevent. Cf. Cummins v. Board of Adjustment of Borough of Leonia, 39 N. J. Super. 452 (App. Div. 1956), certification denied 21 N. J. 550 (1956)."

Appellant alleges that the said transfer is necessary in order for it to stay in business on a profitable basis. However, it is a well established principle, in a conflict between a licensee's financial concern and the public interest, the latter must prevail. Smith v. Bosco, 66 N. J. Super. 165 (App. Div. 1961).

Finally, in a recent case of Lyons Farms Tavern, Inc. v. Mun. Bd. Alc. Bev., Newark and Newark Beth Israel Hospital, 55 N. J. 292, 303, the court stated:

> "The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record...."

See also Rothman v. Hamilton Township, Bulletin 1091, Item 1; West Milford Bar and Liquors, Inc. v. West Milford, Bulletin 1851, Item 2.

After considering all of the evidence herein, including the transcript of the testimony, the exhibits and the summation of counsel, I conclude that appellant has failed to sustain the burden of establishing that the action of the Board was arbitrary unreasonable or constituted an abuse of its discretionary power. Rule 6 of State Regulation No. 15. Hence I recommend that an order be entered affirming the action of the Board and dismissing the appeal.

Conclusions and Order

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

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

Accordingly, it is, on this 12th day of May, 1970,

ORDERED that the action of the respondent be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

RICHARD C. McDONOUGH
Director.

4. DISCIPLINARY PROCEEDINGS - GAMBLING (HORSE RACE BETS) - LICENSE SUSPENDED FOR 75 DAYS.

In the Matter of Disciplinary Proceedings against	)	
FLAT IRON TAVERN, INC. 430 New Brunswick Avenue Perth Amboy, N. J.,	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-58, issued by the Board of Commissioners of the City of Perth Amboy.	)	

Kovacs, Anderson, Horowitz & Rader, Esqs., by Oliver R. Kovacs, Esq., Attorneys for Licensee.
Edward F. Ambrose, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"1. On July 10, 17, 23, 24 and 29, 1969, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets on horse races on all of said dates and the payment of winnings on a horse race bet on said date of July 24, 1969, and further, on said date of July 29, 1969, you allowed, permitted and suffered in and upon your licensed premises, slips, tickets, records, documents, memoranda and other writings pertaining to the aforementioned gambling activity; in violation of Rule 7 of State Regulation No. 20.

"2. On Saturday, July 12, 1969, at about 1:15 a.m., you sold and delivered and allowed, permitted and suffered the sale and delivery of an alcoholic beverage, viz., one pint bottle of Seagram's V. O. Canadian Whisky, at retail, in its original container for consumption off your licensed premises, and allowed, permitted and suffered the removal of said alcoholic beverage in its original container from your licensed premises; in violation of Rule 1 of State Regulation No. 38."

After partial hearing on the first charge during which an ABC agent testified, the licensee changed its plea to non vult on the first charge, after it was stipulated that so much of that charge as related to the date of July 10, 1969 shall be deleted from the said charges because of the absence of evidence to support the same.

Accordingly, I shall now consider the evidence with respect to the second charge. Pursuant to a specific assignment primarily to investigate alleged gambling at the subject premises, ABC agents visited the said premises on numerous occasions. On July 12, 1969 at about 12:10 a.m., ABC agent D, accompanied by agents B and G, entered the tavern and seated themselves at the bar.

Lawrence Toborowsky, an officer of the corporate licensee, and Gerald Yusko acted as bartenders during the course of their stay. They ordered drinks, and at 1:15 a.m., they departed the premises. Within a few minutes thereafter, Agent D re-entered the tavern and asked Toborowsky what his female companion (agent G) had been drinking during their stay at the tavern. Toborowsky stated that he thought she was drinking Seagram's VO. He then said "Let me have a bottle to go." Toborowsky replied, "I know you, then against I don't know you. Where are you from?" When the agent assured him he was from the area, Toborowsky replied "You give the money....give him the money, $5." (pointing to Carmine Dorio.)

Dorio, who, according to the testimony, frequented this bar and had engaged openly in bookmaking in these premises, was seated on a stool nearby. Toborowsky said, "You give him the $5. Give him $5 and he will bring it out to you." The agent handed the money to Toborowsky, who in turn, handed it to Dorio, and agent D then left the premises. As he approached the motor vehicle in which agent G was seated, Dorio emerged from the tavern, approached agent D and said "Go ahead, have a good time." Agent B was standing alongside the motor vehicle when the bottle was handed to agent D.

The agent estimated that three minutes elapsed from the time he left the tavern until Dorio approached him and handed him the bottle. He was certain that Dorio emerged directly from the tavern prior to this transaction.

Agents B and G corroborated the testimony of the prior witness with respect to the activity outside the tavern. They specifically noted that Dorio left the tavern with the bottle of whisky at the time of this incident. They estimated that no more than one minute elapsed from the time agent D left the tavern to the time when Dorio emerged therefrom with the said bottle.

Lawrence Toborowsky, principal stockholder of the corporate licensee, gave the following account:

When agent D returned to the tavern and asked him for a bottle of whisky he said that he couldn't give it to him. "You were talking to Carmine. Go see if Carmine could do anything for you."

He denied selling him a bottle of liquor. He did admit that his tavern sells Seagram's VO and that the price thereof is about $4.40 per pint. He did refer him to Dorio adding that Dorio lives across the street from the tavern. He explained that Dorio had a sufficient amount of liquor in his house and that he apparently left the premises to go to his home and pick up the bottle of liquor. When Dorio returned to the premises he asked Dorio "Did you give him a bottle?"; Dorio replied that he did. He was certain the bottle of liquor that was given to the agent was obtained by Dorio from Dorio's stock at his home.

Carmine Dorio testified that the agent asked him whether he could get him a bottle of whisky, and as an accommodation he went to his home, picked up a bottle of Seagram's VO whiskey, then without re-entering the tavern he walked directly to the agent's motor vehicle and handed the bottle to him. He explained that the reason he accommodated the agent was that shortly before this incident the agent had confided to him that he wanted to take his female companion to a motel. Since Dorio had several bottles of Seagram's VO whisky at his home, he decided to sell him the said whisky. He estimated that it took him five or six minutes to go to his house, pick up the bottle of whisky and bring it to the agent.

On cross examination he admitted that at the time of the confrontation he did not explain to the agent that the bottle of whisky was in fact obtained from his private stock at his home. Nor did Toborowsky, at that time, give any explanation with respect thereto.

We are dealing here with purely disciplinary measures and their alleged infractions. Such proceedings are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948). Thus the Division is required to establish its case only by a preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N. J. 373. In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

Since this case presents a sharp conflict in the testimony, it was necessary to evaluate the testimony after observing the demeanor of the witnesses and giving weight to such testimony as is found credible. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N. J. 546 (1954).

From my evaluation and assessment of the testimony, I am persuaded that the version given by the Division's witnesses was credible and forthright. On the other hand, I completely discount the testimony of the licensee's witnesses because they do violence to both logic and common experience. It would be stretching credulity to the utmost to accept Dorio's testimony that in the

few minutes elapsing from the time agent D left the premises until Dorio handed the bottle of whisky to him, Dorio went to his home and obtained the bottle of whisky. The versions given by Dorio and Toborowsky seem to be woven out of whole cloth.

The fact is, as testified by the agents, that Dorio emerged directly from the tavern within a few minutes after agent D left the tavern and handed the bottle to the agent. Their testimony is consistent with common experience and stands in a better light.

I conclude that the testimony herein generates no doubt whatever that there was in fact a sale and delivery by the licensee's agent and that the licensee permitted and suffered the removal of the said alcoholic beverage in its original container from the licensed premises, in violation of Rule 1 of State Regulation No. 38.

Accordingly, it is recommended that licensee be found guilty of said charges. Licensee has no prior adjudicated record of suspension of license.

It is further recommended that the license be suspended on the first charge for sixty days, Re Truncale, Bulletin 1882, Item 3; and on the second charge for fifteen days, Re Rios, Bulletin 1882, Item 8, making a total suspension of seventy-five days.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 12th day of May, 1970,

ORDERED that Plenary Retail Consumption License C-58, issued by the Board of Commissioners of the City of Perth Amboy to Flat Iron Tavern, Inc., for premises 430 New Brunswick Avenue, Perth Amboy, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1970, commencing at 2:00 a.m. Wednesday, May 27, 1970; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. Monday, August 10, 1970.

Richard C. McDonough
Director.

5. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary Proceedings against

SUSSEX LANES
t/a King Pin Liquors
43 Sparta Centre Street
Sparta, N. J.,

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-10, issued by the Township Council of the Township of Sparta.

Joseph J. Kelly, Esq., Attorney for Licensee.
Walter H. Cleaver, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On January 14, 1969, you possessed, had custody of and allowed, permitted and suffered in and upon your licensed premises, alcoholic beverages in bottles which bore labels which did not truly describe their contents, viz.,

One quart bottle labeled 'Gordon's Distilled London Dry Gin, 90 Proof',

One quart bottle labeled 'Old Fitzgerald Straight Bourbon Whiskey, 100 Proof', and

One quart bottle labeled 'Old Forester Kentucky Straight Bourbon Whiskey, 86 Proof';

in violation of Rule 27 of State Regulation No. 20."

Agent N testified that on January 14, 1969 he visited the licensed premises and tested thirty-nine bottles of the open stock of liquor. He seized the three bottles mentioned in the charge after his preliminary tests disclosed that the contents of the said bottles were low in proof and thus did not correspond with their labels. He further testified that the bottles in question and three unopened bottles of same brands (one of each brand) were brought by him to the Division's laboratory for chemical analysis.

John P. Brady, a qualified chemist, testified that in behalf of the Division he made an analysis of the contents of the bottle labeled "Gordon's Distilled London Dry Gin, 90 Proof" and the tests disclosed it contained 43.25 percent of alcohol by volume and 86.5 proof. Mr. Brady stated that "the solids were approximately the same type of solids that would be expected in gins. The color fell within the classification

of 22 units indicating it was not due to evaporation." Moreover Mr. Brady concluded from the analysis of the gin that it was not genuine as labeled.

Mr. Brady further testified that he analyzed the contents of "Old Fitzgerald Straight Bourbon Whiskey, 100 Proof" and found the proof to be 96.4 and its acids were 74.4 grams per 100 liters, whereas an analysis of the samples of the genuine type of the same brand which has been taken from an unopened bottle disclosed that the acid content ranged from 79.0 to 81.6. Mr. Brady concluded that the contents of said bottle were not genuine as labeled.

Mr. Brady also testified that an analysis of the contents of "Old Forester Kentucky Straight Bourbon Whiskey, 86 Proof", disclosed it to be 81.6 and its acids were 60.0 grams per 100 liters, whereas an analysis of a genuine unopened bottle of the same brand showed the proof to be 87.2 and acids 76.8 grams per 100 liters. Mr. Brady stated that as a result of the proof and acids found in the bottle in question being low it was his conclusion that the contents of said bottle were not genuine as labeled.

Leo Bernstein testified that he is a chemist and has a master's degree in chemistry; that he has had experience in the alcohol field as a research chemist and also for eight years was employed as a senior chemist by a large distilling corporation; that he analyzed the contents of the bottle in question in behalf of the licensee and even though his findings were substantially similar to the findings of Mr. Brady, especially as to the proof in acid content of the respective brands, in his opinion, because of the bottles having had pourers on them and having been in the licensed premises for long periods of time it would appear that evaporation caused the change in the contents in the bottles in question.

The licensee is responsible for any alcoholic beverages not truly labeled found upon his licensed premises Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156; as the court stated in that case at p. 159:

> "* * *We find nothing within the Alcoholic Beverage Control Act, R. S. 33:1-1, et seq., to indicate an intent that the holder of a retail consumption license must have knowledge that he possesses illicit beverages in order to make him amenable to disciplinary action. Our courts have consistently held that such knowledge is not an essential ingredient to conviction for possession under statutes similar to the one under consideration." See also Panda v. Driscoll, 135 N.J.L. 164 (E. & A.).

William H. J. Ely, Jr., president of the corporate-licensee testified that he operated the licensed premises and that the three bottles were slow moving items and each had a pourer thereon. He further stated: "I know nobody tampered with them and nobody put water in them or diluted them with alcohol."

Although the licensee appeared sincere in his testimony that he did not know why the contents of the three bottles were

not genuine as labeled (which both chemists agreed to be the case), the courts have held that knowledge on the part of the licensee is not a prerequisite to a finding of guilt in a matter such as is now before me.

After careful examination of the testimony I am satisfied that the charge herein has been proven by a fair preponderance of the evidence. Therefore, it is recommended that the licensee be found guilty thereof. Cf. Re Dorf, Bulletin 1727, Item 7.

Licensee has a prior dissimilar record. Effective May 31, 1966 its license was suspended for ten days by the Director for sale of alcoholic beverages to a nineteen-year-old minor. Re Sussex Lanes, Inc., Bulletin 1683, Item 8.

It is recommended that the licensee's license be suspended on the instant charge for a period of twenty days (Re Gordon Compton's Surrey Inn, Inc., Bulletin 1896, Item 12), plus five days for the past dissimilar record of suspension which occurred in the past five years (Re The 331 Broad Ave. Corp., Bulletin 1895, Item 2), or a total suspension of twenty-five days.

Conclusions and Order

Written exceptions to the Hearer's report and argument thereto were filed by the licensee pursuant to Rule 6 of State Regulation No. 16.

I find that the matters contained in the exceptions have either been considered in detail by the Hearer in his report or are without merit.

Therefore, having considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions and argument filed with reference thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of May, 1970,

ORDERED that Plenary Retail Consumption License C-10, issued by the Township Council of the Township of Sparta to Sussex Lanes, t/a King Pin Liquors, for premises 43 Sparta Centre Street, Sparta, be and the same is hereby suspended for twenty-five (25) days,*commencing at 2:00 a.m. Thursday, May 28, 1970, and terminating at 2:00 a.m. Monday, June 22, 1970.

RICHARD C. McDONOUGH
Director.

*By order dated May 26, 1970, the suspension was deferred to commence at 2:00 a.m. Sunday, May 31, 1970 and to terminate at 2:00 a.m. Thursday, June 25, 1970.

6. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS AND HORSE RACE BETS) - LICENSE SUSPENDED FOR 60 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
G. G. H. CORP. t/a The Spot 535-37 Liberty Street Camden, N. J.,	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-117, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden.	)	

Novack & Trobman, Esqs., Attorneys for Licensee.
Edward F. Ambrose, Esq., Appearing for Division.

BY THE DIRECTOR:

Licensee pleads non vult to charge alleging that on divers days between April 21 and April 29, 1969, it permitted gambling, viz., the acceptance of numbers and horse race bets on the licensed premises, in violation of Rule 7 of State Regulation No. 7.

Absent prior record, the license will be suspended for sixty days, with remission of five days for the plea entered, leaving a net suspension of fifty-five days. Re Huneke, Bulletin 1899, Item 11.

Accordingly, it is, on this 12th day of May 1970,

ORDERED that Plenary Retail Consumption License C-117, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden to G. G. H. Corp., t/a The Spot, for premises 535-37 Liberty Street, Camden, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1970, commencing at 2:00 a.m. Thursday, May 28, 1970; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. Wednesday, July 22, 1970.

Richard C. McDonough
Director