
Div. of Alcoholic Beverage Control v. H&H
Cite as 11 *N.J.A.R.* 478

**DIVISION OF ALCOHOL
BEVERAGE CONTROL,**

Petitioner,

v.

**H&H WINE AND SPIRIT SHOP, INC.,
T/A TOWNE LIQUORS,**

Respondents

Initial Decision: October 28, 1985

Final Agency Decision: January 27, 1986

Superior Court, Appellate Division Decision Appears at: 216 *N.J.*

Super. 532 (App. Div. 1987)

SYNOPSIS

Respondent was charged with selling alcoholic beverages to an underage individual and other violations. Respondent appealed and the matter was transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case concluded that the petitioner failed to prove that respondent sold alcoholic beverages to an underage person. The agent who testified for the Division of Alcoholic Beverage Control was outside the premises at the time of the sale and did not hear the transaction. The agent observed the underage person go into the store with an adult and take beer from a display case. The clerk rang up the sale and the underage person left the premises with the beer. The administrative law judge ordered the charges against the respondent dismissed.

Upon review, this initial decision was rejected by the Director of the Division of Alcoholic Beverage Control. Because an underage person carried alcoholic beverages from respondent's premises, there was sufficient evidence that the licensee suffered the delivery of alcoholic beverages to a person under the legal age, in violation of *N.J.A.C.* 13:2-23.1(a). Beyond this, the testimony of the Division agent sustained the finding that the licensee permitted a sale of alcoholic beverages to a person under the legal age. The administrative law judge placed too much weight on the fact that the agent was outside the premises and did not hear what was said at the time of sale. The agent's observations, along with the natural and probable inferences to be drawn therefrom, were sufficient on which to base

a finding of guilt. Respondent's license was ordered suspended for a total of 17 days.

The Appellate Division affirmed.

Melissa Baggitt, Deputy Attorney General, for petitioner (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)
James G. Lepis, Esq., for respondent (Lepis, Lepis & Curley, attorneys)

GOLDBERG, ALJ:

This is an appeal from a Notice and charges proffered against H & H Wine & Spirit Shop, Inc., t/a Towne Liquors (respondent) under Plenary Retail Consumption License No. 1331-44-008-003, issued by the Township Committee of Middletown Township and under the direction and control of the Director of the Division of Alcoholic Beverage Control (petitioner), pursuant to *N.J.S.A.* 33:1-31, alleging that:

1. On October 16, 1984, you sold, served or delivered, or allowed, permitted or suffered the sale, service or delivery of alcoholic beverages, viz., [H.E.B.], age 19 in violation of *N.J.A.C.* 13:2-23.1(a).
2. On October 16, 1984, you conducted your licensed business without keeping and having on your licensed premises available for inspection by authorized persons and officers a photostatic or other true copy of the application for then current license; in violation of *N.J.A.C.* 13:2-23.13(a)2.
3. On October 16, 1984, you conducted your licensed business without keeping on your licensed premises a list containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises; in violation of *N.J.A.C.* 13:2-23.13(a)3).

On December 7, 1984, respondent, through counsel, entered a plea of not guilty to charge 1. At the same time, respondent entered *non vult* pleas to charges 2 and 3, leaving only charge 1 to be resolved through the administrative appeal process. Subsequently, on January 10, 1985, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was conducted on March 29, 1985. The

hearing was held on October 10, 1985, at the Office of Administrative Law, Mercerville, New Jersey. After the conclusion of testimony on October 10, 1985, the record in this matter was closed.

FACTUAL DISCUSSION

At 9:00 P.M. (time approximate), on October 16, 1984, petitioner alleges that Gregory Hanlon, an employee of Towne Liquors, sold an eight-pack of Budweiser beer (eight seven-ounce bottles) to H.E.B., age 19. The sale was observed by an undercover Alcoholic Beverage Control (ABC) inspector, T.G., who was standing outside the licensee's front window, about 20 feet from the counter containing the cash register. T.G. testified that he observed H.E.B. in the company of an adult, Joseph Flatly, enter the licensed premises, proceed to the rear of the store, take the eight-pack of beer from a display case and take it to the checkout counter where the clerk, Gregory Hanlon, rang up the sale without asking H.E.B. for proof of age. After observing the transaction, T.G. returned to his car and told his partner, A.M.S., to drive to H.E.B.'s vehicle. When H.E.B. reached the car, T.G. identified himself and he obtained an admission from H.E.B. that he was 19 years old. H.E.B.'s age was confirmed when he subsequently produced a valid New Jersey driver's license indicating an April 6, 1965 birthdate. At this point, H.E.B. was placed under arrest and he was escorted by T.G. back into the liquor store. The unopened bottles of beer were confiscated. T.G. offered that he had been paying close attention to H.E.B.'s movements when H.E.B. was in the liquor store because he looked like an underage person. In addition, T.G. was sure H.E.B. bought the beer because there was no one else waiting to pay for package goods when H.E.B. checked out.

The problem with T.G.'s testimony concerns the fact that he did not hear the transaction. He could report only what he saw from 20 feet away outside of the licensed premises.

Gregory R. Hanlon, the clerk who allegedly sold the beer to H.E.B., testified that he was very busy on the Friday night (8:30 to 9:00 P.M.) in question. He estimated that there were fifteen patrons in the store and approximately seven of the patrons were waiting with alcoholic beverages at the checkout counter. He recognized Mr. Flatly as a schoolmate and friend of his older brother. He testified that Mr. Flatly and H.E.B. came to the checkout counter. Mr. Flatly placed the eight pack of Budweiser (eight seven-ounce bottles) on the counter and paid for it with \$2.60 (exact change). Mr. Hanlon then bagged

the beer and gave H.E.B. change for a dollar bill for the cigarette machine. He saw H.E.B. give Mr. Flatly the change, and he heard Mr. Flatly ask H.E.B. to take the beer. Mr. Hanlon then gave his attention to the next customer. Mr. Hanlon concluded his testimony with the statement that he sold the beer to Mr. Flatly and not to H.E.B. Charges brought against Mr. Hanlon in municipal court for selling alcoholic beverages to H.E.B. were dismissed.

Based upon the foregoing, I **FIND** as **FACT** that:

1. H.E.B. was 19 years and six months old on October 16, 1984.
2. On October 16, 1984, while in respondent's licensed premises, H.E.B. asked for and received change of a dollar from liquor store clerk Gregory Hanlon.
3. Joseph Flatly purchased an eight pack of seven-ounce bottles of Budweiser beer.
4. T.G., an ABC inspector, was standing outside the liquor store, 20 feet from the checkout counter, and did not hear the transactions between H.E.B., Mr. Flatly and Mr. Hanlon.
5. H.E.B. carried the beer from the premises.
6. The beer was unopened when confiscated by Inspector T.G.

LEGAL ARGUMENT

Respondent's claim that H.E.B.'s statement to Inspector T.G. that he was 19 years old is hearsay and, therefore, is not admissible and is rejected. Since the declaration subjects him to a civil liability, it must be considered a declaration against interest admissible under *Evid. R.* 63(10). Also, respondent's position that the certified copy of H.E.B.'s New Jersey driver's license is not competent evidence is likewise rejected. *Evid. R.* 63(17) provides that a writing purporting to be a copy of an official record is admissible to prove the content of that record providing the writing meets the authentication requirement of *Evid. R.* 68. In the instant situation, authentication is established with the statement and signature of the certification clerk and the Seal of the New Jersey Department of Motor Vehicles, affixed thereon.

Notwithstanding that competent evidence establishes that H.E.B. was under the legal drinking age for the purchase of alcoholic beverages, petitioner has the burden to prove that the clerk, Gregory

Hanlon, sold or delivered alcoholic beverages to an underage person. After weighing the evidence provided by the two witnesses, I must **CONCLUDE** that petitioner failed to prove that respondent sold or delivered alcoholic beverages to an underage person. Therefore, I **ORDER** that petitioner's charges against respondent of selling alcoholic beverages to a person under the legal age in violation of *N.J.A.C.* 13:2-23.1(a) be **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.**, who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.:

Written exceptions were filed to the initial decision by the deputy attorney general representing the Division and written replies thereto were filed on behalf of the licensee, as is permitted pursuant to *N.J.A.C.* 13:2-19.6. In her exceptions the deputy attorney general argues that the administrative law judge hearing the case improperly discounted the Division's evidence and furthermore that, even based upon the administrative law judge's findings of facts, the Division sustained its burden of proof concerning the charge that the licensee permitted the delivery of alcoholic beverages to a person under the legal age to consume. The attorney representing the licensee argues to the contrary and states that the decision of the administrative law judge should be sustained. The time provided the Director to make a final determination in this matter was extended by a properly executed Order of Extension until January 27, 1986.

For the reasons further discussed below, I shall accept the exceptions filed and shall reject the initial decision of the administrative law judge. I shall, therefore, find the licensee guilty of the charges preferred and impose a suspension thereon.

The licensee was charged by the Division with the following three violations that: (1) On October 16, 1984, it sold, served or delivered, or allowed, permitted or suffered the sale, service or delivery of alcoholic beverages, viz., [H.E.B.], age 19, in violation of *N.J.A.C.* 13:2-23.1(a); (2) On October 16, 1984, it conducted its licensed business without keeping and having on its licensed premises, available for inspection by authorized persons and officers, a photostatic or other true copy of the application for the then current license, in

violation of *N.J.A.C.* 13:2-23.13(a)2; and (3) On October 16, 1984, it conducted its licensed business without keeping on its licensed premises a list containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises, in violation of *N.J.A.C.* 13:2-23.13(a)(3). The Licensee pled *non vult* to the second and third charge, but pled not guilty to the first charge and the matter was thereafter submitted to the Office of Administrative Law for a determination as a contested case.

The administrative law judge hearing this case made no finding or recommendation with respect to the second and third charges. Since the licensee has pled *non vult*, there are no issues to be contested regarding same. Since the file reflects no disposition on these charges I shall hereafter impose a penalty of one (1) day suspension on each of these charges. With respect to the first charge, the administrative law judge weighed the evidence and concluded that the Division failed to sustain its burden of proof. I reject this conclusion.

By the administrative law judge's own findings of fact, he found that the person under the legal age *carried* the alcoholic beverages from the premises to the outside. Accordingly, there is sufficient evidence upon this finding of fact alone to properly conclude that the licensee suffered the delivery of alcoholic beverages to a person under the legal age in violation of *N.J.A.C.* 13:2-23.1(a). (*Cf.*, *Bulletin* 10, Item #8; *Bulletin* 41, Item #1; *Bulletin* 50, Item #11; *In the Matter of Disciplinary Proceedings Against Vincent Romano*, OAL Dkt. No. ABC 2559-82 and 2560-82, Appeal Nos. 4677 and 4683 (Consolidated) (decided October 11, 1984).) It has long been held that a licensee must take active steps to prevent violations from occurring on its licensed premises and that the failure to do so can result in the finding that a violation occurred. *Essex Holding Company v. Hock*, 36 *N. J. L.* 28, (*Sup. Ct.* 1947). *See, also, TLS v. Bayonne, Bulletin* 2444, Item 7. Therefore, it is clear that the licensee is guilty of this alternative portion of the charge and it is therefore liable for a penalty to be imposed upon its licensed privileges for such violation.

Beyond this finding, I have reviewed the transcript supplied to me in this matter and I find that there is sufficient evidence based upon the testimony of the Division's agent to further sustain a finding that the licensee permitted a sale of alcoholic beverages to a person under the legal age. (*See, T.* 8-10, 23-33). In contrast, the licensee utilized the testimony of its former employee who testified that he sold the beer to a person who was of age and who accompanied the

under-age person. It therefore becomes basically a matter of determining the credibility to be accorded the two witnesses who testified to two divergent events occurring on the night in question. While I am cognizant that the administrative law judge hearing the case had the ability to personally observe and assess the demeanor of both witnesses testifying in this case, I am nevertheless satisfied that the record before me sustains, by a preponderance of the credible evidence, the charge of a sale of alcoholic beverages to a person under the legal age.

There was no showing of any bias or improper motive which would influence the Division's agent to falsify his testimony in this case. Notwithstanding this fact, the judge in reaching his conclusion, apparently placed too much weight on the fact that the agent was outside and did not hear what was said at the time of the sale. Nevertheless, I find the agent's observations, along with the natural and probable inferences to be drawn therefrom, to be sufficient to base a finding of guilt to a charge of an unlawful sale of alcoholic beverages to a person under the legal age.

The agent testified clearly and specifically that he was aware of the two males who entered the premises and that he focused his attention on H.E.B. because he was youthful looking while the other person was not. Thereafter the agent testified that he observed H.E.B. proceed:

“. . . to the rear of the store and remove an eight-pack of seven ounce bottles of Budweiser. With this in his possession he walked to the front of the store and placed it on the checkout counter.”

* * *

“. . . once [H.E.B.] placed these on the checkout counter, the clerk who was employed that evening, a Mr. Hanlon, rang up the transaction. During this transaction there was no identification requested by the clerk Hanlon or [H.E.B.] did not produce any I.D. at this time.” [T.9]

The licensee's case could have been strengthened had it provided the testimony of both the under-age person as well as that of his of-age companion who were at the store on the night in question. Neglecting to provide such testimony, I find that the credible evidence of record is sufficient to sustain this charge.

Based upon the precedent penalty for such a violation, I shall impose a fifteen day suspension of license and, along with the previously mentioned two (2) days suspension of license, I shall suspend the license for a total of seventeen (17) days.

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Accordingly, it is on this 27th day of January, 1986, **ORDERED** that Plenary Retail Distribution License No. 1331-44-008-003 issued by the Township Council of the Township of Middletown to H and H Wine and Spirit Shop, Inc., t/a Towne Liquors, for premises at 477 Highway 35, Middletown, New Jersey, be and the same is hereby suspended for a period of seventeen (17) days commencing at 2:00 A.M., Tuesday, February 18, 1986 and terminating at 2:00 A.M., Friday, March 7, 1986.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.