

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 2395

April 3, 1981

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April 3, 1981

1. COURT DECISIONS - KEN LAV CORPORATION v. DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2986-79

KEN LAV CORPORATION)
t/a PARTYTIME INN,)
)
Appellant,)
)
v.)
)
DIRECTOR, DIVISION OF ALCOHOLIC)
BEVERAGE CONTROL, STATE OF NEW)
JERSEY,)
)
Respondents.)

Argued March 3, 1981 - Decided March 17, 1981.

Before Judges Matthews, Morton I. Greenberg & J. H. Coleman

On appeal from the Division of Alcoholic Beverage Control

John J. Mulvihill argued the cause for appellant (Nolan, Bell & Moore, attorneys, Mr. Mulvihill on the brief)

Kenneth I. Nowak, Deputy Attorney General, argued the cause for respondents (John J. Degnan, Attorney General) (Erminie L. Conley, Assistant Attorney General of counsel and Kenneth I. Nowak, Deputy Attorney General on the brief)

PER CURIAM

(Appeal from the Director's decision in Re: Ken Lav Corporation, Bulletin 2394, Item 2. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions.)

2. DISCIPLINARY PROCEEDINGS - SALE, SERVICE AND DELIVERY OF AN ALCOHOLIC BEVERAGE TO AN APPARENTLY INTOXICATED PERSON - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary Proceedings against	:	CONCLUSIONS
	:	
Peter Andolpho, Bobby McNeil	:	AND
and Edward Chalecki	:	
1110 Florence Avenue	:	ORDER
Union Beach, New Jersey	:	
	:	OAL DKT NO. ABC 5187-79
Holdes of Plenary Retail Consumption	:	
License No. 1350-33-003-002 issued by	:	S-12,431
the Mayor and Council of the Borough	:	
of Union Beach.	:	X-54,835-A
-----:		

Peter A. Berman, Esq., Attorney for Licensee.
Kenneth I. Nowak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

DATED: March 17, 1980

RECEIVED: March 19, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision below, with supportive argument, were filed on behalf of the Division, pursuant to N.J.A.C. 13:2-19.6.

The exceptions contends in sum, that the Administrative Law Judge's conclusions are "not supported by the record or the findings of fact, and should be reversed."

Before analyzing the Initial Decision in the light of the exceptions and the record, it should be emphasized that this is an administrative disciplinary proceeding instituted by the Division of Alcoholic Beverage Control against the licensee, pursuant to N.J.S.A. 33:1-31. Thus, the licensee should be denominated as such, and not be referred to as the "petitioner". Similarly, the Division should not be referred to as the "State of New Jersey" since it is the Division of Alcoholic Beverage Control which has instituted this proceeding.

This proceeding involves a charge against the licensee which alleges that, on or about September 15, 1979, he sold, served and delivered, and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated, and/or allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon the licensed premises.

We are dealing here with a purely disciplinary matter and its alleged infraction. Such proceedings are civil in nature, and

not criminal, Kravis vs. Hock, 137 N.J.S. 252, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern, v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956); Freud & Pitaes v. Davis, 64 N.J. Super. 242, 248 (1960).

One further point should be clarified; the Administrative Law Judge referred to the ABC agents as being part of ATRA personnel. It would be instructive to describe the purpose and activity of the ATRA program. The ABC agents herein were operating under a pilot program sponsored under the provisions of the Federal Alcohol Treatment and Rehabilitation Act, and the Highway Safety Program of the Division of Motor Vehicles. Its operation consists of several teams, each of which is composed of two agents of the ABC Enforcement Bureau of the Division of State Police, two State Troopers, and two ATRA personnel. The objective of this program is to save lives by preventing persons who are apparently or actually intoxicated from driving their own motor vehicles after they leave liquor-licensed premises, and become involved in motor vehicle accidents.

The agents enter certain designated premises, upon specific assignment to observe whether or not any patrons therein are actually or apparently intoxicated. If such patron or patrons are observed, the agents then identify themselves, and with the assistance of State Troopers who were on the outside of the premises, and have been alerted, escort that particular patron or patrons to the outside of the premises, where they are then advised that they may be taken to a detoxication center or to their home; but in no event are they permitted to enter into and operate their own motor vehicle. It is noteworthy that the condition of the said patron is confirmed by the State Police and the ATRA personnel before he is delivered into their custody.

The Administrative Law Judge made numerous findings of fact among which were the following:

"The white male was observed to have difficulty standing after taking a shot, to stagger when walking and to have to lean on the bar or pool table for support."

"The patron was observed to be loud and boisterous and use profanity."

"The patron was observed to consume part of a mug of beer as well as a shot of what was identified to be tequila."

"The patron was observed to urinate on a van parked in front of the premises."

"The patron was observed to attempt to climb on the top of a cigarette machine."

"The patron was observed to be served a cup of coffee and drank same."

"The patron was observed after consuming the cup of coffee to sip out of a mug of beer."

In addition to these findings, the Judge noted that the testimony of the barmaid corroborated, to a great degree, the testimony of the agents and their observations, except for the consumption of alcoholic beverages after being "flagged" and served a cup of coffee. The Judge concludes that the barmaid did not observe the patron drinking beer from a mug after consuming some coffee or "if she did observe, did not have sufficient time to correct the situation involving the consumption of an alcoholic beverage." Therefore, the Judge concludes "the barmaid did not serve an alcoholic beverage, directly or indirectly, nor permit an alcoholic beverage to be consumed directly or indirectly by an intoxicated or apparently intoxicated person with their permission".

In his exceptions, the Deputy Attorney General representing the Division asserts that this analysis is an error. He argues that the Judge completely "ignored the fact that the barmaid repeatedly testified under direct examination that she flagged the patron prior to the arrival of the agents." Thus, if her testimony on this issue is to be believed, all of the testimony of the agents must be pure fabrication, for if the agents' observation was imaginary, how could the bartender or the licensee explain the fact that the agents, when they identified themselves to the bartender were able to point to the precise bottle of tequila from which the bartender poured the alcoholic beverage for the patron.

He further argues that the Judge found that, after the patron was served the coffee, he was observed to have red and watery eyes; to use obscenities; to stagger between the pool table and bar; and continue to drink beer and tequila. Added to these, that he urinated in the street and upon returning to the tavern, climbed onto the cigarette machine indicated unmistakably that he was an intoxicated or apparently intoxicated person.

The specific issue in this proceeding is whether a patron who is actually or apparently intoxicated was served by the licensee or his employee. In Division of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196 at page 201 (App. Div. 1968), the Court stated: "whether a man is sober or intoxicated is a matter of common observation not requiring special knowledge or skill. See Castner v. Sliker, 33 N.J.L. 95 (E. & A. 1968); Freud v. Davis, supra.

The words "actually" or "apparently intoxicated" portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior:, Zane, supra at 201. Our New Jersey Courts have held that it is sufficient to show that the sale, service and delivery was made to persons apparently intoxicated without the necessity or showing

that the person was actually intoxicated. Re Carbone and Benedetto, Bulletin 1236, Item 8; Re Subar, Inc., Bulletin 1586, Item 2. It is abundantly clear that the patron here was intoxicated because even the witnesses for the licensee freely admitted that the behavior substantially deviated from the normal; and in fact, the barmaid herself recognized that he was intoxicated when she initially flagged him.

The barmaid asserted, according to the Administrative Law Judge, that she either did not observe the patron drinking alcoholic beverages after he consumed some of the coffee or that she did not have sufficient time to correct the situation involving his consumption. However, it was her duty to make those observations. This is a far cry from denying that the patron did so consume the beer after he drank some coffee. As was stated in Bilowith v. Passaic, Bulletin 527, Item 1, "licensees may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees must use their eyes and ears and use them effectively to prevent improper use of their premises." Re: 135 Mulberry Street Corp. Bulletin 892, Item 2; Re 500 Cafe, Inc., Bulletin 1584, Item 2. In contrast to the barmaid's negative and uncertain testimony, we have the specific and direct testimony of the agents who made the observations and who testified that the patron did, indeed, consume alcoholic beverages after he drank some coffee.

I am, therefore, persuaded from the findings of fact and the record itself, that the charges herein have been established by a fair preponderance of the credible evidence, indeed, by substantial evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, supra.

I shall, therefore, sustain the exceptions and reject the conclusion contained in the Initial Decision. I find the licensee guilty as charged and shall suspend the subject license for twenty-five (25) days.

Accordingly, it is, on this 17th day of April, 1980,

ORDERED that Plenary Retail Consumption License No. 1350-33-003-002 issued by the Mayor and Council of the Borough of Union Beach to Peter Andolpho, Bobby McNeil and Edward Chalicki for premises 1110 Florence Avenue, Union Beach be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. on Monday, April 28, 1980 and terminating 2:00 a.m. on Friday, May 23, 1980.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

IN THE MATTER OF:)	<u>INITIAL DECISION</u>
)	OAL DKT.NO. ABC 5187-79
PETER ANDOLPHO)	AGENCY DKT.NO. S-12,431; X-54,
)	835-A; H-7079-136
)	

APPEARANCES:

Kenneth I. Nowak, Esq., Deputy Attorney General

Peter A. Berman, attorney for Petitioner

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

This is a hearing concerning alleged violation by petitioner of N.J.A.C. 13:2-23.1(b) which provides that no licensee shall sell, serve or deliver, or allow, permit or suffer the sale, service or delivery of any alcoholic beverage directly or indirectly to any person actually or apparently intoxicated or permit, or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

The petitioner is the holder of plenary retail consumption license #1350-33-003-002 located at 1110 Florence Avenue, Union Beach, New Jersey. Said violation allegedly occurred on September 15, 1979. Petitioner was served with notice of alleged violation on October 26, 1979 and an answer and plea of not guilty was filed with the Director of the Division of Alcoholic Beverage Control. The matter was then 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 held on January 31, 1980 and final papers of summation were received by the Court on February 15, 1980.

The issues of the hearing were whether or not on September 15, 1979 petitioner sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and/or allowed, permitted and suffered the consumption of alcoholic beverages by such person in and on the licensed premises.

The State presented two witnesses, Inspectors K. McN and J. G. Inspector McN testified that on September 14, 1979 he was assigned to an ATRA patrol and went to the Colony Inn along with his partner, J.G., to make observations as to whether or not intoxicated or apparently intoxicated individuals were being served alcoholic beverages. He arrived at approximately 11:55 p.m., entered the establishment and occupied a seat on the left hand corner of the U-shaped bar. He observed a bar maid and organist working at the time.

His attention was then focused on a male later identified as Martin Rankin who was playing pool. Everytime the individual took a shot and stood up he had difficulty in maintaining his balance and was observed to stagger and waver. The agent then walked past the individual under the pretext of going

to the bathroom and observed that the individual's eyes were droopy and bloodshot but his speech was normal. Between shots Mr. Rankin was observed to walk back to the bar and take a drink from a mug of beer which was on same. At one point he was observed to fall and was caught by the agent. At that time his breath was noted to have a strong odor of alcohol on it. He was then observed to consume a drink in a shot glass which was later identified to be tequila.

The patron became loud and profane and had to be told to calm down by the barmaid. He talked to individuals next to him and would shout at other people at the pool table. The patron was also observed to climb, or attempt to climb on top of the cigarette machine and had to be restrained by other individuals in the bar. The barmaid at that point requested Mr. Rankin to have a cup of coffee to which he agreed and he was observed to be served same. At that time his speech was observed to be slurred and rambling.

It was the agent's opinion at that point that the individual was intoxicated. He identified himself to the employees of the premises as well as to the individual and requested the back up team of two troopers and two ATRA personnel.

On cross-examination, he stated that he had been at the bar approximately one hour, 40 to 50 minutes, and observed the patron to have one shot of what was later identified as tequila and a beer. The patron was first observed to consume a portion of the beer five minutes after they entered and the shot at approximately 12:20 a.m. It was not until approximately 1:00 a.m. that they identified themselves and advised the barmaid of their purpose of being present.

The Court then asked the agent what time he had observed the shot glass being filled and he stated that it was approximately 20-25 minutes after they entered the bar.

Inspector J.G. testified that he observed the male to stagger and bump into objects when walking and to lean against the pool table bar when standing. He stated that he observed the shot glass in front of the patron and approximately 20-25 minutes after they entered, he observed the patron drinking from the shot glass. He detected the patron's speech to be slurred and his eyes watery. After making these observations, he then observed the patron to be served a cup of coffee and after completion of same to return to the space he had been occupying prior to drinking the coffee and to sip from a beer.

The patron left the bar and was observed to urinate on a truck outside, return and continue to horse-play, including climbing, or attempting to climb on top of the cigarette machine. After identifying themselves to the barmaid who stated that the patron had been drinking beer and a shot of tequila, they formed the opinion that the patron was intoxicated and was such while consuming liquor.

On cross-examination, it was admitted that he did not observe when the shot was ordered, by whom it was ordered or when poured.

The State rested its case and petitioner called Patricia Sawickie who testified she is employed as a barmaid and cook and was employed on the date in question as a cook. She observed the patron on the night in question and knew him previously for approximately two years. Her own personal knowledge of the individual is that he is a diabetic and hyperactive. She stated that his speech is usually normal but he has a tendency to stutter or speak too fast and become tongue-tied. She did not observe him being served on the night in question but she did recall that she served the inspectors their first drinks.

Under cross-examination she stated that she was working in the kitchen most of the time on the evening in question which is located in a separate room towards the back of the premises. She did not observe the patron when he entered but off and on did observe him over an hour and a half period. She recalled serving the patron coffee sometime between 11:30 p.m. and 12:00 a.m.

Joan Webb testified that she was employed at the Colony Inn but not on the night in question, but that she was present as a customer on the night in question and sat approximately two stools from where patron was seated. She arrived at approximately 9:00 p.m. but did not recall when he arrived. She described him as being wild, loud and boisterous. It was her recollection that she did not remember the patron drinking on the evening in question and she remained at the premises until approximately 1:30 or 2:00 a.m. when the bar closed.

Under cross-examination she stated that her physical observations of the patron were that he was not normal. He normally has watery and red bloodshot eyes. She first observed him sometime around 11:00 or 11:30 p.m. and noted that he was his usual, loud obnoxious self. She did not observe him climb onto the cigarette machine.

Joyce Bengyel, the barmaid, testified that she has been employed by the Colony for approximately 2½ years and knows the patron both in the premises as well as outside of work. She has observed him on a few occasions at ballgames but most frequently at work. She recalled serving the patron a mug of beer and a shot of tequila on the night in question. She described the mug of beer as being a 10 ounce size and the shot glass being 7/8ths of an ounce. She recalled serving the patron a cup of coffee at approximately 12:30 a.m. and guessed that he took same because he had been refused any more drinks. She stated that she flagged the patron somewhere around 12 midnight. Her description of the patron is that he is fidgety, wirey, very loud and is an immature adult. She recalled observing the patron spill his cup of coffee when attempting to drink same.

Under cross-examination, she stated that she does not know whether he normally urinates on cars and that she did not observe him to do same. Also, she did not observe patron to climb or attempt to climb onto the cigarette machine. She stated that the patron had moved his seat when he was served his coffee and that he did not have any alcoholic beverages in front of him and in fact she had taken the beer and shot glass he had had

previously when she flagged him. She did not serve the patron according to her testimony, anything but coffee after the agents had arrived.

When questioned by the agent, she stated that she had informed them that she had only served him one mug of beer and a shot of tequila. She did not recall everything she had told them but she definitely remembered telling them that he had been drinking a shot of tequila. She described the patron's walk as being funny and that he appears to be unbalanced or have a lack of equilibrium constantly. She stated that she flagged the patron because he had just gotten out of the hospital and did not look well.

Under re-direct examination, she stated that the clock on the bar wall is set 16 to 18 minutes fast and that she served coffee to the patron at approximately 12:30 p.m. She also stated that it was not an hour prior to the arrival of the agents that the patron arrived. Both parties rested and requested the opportunity to submit written summations which was granted by the Court.

After having observed all the witnesses from both sides and having considered the entire record, including the testimony and arguments of counsel, the Court makes the following findings of fact:

1. Peter Andolpho is the possessor of plenary retail consumption license #1350-33-003-002 located at 1110 Florence Avenue, Union Beach, New Jersey, and it was so owned on September 15, 1979.
2. On September 15, 1979, two inspectors from the New Jersey State Police Division of Alcoholic Beverage Control, two State troopers and two ATRA agents were assigned to investigate the tavern.
3. The two investigators entered the premises at approximately 11:55 p.m. and observed a white male playing pool.
4. The white male was observed to have difficulty standing after taking a shot, to stagger when walking and to have to lean on the bar or pool table for support.
5. The patron was observed to be loud and boisterous and use profanity.
6. The patron was observed to consume part of a mug of beer as well as a shot of what was identified to be tequila.
7. The patron was observed to urinate on a van parked in front of the premises.

8. The patron was observed to attempt to climb on the top of a cigarette machine.
9. The patron was observed to be served a cup of coffee and drank same.
10. The patron was observed after consuming the cup of coffee to sip out of a mug of beer.

The owning of an alcoholic beverage license is a privilege, not a right, and should be protected as such. It is clear that appellant was sold an alcoholic beverage or intoxicating liquor but what is not clear is at what point appellant became intoxicated. Testimony presented by both agents was that they observed the patron to sip from a mug of beer that was already present, to consume a shot of tequila that was served to the patron sometime around 12:15 p.m., and that the patron was thereafter observed to be given a cup of coffee at 12:30 p.m. or shortly thereafter. The Court could conclude just from that testimony alone that the barmaid concluded that the patron was intoxicated, cut the patron off from drinks and attempted to sober him up. However, the agents also testified that they observed the patron after having consumed the cup of coffee to return to his old position and sip out of a mug of beer which they construed as being a violation of N.J.A.C. 13:2-23.1(b) in that the establishment permitted delivery of an alcoholic beverage indirectly to a person apparently intoxicated and allowed that person to consume same on the licensed premises. However, we have the testimony of the barmaid which to a great degree corroborates the testimony of the agents as to their observations except for the consumption of the alcoholic beverage after being flagged and served a cup of coffee. The barmaid testified that she removed the patron's glass of beer and shot glass when she flagged him and thereafter served him the cup of coffee in an attempt to counter the effects of the alcoholic beverage previously consumed.

The Court concludes that the barmaid did in fact flag the individual and did in fact remove the patron's beer mug and shot glass from the bar. The Court also concludes that the agents immediately upon observing the patron to sip from someone's mug of beer, identified themselves and proceeded pursuant to the ATRA program. The Court also concludes that the barmaid did not observe or, if she did observe, did not have sufficient time to correct the situation involving the patron's consumption of an alcoholic beverage. Therefore, the Court concludes that the bar did not serve an alcoholic beverage directly or indirectly nor permit an intoxicated or apparently intoxicated person with their permission. Having found the Petitioner not in violation of the Administrative Code, it is the Court's conclusion that this matter be DISMISSED.

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

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

3. APPELLATE DECISIONS - LOIGMAN v. MIDDLETOWN et al.
#4381

Larry S. Loigman,

Appellant,

vs.

Township Committee of the Township
of Middletown and San-Scho, Inc.,

Respondents.

ON APPEAL

CONCLUSIONS

AND

ORDER

OAL DKT. NO. ABC 4277-79

Larry S. Loigman, Esq., Appellant Pro se.
Wilson, Argentieri & McLeod, Esqs., by Robert E. McLeod, Esq.,
Attorneys for Respondent-Township Committee of Middletown Township.
Arthur Dennis Loring, Esq., Attorney for Respondent-San-Scho, Inc.

Initial Decision Below

Hon. R. Jackson Dwyer, Administrative Law Judge

DATED: March 4, 1980

RECEIVED: March 5, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by the appellant, pursuant to N.J.A.C. 13:2-17.14.

In his Exceptions, the appellant objects to the proposed remand of the cause to the Township Committee of the Township of Middletown for hearing on the merits of his objections to the grant of renewal of the license of San-Shco, Inc. for the 1979-80 license term.

It appears from the record that appellant timely filed a written objection to the renewal of the San-Scho, Inc. license, primarily asserting that the licensee was a "front" for a specified individual. The license was renewed on June 26, 1979 (purportedly for thirty (30) days) and a hearing on the objections was scheduled for July 26, 1979.

