

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Dr. Cranford, N.J. 07016

BULLETIN 2084

February 7, 1973

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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Dr. Cranford, N.J. 07016

BULLETIN 2084

February 7, 1973

1. APPELLATE DECISIONS - J. J. and SONS v. JERSEY CITY.

J. J. and Sons (corporation),)	
t/a West Side Wine & Liq.)	
Store,)	
)	
Appellant,)	
v.)	On Appeal
)	
Municipal Board of Alcoholic)	CONCLUSIONS and ORDER
Beverage Control of the City)	
of Jersey City,)	
Respondent.)	
-----)	

John W. Yengo, Esq., Attorney for Appellant
Samuel C. Scott, Esq., by Bernard Abrams, Esq., Attorney for
Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action of respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which, by resolution dated June 2, 1972, suspended appellant's plenary retail distribution license for premises 753 West Side Avenue, Jersey City, for fifteen days commencing July 9, 1972, after finding appellant guilty of a charge alleging that on January 24, 1972, while appellant's license was then under suspension, alcoholic beverages were sold on the premises.

The effective date of suspension was stayed by order of the Director dated July 11, 1972, pending determination of this appeal.

Appellant contended that the charge was not based upon proper evidence and was the result of a "conspiracy" against it. The Board in its answer denied these contentions.

This appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15; full opportunity was afforded the parties to produce testimony and to cross-examine witnesses.

By stipulation, counsel for both parties agreed that the licensed premises were under suspension on January 24, 1972, which suspension would not terminate until the following day.

The Board introduced testimony of Gladys Petrie (a resident of Jersey City). She stated that on January 24, 1972, in late afternoon, she visited the front of the licensed premises, peered into the interior of the liquor store after noticing a sign on the door indicating premises were closed until January

25. Observing the manager within, whom she knew, she approached the door which was then opened by the son of the manager. She made inquiry concerning their vacation, presuming the closing was for vacation purposes, and learned the owners had recently returned from Puerto Rico. She entered the store, went to a shelf and took a bottle of alcoholic beverage, i.e., a pint bottle of Seagram's 7, for which she paid \$3.47. Her recollection as to the mode of payment was vague as she could not recall if she paid the manager directly or deposited that amount on the counter. She departed after placing the bottle in her shopping bag and walked about fifty feet from the store when she was stopped by a police officer. He inquired about a purchase and she readily admitted buying the bottle. He requested her to accompany him to a nearby store, which she did. There he made a telephone call and, as the officer had seized the aforementioned bottle, the owner of the store, who is a member of the Board, visited another liquor store and obtained a replacement. She was then permitted to depart for home. On cross examination she admitted testifying before the Board that she placed the money for the said purchase on the counter.

Police Officer Walter Cuzzo of the Jersey City Police Department testified that he patrols the beat which encompasses the licensed premises. On January 24, 1972, while on duty, he saw a man emerge from the store carrying a package, whom he stopped, made inquiry and learned that the man was a liquor salesman. While that inquiry was in progress, he noticed a lady emerging from the store carrying a shopping bag. He caught up to that lady (later identified as Mrs. Petrie) and ascertained that she had just purchased a bottle of whiskey. He escorted her to the store owned by the Board member and there called his superior officer after seizing the bottle. Upon arrival of his superior, they returned to appellant's premises.

On cross examination the officer admitted that in the four months during his assignment to the area this was the first alcoholic beverage violation that came to his attention for action. He stated that, upon seizing the bottle, he requested Mrs. Petrie to accompany him to the ice cream store of the Board member because it contained the nearest public phone with a closed booth. He admitted that on a prior occasion he had stopped youthful-looking persons whom he had seen purchase alcoholic beverages in appellant's store. He vigorously denied the accosting of Mrs. Petrie or the surveillance of appellant's premises were planned.

Testifying on behalf of appellant, Ronald High identified himself as a liquor salesman who visited the premises on the day in question because he knew that the premises would be opened for business the next day, and he hoped that he could get an order. He was stopped on leaving by the officer whose inquiry he satisfied, and he then departed. He described the window-shade on the front door as covering three-quarters of the glass pane.

Joseph Fitzgerald testified that he is twenty-one years old and, during the past summer, was stopped by the same officer after he had made a purchase at appellant's premises. Upon verification of his age, he had been permitted to depart.

Appellant's manager Jack Stancanpiano testified that he and his wife are the sole owners of all of the stock of the licensee corporation. On January 24, 1972, preparatory to opening for business on the following day, he and his son were in the premises engaged in cleaning. He had been decorating the windows and his son had gone outside to observe them, leaving the door opened. Thus the door was unlocked when Mrs. Petrie came by and

entered. A discussion about their vacation followed and her request to purchase a bottle was rejected with the explanation that no sale could be made until the following day. He resumed the decorating, Mrs. Petrie left and, a short time later while passing the counter, he found \$3.47 lying upon it. Within ten minutes two police officers entered and advised him of the violation.

The following day Mrs. Petrie returned to his store to explain that the police officer had initiated the inquiry of her concerning the purchase and that she was not the cause of the troubles that inquiry had occasioned.

He described Mrs. Petrie as a frequent customer who oftentimes would pick up a bottle she selected and would place the proper amount of money on the counter and depart. He further described the area as containing numerous stores from which telephone calls could be made, including his own, which would not require the walk to the store of the Board member.

Testimony to be believed must come from the mouths of credible witnesses. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960). The court has defined "credible witness" as "... by a 'credible witness' is meant one whose testimony is worthy of credit, credence, belief -- that is, in more modern phrase, a credible witness." State v. Kenilworth, 69 N.J.L. 114, 116 (1903).

The testimony of Mrs. Petrie and Officer Guozzo was forthright and direct except for some vagueness of recollection with respect to certain unsubstantial matters. Testimony of appellant's principal stockholder and manager that he had entertained purchases by Mrs. Petrie in the past that consisted of the mere depositing of a purchase price on the counter reveals a custom that could and did reappear. Granting the truthfulness of his account of her visit and the admission of finding the cost of the beverage on the counter, his account gives rise to the conclusion that there was a purchase which could have been prevented by his taking pains to deny her admission. At the very least, he should have kept her under observation during her visit. He cannot now complain of the continuance of the custom on the prohibited day.

The truth of charges in a proceeding before an administrative agency need be established only by a mere preponderance of the believable evidence, not beyond a reasonable doubt. Atkinson v. Parsekian, 37 N.J. 343 (1962); Butler Oak Tavern v. Div. of Alcoholic Bev. Control, 20 N.J. 373 (1956); In re Schneider, 12 N.J. Super. 449 (App.Div. 1951); Kravis v. Hock, 137 N.J.L. 252 (Sup.Ct. 1948).

I find the contention that appellant was the victim of a conspiracy to be totally without merit. The telephone call made by the officer to his superior from the store of the Board member supports no such contention. It would be most natural for an officer encountering his first alcoholic beverage violation to summon aid, and the immediate proximity of a telephone in the store of a Board member could be merely a fortuitous coincidence. The fact is that the officer acted with due diligence in consonance with his duty and obligation under the circumstances.

It is concluded that the testimony presented is fully established by a fair preponderance of the credible evidence, indeed by substantial evidence, that appellant is guilty of the charge preferred. The burden of establishing that the Board acted erroneously and in an abuse of its discretion is upon appellant. There was patently no abuse of discretion which would warrant reversal, nor was there an unwarranted finding of fact or mistake of law by the Board. Cf. Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502; Greenstein v. Elizabeth, Bulletin 2065, Item 2.

Appellant has failed to sustain the burden of establishing that the Board's action should be reversed. Rule 6 of State Regulation No. 15. It is therefore recommended that an order be entered affirming the action of the Board, dismissing the appeal and fixing the effective dates for the suspension imposed by the Board and stayed by the Director's order pending entry of a further order herein.

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 herein, including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 11th day of December 1972,

ORDERED that the action of respondent be and the same is hereby affirmed, and the appeal be and the same is hereby dismissed; and it is further

ORDERED that my order dated July 11, 1972 staying the respondent's order of suspension pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Distribution License D-123, issued by the Municipal Board of Alcoholic Beverage Control for the City of Jersey City to J. J. and Sons (corporation), t/a West Side Wine & Liq. Store for premises 753 West Side Avenue, Jersey City, be and the same is hereby suspended for fifteen (15) days commencing at 2:00 a.m. Tuesday, January 2, 1973 and terminating 2:00 a.m. Wednesday, January 17, 1973.

Robert E. Bower
Director

2. APPELLATE DECISIONS - SMITTY'S OWL LOUNGE v. NEWARK.

Smitty's Owl Lounge, Inc.,)	
)	
Appellant,)	On Appeal
v.)	
)	
Municipal Board of Alcoholic)	CONCLUSIONS and ORDER
Beverage Control of the City)	
of Newark,)	
Respondent.)	

Yankowitz & Tessler, Esqs., by David E. Yankowitz, Esq.,
Attorneys for Appellant
William H. Walls, Esq., by Beth M. Jaffe, 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 Municipal Board of Alcoholic Beverage Control of the City of Newark (Board) whereby it suspended appellant's plenary retail consumption license for sixty days commencing May 8, 1972, after finding appellant guilty of allowing, permitting and suffering the unlawful possession of, and the unlawful activity in, narcotic drugs and of allowing and permitting a nuisance activity in that through its employees it offered to and arranged with patrons the procurement and/or sale of narcotic drugs, all in violation of Rules 4 and 5 of State Regulation No. 20.

Upon filing of the appeal herein an order was entered by the Director staying the Board's order of suspension until further order herein.

Appellant contends that the action of the Board should be reversed on the grounds that (a) appellant had no knowledge of any wrong-doing on its premises and acted reasonably and prudently in attempting to maintain its premises in a manner free from all illegal activity, more specifically those involved in the charges preferred, (b) the violations charged against appellant did not in fact occur, and in the alternative pleads that, in the event the Director affirms the findings of the Board, the Director modify the suspension imposed by the Board.

In its answer the Board denies the allegations of the petition and avers that the grounds upon which the Board made its decision were based upon the factual testimony before it from which it in its sound discretion concluded that the penalty imposed was reasonable and proper.

Both parties agreed to present the appeal solely upon the stenographic transcript of the proceedings before the Board pursuant to Rules 6 and 8 of State Regulation No. 15, with leave granted for oral argument of counsel.

It appears from the transcript that two members of the Newark Police Department testified regarding the incident herein.

Detective Eugene Nicholson (a member of the Newark Police force for the past eight years) testified that on November 6, 1971, in civilian attire he entered the premises herein at the request of Officer Sapienza to investigate the allegation of traffic in narcotics. Seated at the bar he was served a drink by a bartender (later identified as Lloyd Rich) who was assisted by bartender Ernie Hightower. He observed two patrons approach Hightower and converse briefly, whereupon Hightower proceeded to a small room behind the bar and removed something from the pocket of a leather coat. He thereupon returned to the bar, handed an object to one of the patrons and accepted currency. The patron then departed. He observed several such transactions. He further overheard conversations including the use of slang terms which he recognized from experience as relating to narcotics. He further observed Hightower pass small foil-wrapped packages to the patrons in exchange for currency. He thereupon summoned Officer Sapienza and together they searched the coat from which Hightower had taken the foil-wrapped packets and found numerous additional packets. An inspection of the contents of the packets showed what appeared to them to be cocaine and heroin. He thereafter forwarded samples to the police laboratory but was not aware of the results of the analysis. He subsequently discovered a package of "suspected marijuana." Officer Nicholson concluded that the licensee was not on the premises during this incident. This witness is not a member of the narcotics squad; he is primarily assigned to the investigation of vice, gambling and liquor violations. The narcotics squad was not involved in this investigation.

Nicholas Sapienza testified that he has been a member of the Newark Police Department for three years. On the evening in question he was informed of possible narcotic activity on the premises. He summoned Detective Nicholson who entered the premises while he (Sapienza) remained outside. Upon being summoned by Nicholson, he entered the premises and assisted Nicholson in the search of the coat. He corroborated Nicholson's testimony regarding the tinfoil packets and concluded his direct testimony with the following statement:

"At the time we weren't aware whether we had heroin or cocaine and in my report I indicated suspected heroin or cocaine. Cocaine is also a narcotic."

The licensee presented numerous witnesses who testified generally as to its good conduct, character and reputation. Additionally, John Freeman (a patron on the evening in question) testified and refuted a substantial portion of the testimony of Nicholson.

I have condensed the evidence presented by the licensee in defense of the charges for reasons which will shortly become apparent.

A charge must be established by affirmative, satisfactory evidence. A guilty finding may not be based upon mere suspicion, no matter how reasonably inferable such suspicion may be. Estoril Lounge, Inc. v. Newark, Bulletin 2022, Item 6.

Neither the physical evidence (i.e., one or more of the seized packets) nor the report of chemical analysis from the police laboratory was presented to the Board. Therefore the Board had before it merely the suspicion of the officers that the packets contained narcotics. Such evidence is wholly insufficient. It is unfortunate that the evidence presented was so lacking in force when it would appear that, with the exercise of reasonable diligence, sufficient evidence could have been presented. The failure to produce such probative evidence is fatally defective.

Thus I find that the appellant has sustained its burden of establishing that the action of the Board was erroneous and should be reversed. Rule 6 of State Regulation No. 15.

Therefore, it is recommended that the action of the Board be reversed and the charges herein be dismissed.

Conclusions and Order

Written exceptions to the Hearer's report with supportive argument were filed by the Board pursuant to Rule 14 of State Regulation No. 15. Written answer to the exceptions was filed by the appellant. In addition, oral argument was had before me.

In arriving at his recommendation that the action of the Board be reversed and the charges herein be dismissed, the Hearer premised his conclusion upon his finding that "[N]either the physical evidence (i.e., one or more of the seized packets) nor the report of chemical analysis from the police laboratory was presented to the Board. Therefore the Board had before it merely the suspicion of the officers that the packets contained narcotics. Such evidence is wholly insufficient."

This matter was presented on appeal solely upon the stenographic transcript of the proceedings before the Board pursuant to Rules 6 and 8 of State Regulation No. 15. When the matter was considered by the Hearer, the report of chemical analysis was not included as part of the transcript because it was apparently inadvertently not marked in evidence at the hearing before the Board.

However, prior to oral argument, the attorney for the appellant stipulated that the said report shall now be included as part of the record in this matter. The certificate of chemical analysis clearly establishes that the contents of certain packets seized at the subject premises and submitted by the local police for analysis contained the following:

	<u>WEIGHT OF CONTENTS</u>	<u>FOUND</u>
LAB -32183-A	.1953 grams	Cocaine
LAB - 32183 -B	1.3898 grams	Marihuana Concentrate (Hashish)
LAB-32184	.2634 grams	6/2% Cocaine
LAB-32185	2.9160 grams	Marihuana (Canabis Sativa)

Weight of the contents of the 10 envelopes by extrapolation was 26.8487 grams.

Since the Hearer did not have the said report of chemical analysis before him, it is understandable that he made the aforementioned finding. However, in view of the said certificate of analysis and after consideration of the entire record, I find that the charges have been established by a fair preponderance of the credible evidence.

In oral argument before me, the attorney for the appellant argues that the principal officer of the appellant was not present when the alleged narcotics activity took place and that, therefore, the appellant should not be inculcated by the unlawful activities of its employees. The law, however, is to the contrary. Rule 33 of State Regulation No. 20. The fact that the licensee did not participate in the violation or that his employees acted con-

trary to instructions given to them by the licensee constitutes no defense to the charges preferred in such disciplinary proceedings. In re Olympic, Inc., 49 N.J. Super. 299; Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); Kravis v. Hock, 137 N.J.L. 252 (Sup.Ct. 1948). I shall, therefore, reject the recommendation of the Hearer and affirm the action of the Board in finding the appellant guilty.

The attorney finally contends, at the oral argument, that the penalty of sixty days was excessive and should be modified. I do not agree with that contention. This Division has imposed a penalty of 180 days or even revocation upon the finding of guilt of such charges. See El Torero, Inc. v. Newark, Bulletin 1989, Item 1 (revocation); Re Richards, Bulletin 1838, Item 1 (revocation); Re Gi-Mo-Do Enterprises (A Corp.), Bulletin 1979, Item 1 (suspension for 180 days). Thus, this contention lacks merit.

Having considered the entire record herein, including the transcripts of testimony, the exhibits, the Hearer's report, the written exceptions and answer to the exceptions filed with respect thereto and the oral argument of counsel, I have determined to reject the recommendation of the Hearer and shall affirm the action of the Board.

Accordingly, it is, on this 12th day of December, 1972

ORDERED that the action of the Board be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated May 15, 1972 staying the suspension imposed by the Board until the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-428 issued by the Board of Alcoholic Beverage Control of the City of Newark to Smitty's Owl Lounge, Inc., for premises 366 - 6th Avenue, Newark, be and the same is hereby suspended for sixty (60) days, commencing at 7:00 a.m. Tuesday, January 2, 1973, and terminating at 7:00 a.m. Saturday, March 3, 1973.

Robert E. Bower,
Director

3. DISCIPLINARY PROCEEDINGS - AMENDED ORDER.

In the Matter of Disciplinary)
Proceedings against)
Jesse Robins & Alma Robins) AMENDED
t/a Robins Nest) ORDER
236 Monticello Ave.,)
Jersey City, N.J.,)
Holder of Plenary Retail Consumption)
License C-81, issued by the Municipal)
Board of Alcoholic Beverage Control)
of the City of Jersey City.)
-----)
Licensees, Pro se

BY THE DIRECTOR:

On November 6, 1972 I entered an order herein suspending the subject license for seventy-two days commencing November 20, 1972 and terminating January 31, 1973, upon their plea of non vult to a charge alleging that on dates set forth in the said order, they permitted gambling, i.e., "numbers game" on their licensed premises, in violation of Rule 6 of State Regulation No. 20.

By letter dated November 14, 1972 the licensees have requested that the said order be amended to provide that the suspension be deferred until after January 1, 1973 because they are heavily in debt, have recently been hospitalized for serious physical conditions, and the closing during the holiday season would cause them "financial ruin". Under the circumstances, I have determined to grant the request.

Accordingly, it is, on this 15th day of November 1972,

ORDERED that the order heretofore entered on November 6, 1972, be and the same is hereby amended as follows:

ORDERED that Plenary Retail Consumption License C-81, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Jesse Robins & Alma Robins, t/a Robins Nest, for premises 236 Monticello Ave., Jersey City, be and the same is hereby suspended for seventy-two (72) days, commencing 2:00 a.m. on Tuesday, January 2, 1973 and terminating 2:00 a.m. on Thursday, March 15, 1973.

Robert E. Bower
Director

4. DISCIPLINARY PROCEEDINGS - WHOLESALE LICENSEE CONDUCTED PROMOTIONAL CONTEST IN VIOLATION OF RULE 14 OF STATE REGULATION NO. 34 - FINE ACCEPTED IN LIEU OF 5 DAY SUSPENSION.

In the Matter of Disciplinary)
Proceedings against)

Wine Imports of America Ltd.)
1 & 2 Loretto Avenue)
Hawthorne, N. J.,)

CONCLUSIONS
and
ORDER

Holder of Plenary Wholesale License)
W-31, issued by the Director of the)
Division of Alcoholic Beverage Control)
-----)

Licensee, by Carmine A. Lemme, President, Pro se

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on or about January 1, 1972 it conducted a promotional contest in connection with the sale of alcoholic beverages, other than malt alcoholic beverages, in violation of Rule 14 of State Regulation No. 34.

Absent prior record, the license would normally be suspended for ten days, with remission of five days for the plea entered, leaving a net suspension of five days. However, the licensee has made application for the imposition of a fine in lieu of suspension in accordance with the provisions of Chapter 9 of the Laws of 1971.

Having favorably considered the application in question, I have determined to accept an offer in compromise by the licensee to pay a fine of \$1,000 in lieu of suspension.

Accordingly, it is, on this 11th day of December 1972,

ORDERED that the payment of a \$1,000 fine by the licensee is hereby accepted in lieu of a suspension of license for five days.

Robert E. Bower,)
Director.)

5. DISCIPLINARY PROCEEDINGS - AMENDED ORDER IMPOSING SUSPENSION.

In the Matter of Disciplinary)
Proceedings against)
George Raheb)
t/a George's Liquor & Deli)
74 Crawford St.)
PO Eatontown) AMENDED ORDER
Shrewsbury Township, N. J.,)
Holder of Plenary Retail Distribution)
License D-1, issued by the Township)
Committee of the Township of Shrewsbury)
-----)

Licensee, Pro se
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

On November 6, 1972, Conclusions and Order were entered in the above matter suspending the license for fifteen days in consequence of a plea of non vult to a charge alleging that licensee sold alcoholic beverages to a minor, age 17, in violation of Rule 1 of State Regulation No. 20. Re Raheb, Bulletin 2074, Item 1(z).

Thereafter, upon application by the licensee for the imposition of a fine in lieu of suspension in accordance with Chapter 9 of the Laws of 1971, the effective dates of such suspension were therefore stayed pending disposition of such application.

The licensee has now retracted the said application and requests that the aforesaid suspension be reinstated. The said suspension will now be reimposed.

Accordingly, it is, on this 11th day of December 1972,

ORDERED that Plenary Retail Distribution License D-1, issued by the Township Committee of the Township of Shrewsbury to George Raheb, t/a George's Liquor & Deli, for premises 74 Crawford Street, Shrewsbury Township, be and the same is hereby suspended for fifteen (15) days, commencing at 3 a.m. Tuesday, January 2, 1973, and terminating at 3 a.m. Wednesday, January 17, 1973.

Robert E. Bower,
Director.

6. DISCIPLINARY PROCEEDINGS - VIOLATION OF RULE 1 OF STATE REGULATION NO. 38 -
POSSESSION OF INDECENT MATTER - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary)
Proceedings against)

Vincent Wysocki)
t/a Captain Bill's Tavern)
233 Third Street)
Elizabeth, N.J.,)

CONCLUSIONS
and
ORDER

Holder of Plenary Retail Consumption)
License C-36, issued by the City)
Council of the City of Elizabeth.)

Albert L. Kessler, Esq., Attorney for Licensee
David S. Piltzer, 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 Thursday, May 25, 1972, at about 1:40 a.m., you sold and delivered and allowed, permitted and suffered the sale and delivery of an alcoholic beverage, viz., a 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.
- "2. On Thursday, May 25, 1972, you allowed, permitted and suffered in and upon your licensed premises and had in your possession matter containing obscene, indecent, filthy and lewd, lascivious and disgusting printings, writings, stories, illustrations, and accounts, viz., a copy of 'Pix Magazine For Men Who Like Action'; in violation of Rule 17 of State Regulation No. 20."

At the commencement of this hearing, the attorney for the Division was granted an amendment to Charge No. 1, changing "pint bottle" to a "half-pint bottle" which he stated was apparently a typographical error.

The Division bottomed its case upon the testimony of three ABC agents who were specifically assigned to investigate activities at the subject premises. Their version may be briefly summarized as follows:

On May 25, 1972 at approximately 1:40 a.m. ABC agents V, D'A and P approached the licensed premises. Agent V entered the premises while the other two agents remained on the outside. He noted that there was one patron in the premises and he approached the bartender, later identified as Robert A. Loneker, Sr., and ordered a half-pint of Seagram's V.O Canadian Whisky. The bartender served him and accepted payment in the sum of \$3.00 which he rang up on the cash register. The agent, thereupon, left the premises, displayed the bottle to the other two agents; the three agents then entered the premises and identified themselves to the bartender.

The other agents pursued an investigation of the premises, and, in the course of their investigation had the bartender remove the tape from the cash register. The tape which was entered into evidence reflected, as the last item thereon, a sale in the sum of \$3.00.

During their investigation, an agent opened one of the drawers in a cabinet behind the bar and found a magazine "Pix". The magazine was clearly pornographic and when agent D'A showed it to the bartender and asked him to initial it he at first refused, stating "It isn't my book. It doesn't belong to me. It belongs to the bar." But "he initialed it anyway."

The agent then initialed the magazine and imprinted the date of seizure thereof. The bartender was also asked to initial the bottle which he refused to do and denied that he had sold the same to agent V. However, he did initial the cash register tape.

Robert A. Loneker, Sr., the bartender employed by the licensee on the date and time set forth in the charge, gave the following account:

Three ABC agents entered his premises and identified themselves and wanted to know why he had sold an unidentified person a bottle of liquor. This unidentified person was told by the agents that he could leave. He was unable to describe the appearance of this person because he could not get a clear view of that person.

The agents then "...accused me of selling package goods after the hour of ten o'clock." He denied the sale and stated that actually the price for a half-pint bottle of Seagram's V.O. is \$2.35, plus tax. He could not explain, however, the item of \$3.00 reflected on the tape, although he stated that he might have sold some patron two six-packs of beer, which would total \$3.00. He could not remember when that sale was made.

With respect to the magazine, he denied that he had initialed the magazine at the request of the agents or that he had ever seen the magazine before that date. He also denied that he had taken the tape out of the register but, in fact, asserted that the tape was ripped from the register by one of the agents.

He was further questioned with respect to the cabinet in which the magazine was found, and he admitted that he has had occasion to go into the cabinet while on duty. However, he did not recall whether he had specifically opened the cabinet on that day.

Finally, he insisted that he refused to initial the magazine because "I told them I refused to sign it; it doesn't belong to me." He was then cross-examined with respect to the \$3.00 item on the tape and admitted that it represented the last sale that evening, although he could not remember when that sale was made, or for what items, or to whom.

Joseph Blazia, who was the patron at the time of this incident, testified that he had been in the premises during the entire evening and had occasion to go to the men's room. It was when he left the men's room that he saw the three agents in conversation with the bartender. One of the agents was behind the bar; and he didn't know who they were, and thought that possibly they were trying to rob the place. He was told by the bartender not to interfere because they were ABC agents. He was not convinced that they were, in fact, ABC agents, and telephone the Police Department.

On cross examination, he stated that he did not see any sale take place; he did not even see the bottle of liquor, nor did he see the magazine at any time. Furthermore, he did not recall how long before the agents arrived any other patron had entered the premises or made a purchase.

Vincent Wysocki, the licensee, testified that he has instructed his bartender not to sell alcoholic beverages for off-premises consumption after 10:00 p.m. With respect to the magazine, he denied any knowledge of it, but stated that, if he knew that this magazine was on the premises, he would have disposed of it because it is an "improper magazine" and that it "would not be proper to have it on the premises." He further stated that in the cabinet in which the magazine was found they "...have sales books, price books for the liquor sales, and wholesale books."

In my consideration of these charges certain long-established principles are the guideposts. We are dealing here with a purely disciplinary measure and its alleged infraction; such measures are civil and not criminal, and require proof by a preponderance of the credible evidence only. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (App. Div. 1956).

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); Hornauer, supra. Thus, I have carefully observed the demeanor of the witnesses as they testified. I am thus persuaded from my observation and evaluation that the testimony of the agents represented an accurate and forthright account of the incidents as set forth herein. The testimony of the agents was factual and convincing.

On the other hand, the testimony of the bartender does not have the ring of truth. It seems inconceivable to me that, with the empiric evidence of the cash register tape reflecting a sale of \$3.00 as the last sale prior to the confrontation by the agents, the bartender could truthfully deny that such sale took place. His contention that this might have been a sale some time prior to the entry of the agents is negated by his own testimony that he could not even remember when the sale of package goods was made. It would seem quite logical that, under the circumstances, he would readily have remembered such sale when confronted by the agents.

The other witnesses for the licensee, could neither recollect nor substantiate the events of that evening since he could not remember anything of significance with respect thereto.

With respect to the magazine my examination of its contents satisfies me that under any standard or criteria its contents were clearly obscene, indecent, filthy and lewd. See State v. Weitershausen, 11 N.J. Super. 487, 491; Davis v. New Town Tavern, 37 N.J. Super. 376 (App. Div. 1955); McFadden's Lounge, Inc., v. Div. of Alc. Bev. Cont., 33 N.J. Super. 61 (App. Div. 1954). The agents' testimony that the bartender stated that it was not his property but, in fact, belonged to the bar lends substantial credence to the charge that the licensee knew that the magazine was on the premises.

Therefore, I conclude that a fair evaluation of the evidence clearly preponderates in support of a finding of guilt on both charges, which I, accordingly, recommend.

The licensee has no prior adjudicated record. I further recommend that the license be suspended for fifteen days on the first charge; Re Wally's Bar and Grill, Inc., Bulletin 2063, Item 6; and fifteen days on the second charge, Re Lombard, Bulletin 2034, Item 4, or a total of thirty days.

Conclusions and Order

No exceptions to the Hearer's report were filed by the licensee 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 them as my conclusions herein.

Accordingly, it is, on this 13th day of December, 1972,

ORDERED that Plenary Retail Consumption License C-36 issued by the City Council of the City of Elizabeth to Vincent Wysocki, t/a Captain Bill's Tavern for premises 233 Third Street, Elizabeth, be and the same is hereby suspended for thirty (30) days commencing 2:00 a.m. on Tuesday, January 2, 1973 and terminating 2:00 a.m. on Thursday, February 1, 1973.

ROBERT E. BOWER
DIRECTOR

7. DISCIPLINARY PROCEEDINGS - ORDER LIFTING SUSPENSION.

In the Matter of Disciplinary	:	
Proceedings against	:	
	:	
Fred Wyatt	:	
t/a Sam's Bar	:	
1600 South 6th St.	:	O R D E R
Camden, N.J.,	:	
	:	
Holder of Plenary Retail Consumption	:	
License C-107, issued by the Municipal	:	
Board of Alcoholic Beverage Control of	:	
the City of Camden.	:	
.....	:	
Theodore Z. Davis, Esq., Attorney for Licensee.	:	

BY THE DIRECTOR:

On October 5, 1972 I entered Conclusions and Order herein, suspending the license for the balance of its term, commencing on Friday, October 13, 1972 with leave to the licensee or any bona fide transferee of the licensee to file a verified petition establishing the correction of the unlawful situation as set forth in the said conclusions, for the lifting of the suspension on or after twenty-five (25) days from October 13, 1972. (Re Wyatt, Bulletin 2078, Item 1(L)).

It appearing from the verified petition, with supporting affidavits submitted by the licensee that the unlawful situation has been corrected, I shall grant the petition requesting the termination of the suspension, effective immediately.

Accordingly, it is, on this 13th day of December, 1972,

ORDERED that the suspension of license heretofore imposed herein be and the same is hereby terminated, effective immediately.

8. DISCIPLINARY PROCEEDINGS - ORDER TERMINATING SUSPENSION.

In the Matter of Disciplinary)
Proceedings against)
Tomlo, Inc.)
t/a LBJ Bar) O R D E R
617-619 South 11th Street)
Newark, New Jersey)
Holder of Plenary Retail Consumption)
License C-390, issued by the Municipal)
Board of Alcoholic Beverage Control)
of the City of Newark.)
-----)
Stern & Weiss, Esqs., by Morris J. Stern, Esq., Attorneys for
Licensee

BY THE DIRECTOR:

On October 4, 1972 I entered Conclusions and Order herein suspending the license for the balance of its term commencing on October 13, 1972 with leave to the licensee or any bona fide transferee of the licensee to file a verified petition establishing correction of the unlawful situation set forth in the said order, for lifting of the suspension of license on or after twenty-five days from the commencement of the said suspension. Re Tomlo, Inc., Bulletin 2078 , Item 1(J).

It appearing from the verified petition submitted by the licensee that the unlawful situation has been corrected, I shall grant the petition requesting termination of the suspension, effective immediately.


Accordingly, it is, on this 27th day of December 1972,

ORDERED that the suspension heretofore imposed herein be and the same is hereby terminated, effective immediately.

Robert E. Bower
Director

9. STATE LICENSES - NEW APPLICATION FILED.

Schenley Affiliated Brands Corp.
20 Sand Park Road
Cedar Grove, New Jersey
Application filed February 5, 1973
for place-to-place transfer of
Plenary Wholesale License W-41 from
38-40 Sixth Street, Harrison, New Jersey.


Robert E. Bower
Director