

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

BULLETIN 2372

October 20, 1980

TABLE OF CONTENTS

1. APPELLATE DECISIONS - 1466 WEST STATE STREET CORP. v. TRENTON.
2. DISCIPLINARY PROCEEDINGS (Newark) - EMPLOYEE COMMITTED AN UNPROVOKED ASSAULT UPON A PATRON - LICENSE SUSPENDED FOR THIRTY DAYS - DIRECTOR PERMITTED THE PAYMENT OF A FINE IN LIEU OF SUSPENSION.

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

BULLETIN 2372

October 20, 1980

1. APPELLATE DECISIONS - 1466 WEST STATE STREET CORP. v. TRENTON.

1466 West State Street Corp.,	:	
	:	
Appellant,	:	CONCLUSIONS
	:	
vs.	:	AND
	:	
City Council of the City of	:	ORDER
Trenton,	:	
	:	
Respondent.	:	
-----	:	
David J. Meeker, Esq., Attorney for Appellant.		
Stanley A. Adamcik, Esq., Attorney for Respondent.		
John S. Piersanti, Esq., Attorney for Objectors.		

Initial Decision Below

Hon. J. Roger Persichilli, Administrative Law Judge

Dated: December 12, 1979

-

Received: December 13, 1979

BY THE DIRECTOR:

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

I have reviewed the entire record herein including the transcripts of testimony, the exhibits and the Initial Decision, and adopt the conclusions of the Administrative Law Judge as my conclusions herein. Hence, I shall affirm the action of the respondent.

The Administrative Law Judge recommended affirmance of the action of the respondent which denied appellant's application for a place-to-place transfer of its plenary retail consumption license. He grounded the Initial Decision upon the following:

1. the proposed transfer site was less than five (5) hundred feet and the transfer from the existing site therefore would be in violation of the local ordinance; and
2. that the proposed transfer would be contrary to "the public health, safety and general welfare of the community".

The Administrative Law Judge properly weighed the testimony of the witnesses with respect to the distance between the existing licensed premises and the proposed site; and he concluded that the evidence adduced by the witness for the respondent was more

credible. In addition thereto, he made a personal inspection of both sites and actually measured the distance between them. His measurements coincided substantially with those presented by the witness for the respondent. This distance properly measured would be less than five (5) hundred feet which is in clear violation of the statute. N.J.S.A. 33:1-76; Hopkins v. Newark 4 NJ Super. 484 (App. Div. 1951); Karam v. ABC, 102 NJ Super. 291 (App. Div. 1968).

The second ground is equally compelling. As noted by the Administrative Law Judge, the proposed site in question is located in an area which is primarily residential and contains a small number of service stores. The proposed site is located between a pizza parlor, according to the evidence acts as a focal point for many of the area's youngsters who would come in contact with this drinking establishment. Furthermore, there has been abundant evidence presented that many residents of the community, including those who maintain businesses therein, a church and four civic associations, have voiced objections to the introduction of a retail consumption licensed at the proposed site. They feel that it will attract undesirable elements, serve to deteriorate the area, and adversely, negatively, affect the safety, morals and general welfare of the community.

As the Court emphasized in Lyons Farms Tavern v. Mun. Bd. of Alc. Bev., Newark, 55 NJ 292, at page 302 "responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place is primarily committed to municipal authorities, N.J.S.A. 33:1-19,24; Laurino v. State of New Jersey, Div. of Alc. Bev. Control, 81 NJ Super. 220,227 (App. Div. 1963). In allocating spheres of operation by the State Division and municipal authorities, the Legislature wisely recognized that ordinarily local officials are thoroughly familiar with their community's characteristics, the nature of a particular area and the dangers associated with the sale of alcoholic beverages. Consequently, it provided for acceptance of local sentiments in a number of fields of liquor control. Borough of Fanwood v. Rocco, 33 NJ 404,412 (1960). "Obviously when the lawmakers delegated to local Boards the duty 'to enforce primarily' the provisions of the act it invested them with a high responsibility, a wide discretion, and intended their principal guide to be the public interest". Lubliner v. Bd. of Alcoholic Bev. Control of the City of Paterson, 33 NJ 428, 446 (1960).

The Court continued "although the Director conducted 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".

The Court in Lyons Farms referred to the Fanwood case where a holder of a package store license whose place of business was located on the outskirts of Fanwood sought a transfer of the license to premises about a mile and a half away in the middle of the Borough's only business center. The proposed new location was opposite the railroad station, two doors away from a confectionery store where local teenagers congregated, and was about a

block away from a church and two blocks away from a public school. There was strong public sentiment against the package store in that section of the Borough.

The Court spoke of the wise stipulation of the Legislature for recognition of local sentiments in the administration of the Alcoholic Beverage Law. The situation in the case ad judica is substantially similar to Fanwood.

Finally, I find that the decision of the local Board represented a reasonable exercise of its discretion on the basis of the evidence presented, and that there was an adequate and reasonable basis in the evidence, to warrant respondent's determination to deny the appellant's application.

Therefore, I shall affirm the recommended decision and consequently affirm the action of the respondent herein.

Accordingly, it is, on this 22nd day of January, 1980

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

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

IN RE APPEAL OF
1466 WEST STATE STREET
CORPORATION

:
:
:

INITIAL DECISION
DKT. NO. ABC 2814-79
4380

APPEARANCES:

David Meeker, Esq., a Professional Corporation, on
behalf of 1466 West State Street Corporation,
Appellant

Stanley Adamcik, Esq., City Attorney, on behalf of the
City of Trenton, Respondent

John S. Piersanti, Esq., on behalf of the Objectors

WITNESSES:

For Respondent:

Edward Franks, A.B.C. Inspector for the City of
Trenton

For Objectors:

Henry Rouse, Anthony Tucker, Jock N. Reid,
Thure Anderson, Lelia Wishart, Joe Brown and
Margerie Kooper

Appellant did not produce witnesses on its behalf.

DOCUMENTS IN EVIDENCE:

- J-1 A license, an application, and a document entitled
Investigators Report
- J-2 A map of the subject area prepared by Marvin
Chmielewski, a licensed surveyor

DKT. NO. ABC 2814-79

- J-3 A document entitled The Report of Consent of the Hotel Hamilton Corporation
- J-4 A proof of service document
- J-5 The transcript of May 29, 1979
- J-6 The Resolution of City Council, effective May 29, and adopted June 7, 1979

- C-1 A letter dated September 21, 1979, from the Trenton Council of Civic Associations
- C-2 A documents the same as Exhibit J-2, but with markings on it made by Detective Franks

- O-1 A Petition signed by objectors to the present application, consisting of three pages
- O-2 Letters of objection to the present application consisting of thirty-four pages

BEFORE THE HONORABLE J. ROGER PERSICHILLI, A.L.J.

The matter sub judice is an appeal from the action of the City Council of the City of Trenton which, by Resolution 79-419 adopted on June 7, 1979, denied appellant's application for a place to place transfer of Plenary Retail Consumption License No. 1111-32-112-002.

Notice of Appeal and a Petition of Appeal were served on or about July 10, 1979 to Joseph H. Lerner, Director, Division of Alcoholic Beverage Control, Department of Law and Public Safety. An Answer was filed on behalf of City Council of the City of Trenton and the matter was transmitted to the Office of Administrative Law for determination, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on October 2, 1979 at the Office of Administrative Law in Trenton, New Jersey. All parties were given the opportunity to be heard and to cross-examine witnesses. The hearing record was closed on November 13, 1979.

City Council denied the proposed transfer on two separate grounds, as follows:

***1. The distance between the nearest entrance of the proposed premises and that of an existing premise is less than 500 feet measured along a course which would be normally walked by a person walking properly and not in violation of State Law; and which proximity constitutes a bar to the grant of the application by the ordinances of the City of Trenton.

"2. The sentiment expressed by the residents of the neighborhood is overwhelmingly and forcefully opposed to the presence of the proposed licensed activity and constitute evidence compelling the conclusion that the granting of the license would be contrary to the interests of the public health, safety, morals and general welfare."

Appellant contends that finding No. 1, above recited, is against the weight of evidence and finding No. 2, above recited was erroneous and not supported by the evidence adduced at the hearing. Respondent's Answer denies the allegations of the Appeal and relies upon the distance limitations imposed by Section 4.3 of the Revised General Ordinances of the City of Trenton and the statements of community residents appearing before City Council on May 29, 1979.

In the de novo appeal herein, City Council presented one witness, Edward Franks, the ABC Inspector for the City of Trenton. Investigator Franks testified that he took alternate routes of measurement between the proposed site and Sanhican Liquor Shoppe, an existing licensee located at 1572-1574 Edgewood Avenue, in order to determine if the site conformed to the distance limitations of Revised City Ordinance, Section 4.3. The pertinent portion of said ordinance states:

"No plenary retail consumption license, plenary retail distribution license or club license shall be issued for or transferred to premises within 500 feet of any other premises licensed under a plenary retail consumption license, plenary retail distribution license or club license. The said 500 feet shall be measured from the nearest entrance of a premise sought to be licensed to the nearest entrance of an existing premise, in a normal way that a pedestrian would properly walk."

In each instance, the measurement was under 500 feet. His initial measurement, the shortest route, was from the entrance of the proposed site, along Bruce Park Drive and diagonally across Edgewood Avenue to the existing package store, Sanhican Liquor Shoppe. This distance of 415 feet was said to be the route of travel "normally" taken by pedestrians, as actual observations indicated. (See green dotted line in C-2 in evidence) The longest route measured by Inspector Franks extended from the entrance of the proposed site, around the corner of Bruce Park Drive and Edgewood Avenue, crossing Edgewood Avenue, west of a grass island, to the Shopping Center Walkway (see blue dotted line in J-2 in evidence), thence along the Center's walkway to the package store. This route of travel, described as the "proper" route, was measured at 479 feet. The testimony of the witness occasioned discussion and confusion concerning points of measurement vis-a-vis door locations. Suffice it to state that all other matters relating

DKT. NO. ABC 2814-79

to Inspector Frank's testimony are not relevant. His shortest measurement is 415 feet and his longest is 479. He did not accept the measurements of appellant's expert.

The appellant produced no witnesses at the de novo hearing. It elected to rest upon the transcribed record before City Council, J-5 in evidence. At the local hearing, the appellant produced John E. Christ, a highway and traffic engineer. Mr. Christ delineated two routes of measurement, one which was approximately 460 feet and corresponded to Inspector Frank's route of 479 feet and a second which traversed the same route of travel but extended further east along Edgewood Avenue, purportedly to the edge of a sidewalk and across Edgewood, east of a grass island, to the Shopping Center walkway and thence to the package store. The distance was 530 feet. Mr. Christ suggested that this route was the proper and legal way to travel from these two points. He relies upon N.J.S.A. 39:4-34 for his interpretation of the proper route of travel. Said statute recites:

"Where traffic is not controlled and directed by a police officer or a traffic control signal, pedestrians should cross the roadway within a crosswalk or, in the absence of a crosswalk and where not otherwise prohibited, at right angles to the roadway, and when crossing at a point other than at a crosswalk shall yield the right of way to all vehicles on the roadway." (Emphasis supplied.)

From the testimony of Mr. Franks and Mr. Christ, it is undisputed fact that the Sanhican Liquor Shoppe is located in a small strip Shopping Center along Edgewood Avenue at the intersection of Bruce Park Drive and Edgewood Avenue. The Shopping Center has a sidewalk, or concrete apron, for the use and benefit of the Center's patrons. The stores are recessed and parking is provided directly in front of the stores. The front parking yard tapers to the east and terminates with a grass island that separates the stores' sidewalk area from the street. There are no crosswalks at this locale. (A review of the plans in evidence, J-2 or C-2, is helpful).

In view of the diversity and nuances over what appeared to be an exacting question of measurement, the undersigned advised the parties that he intended to personally inspect the area and measure the distances. Appellant's counsel offered no objection but applauded this procedure. Upon notice to the parties by telephone, the undersigned visited the subject area on November 27, 1979 for purposes of corroborating the measurements in question. Mr. Adamcik was the only party who appeared.

DKT. NO. ABC 2814-79

The shortest distance, depicted in C-2 in evidence, was approximately 415 + feet. The longest distance, west of the grass island, was approximately 460 + feet. I reject the measurement advanced by Mr. Christ which extends east of the grass island. (The reader is again referred to the plans in evidence) This measurement defies logic, and common sense and cannot be considered normal or proper. A pedestrian would have to walk away from his intended goal, around a corner, travel over a portion of a paved exterior of "Mr. P's" (identified as No. 4 on J-2 and C-2) which is not part of a normal sidewalk, cross Edgewood Avenue at the very edge of this paved area, pass along the eastern side of the grass island, and continue along the Shopping Center's sidewalk to the package store. Using this path of travel, the appellant might extend beyond the 500 foot prohibition...much in the manner that he would extend beyond 600 feet were he to continue another 50 feet in the opposite direction, easterly along Edgewood Avenue. I find this suggested path of measurement to be totally unreasonable and not in accord with the reasoning of the Court in Karem v. ABC, 102 N.J. Super. 291, to wit:

"Of the various ways, if more than one, by which a pedestrian can properly go from one place to another, the shortest is to govern." (at p. 293)

Considering Karem, supra, Section 4.3 of the Revised General Ordinances of the City of Trenton and N.J.S.A. 39:4-34, I find that, in the absence of crosswalks in this locale, a right angle to the road (hence a proper manner of crossing) could be made along either of Inspector Frank's routes. One might characterize the shorter path as the normal route of travel and the longer path as the proper route of travel. Both lines of measurement are within 500 feet. Thus, the appellant is precluded from establishing operations at the proposed site.

The objectors were represented by seven members of the community. Business persons and area residents testified. Although the reasons for objection varied with each individual, the common thread inherent to the objections was the preservation of the neighborhood. This section of the City of Trenton had undergone a transitional period, as several witnesses testified, and has stabilized and is making a "come-back" from its turbulent times of real estate turnovers. Its present character was described as stable, peaceful and tranquil. The area was further described as basically residential with a small number of local convenience and service stores. The appellant seeks to locate between a pizza parlor and a laundromat. Both businesses attract area residents and the pizza parlor acts as a focal point for area youngsters. The area contains many families with young children. The paramount concerns were for the safety and welfare of the children as well as the adult population. It was felt that a bar would generate additional traffic, would attract patrons from a broad area, cause congestion, create noise and would create a general deterioration of a sensitive area, i.e., one which is capable of backsliding instead of continuing its forward progress.

DKT. NO. ABC 2814-79

Twelve objectors voiced their objections before City Council. Their objections covered a broad spectrum, ranging from economic concerns such as potential losses in property values to concerns which were more heartfelt. Mr. Anthony Tucker testified that "I'm not as concerned now about the property value as I am of the value of my children...We do not want...we do not need another drinking place in our community. We are the community. Please abide by our wishes..."

O-2 in evidence comprises letters of objection, consisting of thirty-four pages, with over 200 persons objecting. There is some duplication of signatures. The objecting organizations are the Church of Blessed Sacrament, the Cadwalder-Stuyvesant Civic Association, Hiltonia Association, West End Civic Association, and the Berkely Square Association, Inc. The Trenton Council of Civic Associations opposed the transfer by letter dated September 21, 1979. (C-1 in evidence)

O-3 in evidence comprises a Petition of three pages signed by 69 persons who are opposed to the transfer.

The foregoing objections provided a unified community voice in strong opposition to the application.

Based upon my observation of the demeanor of the witnesses, the testimony adduced at the hearing, the documents received in evidence, together with the arguments of counsel and post-hearing submissions received from Mr. Adamcik and Mr. Piersanti, I FIND:

1. The appellant, 1466 West State Street Coroporation, a corporation of the State of New Jersey, sought a person-to-person and place-to-place transfer of a Plenary Retail Consumption License No. 111-32-112-002 from 456 South Broad Street, to 1466 West State Street, Trenton, New Jersey.

2. On June 7, 1979, the respondent, City Council of the City of Trenton, denied the application for a place-to-place transfer (and therefore denied the person-to-person by implication) by Resolution 79-419 effective May 29, 1979.

3. Said denial was founded on two separate and distinct grounds:

(a) the distance between the proposed licensee and an existing licensee was less than 500 feet in violation of Section 4.3 of the Revised General Ordinances of the City of Trenton; and

(b) the neighborhood sentiment was strongly opposed to the transfer which was determined to be contrary to the public health, safety, morals and general welfare of the community.

DKT. NO. ABC 2814-79

4. The area in question is primarily residential and contains a small number of convenience and service stores located in the proximity of the proposed site.

5. The proposed site is located between a pizza parlor and a laundromat.

6. The area contains numerous children.

7. The pizza parlor acts as a focal point to many of the areas' youngsters.

8. The area has undergone a period of transition, exemplified by the turnover of homes, and is currently stable and is particularly sensitive to change or negative influences.

9. The community, represented by residents and persons who maintain businesses therein, have voiced strenuous objections and consider the introduction of a retail consumption license as a negative influence which will adversely affect the health, safety, morals and general welfare of the community as a whole.

10. Section 4.3 of the Revised General Ordinances of the City of Trenton prohibits the transfer of a liquor license within 500 feet of an existing license, measured from entrance to entrance, in a normal way that a pedestrian would properly walk.

11. The normal way that a pedestrian would walk is under 500 feet, as measured from entrance to entrance.

12. The proper way that a pedestrian would walk is under 500 feet, as measured from entrance to entrance.

13. The City Council's two separate findings, recited under paragraph three herein, are supported by a preponderance of the competent evident of record.

The general grant or denial of an alcoholic beverage license rests in the sound discretion of the local licensing authority in the first instance. In order to prevail in an appeal, the appellant must show unreasonable action on the part of the local authority, constituting a clear abuse of their discretion. Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484, 1962; Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control of Newark, 55 N.J. 292 (1970); and Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control of Newark, 68 N.J. 44 (1975). The burden of proof in establishing the action of the Board was erroneous rests entirely with appellant. See Downie v. Sumerdale, 44 N.J. Super. 84 (App. Div. 1957); Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957). The decision of the Board should not be reversed unless the Court finds as a fact that there was a clear abuse of discretion, unwarranted finding of fact, or mistake of law. (See Nordco, supra.)

DKT. NO. ABC 2814-79

Since the application did not conform to the distance requirements set forth in the Ordinance, the City Council properly followed the mandates of the Ordinance and denied the application. Tube Bar v. Commuter Bar, Inc., 18 N.J. Super. 351 (App. Div. 1952)

In this instance, the City Council also considered the sentiment of the community and denied the transfer application in this separate basis as well. The record supports this independent finding by City Council by a preponderance of credible evidence. Respondent gave due consideration to the sentiments of persons from the community; it did not act in arbitrary fashion. Therefore, I CONCLUDE that the respondent acted in the circumspect and reasonable exercise of its discretionary authority when it refused to grant the transfer application sub judice.

Accordingly, it is hereby ORDERED that the denial by the City Council of the City of Trenton of the application for a place-to-place transfer of Plenary Retail Consumption License No. 111-32-112-002 from 456 South Broad Street to 1466 West State Street, Trenton, New Jersey, be AFFIRMED.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the Director 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-1 et seq.

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

2. DISCIPLINARY PROCEEDINGS - EMPLOYEE COMMITTED AN UNPROVOKED ASSAULT UPON A PATRON - LICENSE SUSPENDED FOR THIRTY DAYS - DIRECTOR PERMITTED THE PAYMENT OF A FINE IN LIEU OF SUSPENSION.

In the Matter of Disciplinary
Proceedings against

Joseph Martino, Inc.
244 Mulberry Street
Newark, New Jersey

Holder of Plenary Retail Consumption
License No. 0714-33-384-001 issued
by the Municipal Board of Alcoholic
Beverage Control of the City of Newark.)

CONCLUSIONS

AND

ORDER

S-11,664

Allen C. Marra, Esq., Attorney for Licensee.
Heikki Leesment, Esq., Deputy Attorney General, representing the
Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded "not guilty" to a charge alleging that, on January 19, 1978, it committed, through its employee, an assault upon a patron, in violation of Rule 5 of State Regulation No. 20 (now N.J.A.C. 13:2-23.6).

Paul Montalbano, a National Labor Relations Board staff attorney, testified on behalf of the Division. He stated that he entered licensee's establishment soon after 8:00 p.m. on January 19, 1978, where he met fellow staffers, following a Union meeting.

He complained to the bartender on-duty, Edward Bachley, on two occasions: once, to caution him against removing beer bottles partially full, and, then, to advise that a co-worker's change was missing from the bar soon after purchasing a beer.

Immediately following the second complaint, the bartender picked up an empty bottle and struck Montalbano with it on the left side of his jaw. Montalbano stated that he made no threatening gestures or statements to the bartender, did not raise his voice, or touch him prior to the alleged assault.

The bartender then grabbed Montalbano's jacket and attempted to pull him over the bar, but was prevented from doing so by other patrons.

William Grant, another N.L.R.B. staff attorney present that evening, corroborated Montalbano's testimony. He was fifteen feet away when his attention was directed toward Montalbano by the sound of his bar stool scraping the floor. He saw Bachley with a bottle in his hand, directing it toward Montalbano, striking him upon the side of his head. He noted that Montalbano's hands were upon the bar.

Patricia Orner, the co-worker whose change allegedly disappeared from the bar, testified that she was sitting next to Montalbano. Her attention was drawn toward him also by the sound of his bar stool scraping upon the floor. As she turned her head, she saw the bartender holding a bottle in his hand, lift it and strike Montalbano with it. She too, stated that Montalbano's hands were upon the bar at that time.

Newark Police Lieutenant Frank Donnellan testified on behalf of the licensee. He was sitting twenty feet away and did not know what precipitated the altercation. His attention was drawn to the pair because of a comment that there was a fight in progress "down the bar." He separated the participants and commented upon certain events alleged to have occurred subsequently, but which are not relevant to the determination of this hearing.

Gary Schartz, a postal inspector present in the bar at the time, testified that he was seated ten feet away, facing the other direction. His first impression was that of the bartender "fending off" Montalbano's hand. He did not see the bartender strike Montalbano with the bottle. He did not know what preceded his viewing of the bartender "fending off" Montalbano.

Edward Shey of the U.S. Marshall's Office testified that he was sitting at the end of the bar when his attention was caught by an uplifted arm belonging to a patron whom he could not identify. He did not see the bartender strike the patron on his face.

Bachley, the bartender, testified that Montalbano was abusive and touched his sweater. They then came to blows. He denies hitting him across the face as was testified to by all three Division witnesses. His testimony at the hearing was, to some extent, at variance with his prior written statement in which he stated that he "reached over and hit him."

- I -

It is apparent that the critical issue presented for determination is factual.

In evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control, (App. Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented in this proceeding, the credibility of witnesses must be weighed. 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); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

I have had an opportunity to observe the demeanor of the witnesses as they testified and, in view of the conflict in the testimony, I have made a careful analysis and evaluation of their testimony.

I am persuaded that the version recited by Montalbano, Grant and Orner, relative to the events which took place that evening and culminating in an unprovoked assault upon Montalbano by the bartender, Bachley, was credible and factual.

On the other hand, I find the testimony of licensee's witnesses inconclusive. None of them observed the fight from its initiation. All stated that they did not see the assault with a bottle occur. It is apparent from their testimony that their attention was drawn to the dispute subsequent to this most crucial event.

The bulk of their testimony dealt with what transpired subsequent to the parties being separated, all of which bears no relevance whatsoever to the disposition of this charge.

I find that the assault upon the patron was initiated by the corporate licensee's employee, Bachley.

My examination of the facts and the applicable law generates no doubt that the charge herein has been established by a fair preponderance of the believable evidence.

I, therefore, recommend a suspension of corporate licensee's Plenary Retail Consumption License for thirty (30) days.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the licensee, and written Answers thereto were submitted on behalf of the Division, pursuant to N.J.A.C. 13:2-19.6.

In its Exceptions, the licensee argues that a review of the record as a whole indicates that the charge has not been sustained by a preponderance of the believable evidence. It further offers, in the alternative as mitigation, that this licensed business has been family operated since 1938 at the present location without violation and an appropriate applicant for a fine, in compromise, in lieu of license suspension.

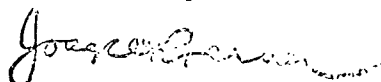
My review of the evidence indicates forthright and persuasive testimony by three Division witnesses that the bartender struck the patron in the face with a beer bottle. The witnesses for the licensee were not proximate to this incident, and their failure to see the bottle incident denotes their inability to credibly testify to this occurrence at its inception. I find no legal justification for the bartender to strike the patron with a bottle. Thus, I find this Exception to be without basis in law or fact, and I find the licensee guilty of the charge.

In the exercise of my discretion pursuant to N.J.S.A. 33:1-31, upon my assessment of all of the circumstances herein, including the fact that the licensee does not have a prior adjudicated record, I shall favorably consider the licensee's request to pay a fine of \$900.00 in compromise, in lieu of suspension of license for thirty (30) days.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's Report, the written Exceptions filed thereto by the licensee and the written Answers submitted on behalf of the Division, I concur in the findings and recommendations of the Hearer, and adopt them, subject to the permission afforded to pay a fine in lieu of suspension, as my conclusions herein.

Accordingly, it is, on this 28th day of January, 1980,

ORDERED that a fine in the amount of \$900.00 be and the same is hereby accepted in lieu of suspension of license for thirty (30) days.



JOSEPH H. LERNER
DIRECTOR