

Copr. © 1999 Alexander Treadwell, Sec of State, NY

(Cite as: 11 N.Y.2d 909) 11 N.Y.2d 909 (Mem) 182 N.E.2d 813, 228 N.Y.S.2d 469

►► *In this decision, the seven Judges of the Court of Appeals (the State's highest Court), reversed the majority decision of the lower court (the Appellate Division), and reinstated the State Liquor Authority's determination. The Authority had found that the restaurant-bowling alley operated by Beverly Lanes, Inc., had permitted the delivery of alcoholic beverages to a person under the legal age (then 18). In reinstating the State Liquor Authority's determination, the Court of Appeals stated that it was reversing the Order of the Appellate Division "for the reasons stated in the dissent." The dissent, written by Justice Bastow, begins at page 5 of this item. ◀◀*

In the Matter of Beverly Lanes, Inc., Respondent,

v.

Thomas E. Rohan et al., Constituting the State Liquor Authority, Appellants.

Court of Appeals of New York

Argued April 3, 1962;

Decided April 26, 1962.

HEADNOTES

Intoxicating liquors--licenses--sale to minor--State Liquor Authority suspended restaurant liquor license on charge of illegal sale to minor-- testimony that, on three occasions, adult who was accompanying minor at petitioner's bowling alley purchased beer at bar and took it to minor who consumed it in bowling area of premises some 70 feet distant from bar--no employee of petitioner delivered beer to minor or observed her receiving or consuming it--Appellate Division annulled determination of Authority--order reversed, determination reinstated, and petition dismissed for reasons stated in dissenting opinion at Appellate Division.

Matter of Beverly Lanes v. Rohan, 12 A D 2d 156, reversed.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered *910 January 5, 1961, in a proceeding under article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Erie County) which (1) annulled a determination of the State Liquor Authority suspending petitioner's restaurant liquor license for a period of 10 days, and (2) rescinded the suspension. The determination was based on a finding that, on three occasions during September of 1957, petitioner violated subdivision 1 of section 65 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away alcoholic beverages to a minor actually or apparently under 18 years of age. The licensed premises were a bowling alley and restaurant owned by petitioner and located at No. 1340 Military Road in the City of Niagara Falls. There was testimony that on a week end in the latter part of September, 1957 one Emma Johnston, then 16 years, 10 months of age, was engaged in bowling on petitioner's premises and was accompanied by one Jack A. Hopkins, an adult, and two other persons; that, on two or three occasions during the evening, Hopkins purchased four bottles of beer at the bar, which was some 70 feet distant from the area where the group was bowling, and carried them back to that area, which was not visible to the person in charge of the bar; that Emma Johnston consumed the contents of at least one of these bottles; that she and Hopkins had been on petitioner's premises on two prior occasions, on each of which Hopkins had purchased two bottles of beer at the bar and carried them to the bowling area, and that on each of these prior occasions Emma Johnston consumed the contents of a bottle of beer. Petitioner's general manager testified that petitioner had a rule that, on week ends, only one bottle of beer could be served to a customer at the bar and that a waitress had to deliver the order if a customer wanted more than one bottle. Police officers, employed by petitioner during their off-duty hours to keep order and check on minors, testified that they did not see Emma Johnston, Hopkins or the others in their group and that traffic at the bowling alley was very heavy on week ends. It was conceded that no employee of petitioner actually delivered beer to Emma Johnston at any time or observed her receiving or consuming it.

APPEARANCES OF COUNSEL

Emanuel D. Black and Hyman Amsel for appellants.

Philip S. Gellman and Robert I. Millonzi for respondent. *911

Order reversed, determination of the State Liquor Authority reinstated and petition dismissed, with costs in this court and in the Appellate Division, for the reasons stated in the dissenting opinion at the Appellate Division. No opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Burke and Foster. Judge Van Voorhis dissents and votes to affirm (Matter of Sheibar v. New York State Liq. Auth., 4 A D 2d 442, affd. 4 N Y 2d 984).

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y. 1962.

Matter of Beverly Lanes v. Rohan

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
12 A.D.2d 156 209 N.Y.S.2d 98

►► *The majority opinion drafted by Justice Goldman was reversed by the State's highest court, the Court of Appeals, at 11 N.Y.2d 909 (pages 1-2 of this item), for the reasons stated in the dissent written by Justice Bastow.* ◀◀

**In the Matter of Beverly Lanes, Inc., Petitioner,
v.
Thomas E. Rohan et al., Constituting the State Liquor Authority, Respondents.**

Supreme Court, Appellate Division, Fourth Department, New York

January 5, 1961

HEADNOTES

Intoxicating liquors--licenses--State Liquor Authority's 10-day suspension of petitioner's license for violation of Alcoholic Beverage Control Law (§ 65, subd. 1) was unsupported by substantial evidence and was annulled.

(1) A determination of the State Liquor Authority suspended for 10 days the license of petitioner which, incidental to its operation of 32 bowling alleys, sold alcoholic beverages at a bar on the premises. The determination was predicated upon a finding that petitioner (in violation of Alcoholic Beverage Control Law, §65, subd. 1) had on three separate occasions sold, delivered or given away, or permitted such sale, delivery or giving away, bottled beer to a 16-year-old girl who consumed it on the premises. There was no substantial evidence to support such administrative determination under the circumstances disclosed by testimony that an adult, who was accompanying the minor and two other persons, had purchased the beer at the bar and had taken it to the minor who consumed it in the bowling alley area of the establishment at least 70 feet from the bar, and it was conceded that no employee of petitioner ever delivered beer to the minor or ever observed her receiving and drinking it. The rule of absolute responsibility -- that despite any circumstances a licensee violates section 65 if a minor somehow obtains alcoholic beverages on licensed premises -- is not supported by authority. Although lack of knowledge of age is no defense, lack of knowledge of presence is a different matter and is one of many elements which should have been considered. The statutory language should be construed according to a common-sense rule in its ordinary and usual meaning so as to absolve the petitioner in the fact situation here presented. Accordingly, the Authority's determination was required to be annulled and the suspension rescinded.

SUMMARY

Proceeding under article 78 of the Civil Practice Act (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court at Special Term, entered in Erie County) to review a determination of respondents, constituting the State Liquor Authority, suspending petitioner's restaurant liquor license.

APPEARANCES OF COUNSEL

Gellman & Gellman (Philip S. Gellman of counsel), for petitioner.

Richard R. Jenczka and Hyman Amsel for respondents.

OPINION OF THE COURT

Goldman, J.

This is an article 78 proceeding to review the determination of the State Liquor Authority which suspended petitioner-appellant's license for a period of 10 days, predicated upon a finding that in violation of subdivision 1 of section 65 of the Alcoholic Beverage Control Law appellant sold, delivered, or gave away or permitted to be sold, delivered or given away alcoholic beverages to a minor under the age of 18 years on three different occasions during the latter part of September, 1957. *157

The appellant operates a bowling establishment in Niagara Falls, New York. The primary purpose of appellant's business is the renting of some 32 bowling alleys to persons engaging in the game of bowling. Incidental to that main purpose, appellant offers for sale alcoholic beverages from a bar which is located at least 70 feet from the area where the infant and others were bowling. The testimony discloses that the minor, a female 16 years, 10 months of age, was in the company of her escort, an adult male and two other persons. The adult purchased bottled beer at the bar, allegedly on three different dates and delivered one or two bottles on each of the occasions to the minor. The hearing officer found this as a fact and also found that the bar at which the beer was purchased was "seventy odd feet distant from the bowling alleys but not visible to the person in charge of the bar". It is conceded that no employee of appellant at any time actually delivered the beer to the minor and that no employee of the appellant observed the minor receiving or consuming the beer. Under these circumstances we can find no substantial evidence to support the administrative determination. (Matter of Humphrey v. State Ins. Fund, 298 N. Y. 327, 331-332; Matter of Miller v. Kling, 291 N. Y. 65; Matter of Stork Restaurant v. Boland, 282 N. Y. 256.)

The rule of absolute responsibility, i.e., that, despite any circumstances a licensee violates section 65 of the Alcoholic Beverage Control Law if a minor in some form or manner obtains alcoholic beverage on licensed premises is not supported by the decisions dealing with this question. (Matter of Sheibar v. New York State Liq. Auth., 4 A D 2d 442, affd. 4 N Y 2d 984; Matter of Erin Wine & Liq. Store v. O'Connell, 283 App. Div. 443, affd. 307 N. Y. 768.) We recognize that the absence of intention to violate the law does not relieve the licensee of the responsibility and burden of ascertaining the age of a youthful patron. (Matter of Ward v. O'Connell, 280 App. Div. 1021.) However, this is not to say that under some circumstances a youthful patron may be present on the premises, unknown to the licensee or his agent, and may consume an alcoholic beverage without violation of section 65 by the licensee. Lack of knowledge of age is no defense but lack of knowledge of presence is a different matter and is one of many elements which should be considered. If the rule of absolute responsibility prevails then all that need be shown is the presence of the minor anywhere on the premises, the reception of alcohol by the minor and nothing else. In our view the language of the statute must be construed according to its ordinary and usual meaning, and has so been interpreted ***158** by the decisions as to absolve the appellant in the fact situation here presented.

The statute must be construed according to a common-sense rule or rule of reason. Our position is clearly stated in People v. Griesebacker (6 A D 2d 679) where the court said: "We believe there is a rule of reason to be applied. The language of the statute is designed to embrace conduct where parties participate directly or indirectly in actual immediate service to a minor under 18 years of age, or knowledgeably and voluntarily, singly or in combination, or under circumstances that should impart knowledge, act so as to permit the delivery of an alcoholic beverage to such minor." We know that the Griesebacker case was a criminal prosecution, in which the degree of proof required differs greatly from an administrative proceeding, but we believe the rule there laid down should govern any proceeding involving section 65. Even in Matter of Maniccia v. State Liq. Auth. (5 A D 2d 929) relied on heavily by the respondents, the conclusion of the court that the licensee knew or should have known of the delivery of the beer to the minors was reached by the application of the test of reasonable diligence. Evidence of good faith in the instant case was demonstrated by testimony that two police officers were employed by the licensee in their off-duty hours to check the bar and to prevent sales to minors.

We believe that Matter of Sheibar v. New York State Liq. Auth. (4 A D 2d 442, affd. 4 N Y 2d 984, *supra*) which was unanimously affirmed by the Court of Appeals is completely controlling. In the Sheibar case, three sailors entered a small one-room bar where all patrons were in full view of the bartender. One sailor, of legal age, purchased three bottles of beer from the bar, took them to his table and the beer was consumed by all three including one underage person. The Appellate Division of the First Department (p. 443) unanimously annulled the determination of the Authority on the ground that there was "absent any proof -- other perhaps than a mere scintilla or a thin speculation -- of the delivery, or the permitting of the delivery, of an alcoholic beverage to the minor. Hence, a conclusion that section 65 of the Alcoholic Beverage Control Law had been violated was not a reasonable inference from the facts." Certainly, the Authority's proof in the case at bar, dealing with large premises with the alleys out of sight of the bartender and crowds of bowling patrons, is substantially weaker than that in Matter of Sheibar (*supra*) and, a fortiori, requires annulment of the Authority's determination.

We are as concerned as the Authority with the sale of alcoholic beverages to minors. In our view it would not be unreasonable *159 for the Authority to promulgate regulations prohibiting sale of alcoholic beverages in establishments like bowling alleys and similar enterprises, where the sale is only incidental to the main purpose of the business, unless the beverage is delivered to the consuming parties by waiters charged with the responsibility of determining the ages of all persons in the party. Any reasonable requirement of supervision which would prevent the imbibing of alcoholic beverages by minors would be highly desirable. If such action were taken by the Authority, the burden specifically placed upon the business might well discourage bowling alleys and similar places of amusement from dispensing alcoholic beverages. Until such action is taken by the Authority, to define clearly and positively the responsibility of the licensee, the present state of the law imposes no such obligation.

The determination of the Authority should be annulled, the suspension rescinded and the petition granted.

Bastow, J. P. (Dissenting).

This appeal requires simply the application of well-established legal principles to a factual situation. The Authority does not ask for the laying down of any rule of absolute responsibility of a licensee in any and all cases where an underage minor obtains an alcoholic beverage. It contends, and correctly, that the licensee by a course of conduct has failed in its duty to supervise with reasonable diligence the sale and consumption of bottled beer so that underaged minors may not obtain and consume the beverage.

The licensed premises consist of 32 bowling lanes with the bar located in the center thereof. The premises are open 24 hours a day for seven days a week. At times 300 or 400 persons are present and the crowd does not disperse until 5 o'clock in the morning. There is ample evidence to support the findings that on three separate occasions a male companion of a 16-year-old girl procured and delivered to her one or two bottles of beer on each occasion. These had been obtained from the bar which was 70-odd feet distant from the alleys and not visible to the person in charge of the bar. Two police officers of the City of Niagara Falls testified that on week ends they alternated on duty as employees of the licensee from 7 until 12 in the evening. One stated that his duties included keeping "an eye on the bar -- make sure that they check identification and so on for drinking."

Thus, the Authority had before it substantial proof to warrant the finding that "the licensee actually knew or should have known, had reasonable diligence been exercised" (Matter of Lynch's Bldrs. Restaurant v. O'Connell, 303 N. Y. 408, 410) *160 that on repeated occasions on different dates adults were permitted to purchase multiple bottles of beer at the bar, carry them to a remote place in the premises where the intoxicants were consumed by members of a party, at least one of whom was an underage minor. The duty of the licensee did not end at the bar. The mandate of the statute is that "No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1. Any minor, actually or apparently, under the age of eighteen years" (Alcoholic Beverage Control Law, §65). It is a mere play on words to say, as petitioner does herein, that there was no proof of any actual delivery or service to any minor. "Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence. *** But the duty to inquire existing, there is no safety in ignorance if proper inquiry would avail *** Whatever reasonable supervision by oneself or one's agents would discover and prevent, that, if continued, will be taken as suffered." (People ex rel. Price v. Sheffield Farms Co., 225 N. Y. 25, 30-31.)

The premises here involved consisting of thousands of square feet with crowds milling about throughout the day and night differ vastly from the family tavern or package liquor store considered in the authorities relied upon in the majority opinion. The licensee itself recognized its duty of supervision by retaining city policemen during the evening to "keep an eye" on the bar. Its very position in this proceeding, however, shows that it had and has no proper concept of the scope of that duty. It contends "that there was no delivery to the minor". In substance it argues, and apparently with success, that its duty of surveillance ended with the completed sale to an adult of a quantity of bottled beer at the bar. Under a so-called "rule of reason" it is now being held that there is no duty to make certain that these intoxicants are not carried elsewhere in the premises and consumed by youthful bowlers.

Here pertinent is the observation made in Matter of Maniccia v. State Liq. Auth. (5 A D 2d 929): "The fact that one person purchased an unusually large quantity of beer in bottles should have been sufficient to

put the person in charge of the premises on notice that the beer was not intended for consumption alone by the one making the purchase. Any inquiry on his part might readily have disclosed that some of the beer was intended for, and in fact consumed by minors in the party. Petitioner is ***161** bound by the rule that wherever reasonable supervision by oneself or one's agent would discover and prevent a violation, the party charged is bound to exercise such supervision".

The suggestion in the majority opinion that the Authority should promulgate additional regulations to cover the situation here disclosed is difficult to understand. The prohibitions in section 65 of the Alcoholic Beverage Control Law against the gift, sale or delivery of alcoholic beverage to those under 18 have existed since the enactment thereof. (L. 1934, ch. 478, § 65.) Any careful licensee conducting premises consisting of a bar and bowling alleys may prevent such occurrences by instructing its employees at the bar that only one bottle of beer will be served at a time to any one person. Multiple orders would be delivered directly to a group of persons by an employee who would be required to make certain that underage minors were not served. It is submitted that no additional regulations are required. Through the years the courts have vigorously sustained the Authority in this area. "The protection of adolescents against psychic and physical impairment from the use of alcohol is a settled policy of the State. It is more important than the inconvenience that might come to liquor purveyors in taking the trouble to check somewhat the maturity of their customers. The burden is not intolerable, but whatever it is the Legislature has undoubtedly power to impose it. If it seems heavy, it is placed where it is for good cause." (Matter of Barnett v. O'Connell, 279 App. Div. 449, 450.)

In the face of this and similar authoritative statements on the subject it is now being held that unless and until further regulations are adopted by the Authority "to define clearly and positively the responsibility of the licensee, the present state of the law imposes no such obligation." The provisions of the statute under consideration are plain and unambiguous. Conclusive interpretation has been given this and similar legislation by the courts of this State. This particular statute is one carrying penal sanctions. (Alcoholic Beverage Control Law, §130, subd. 3.) The decision now being made in substance prevents both the administrative agency and the police from proceeding against licensees operating bowling alleys, and those similarly situated, until the Authority by regulation defines "clearly and positively" what the Legislature has meant by the plain language of the statute. This would appear to be an unwarranted exercise of judicial power in the field of statutory construction.

The determination should be confirmed. ***162**

All concur, except Bastow, J. P., and Halpern, J., who dissent and vote to confirm the determination, in an opinion by Bastow, J. P., in which Halpern, J., concurs. Present -- Bastow, J. P., Goldman, Halpern, McClusky and Henry, JJ.

Determination annulled, with \$50 costs and disbursements, suspension rescinded, and petition granted.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1961.

MATTER OF BEVERLY LANES v. ROHAN

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
157 A.D.2d 656 549 N.Y.S.2d 757

**In the Matter of Al Ronick, Inc., Petitioner,
v.
New York State Liquor Authority, Respondent**

Supreme Court, Appellate Division, Second Department, New York

January 8, 1990

SUMMARY

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Liquor Authority dated December 30, 1988, which, after a hearing, suspended the petitioner's liquor license for 15 days and imposed a \$1,000 bond claim.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, with costs.

The evidence adduced at the administrative hearing established that the petitioner's bartender sold and delivered two alcoholic beverages to an adult male who was in the company of a female actually under the age of 21. The adult male then handed one of those drinks, an alcoholic beverage known as "iced tea", to the female, who began consuming the drink. Although both were seated at the bar, the female was never asked ***657** to produce proof of her age. Clearly, under these circumstances, substantial evidence supported the State Liquor Authority's determination that the illegal conduct was "open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented" (Matter of Austin Lemontree v New York State Liq. Auth., 147 AD2d 476, 477, affd 74 NY2d 869, quoting Matter of 4373 Tavern Corp. v New York State Liq. Auth., 50 AD2d 855, 856).

Thompson, J. P., Lawrence, Eiber and Balletta, JJ., concur.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1990.

AL RONICK, INC. V NEW YORK STATE LIQUOR AUTHORITY

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
74 N.Y.2d 869 547 N.E.2d 93 547 N.Y.S.2d 838

- *In this decision, the seven Judges of the Court of Appeals (the State's highest Court), affirmed the majority decision of the lower court (the Appellate Division), which had confirmed the State Liquor Authority's determination. The Authority had found that a patron's delivery of an alcoholic beverage to a person under the legal age had been permitted by the tavern, where the delivery occurred three feet from the bar where 4 or 5 bartenders were working.* ◀◀

**In the Matter of Austin Lemontree, Inc., Appellant,
v.
New York State Liquor Authority, Respondent.**

Court of Appeals of New York

Decided October 17, 1989

SUMMARY

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 6, 1989 in a proceeding pursuant to CPLR article 78, which, with two Justices dissenting, (1) confirmed a determination of the New York State Liquor Authority finding petitioner guilty of the sale of alcoholic beverages to a minor and suspending petitioner's liquor license for 10 days, and (2) dismissed the proceeding.

In this proceeding to review a determination of the State Liquor Authority, the Appellate Division concluded that the Authority's determination that petitioner violated Alcoholic Beverage Control Law § 65 by selling, delivering or giving away or causing or permitting or procuring to be sold, delivered or given away alcoholic beverages to a 19-year-old minor was supported by substantial evidence; that the minor's presence three feet from the bar where four or five bartenders were working when the drink was purchased for, and given to, the minor was sufficient to support the conclusion that petitioner's illegal conduct was open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented, and that the penalty of a 10-day license suspension was not so disproportionate to the offense as to be shocking to one's sense of fairness. *870

Matter of Austin Lemontree v New York State Liq. Auth., 147 AD2d 476, affirmed.

HEADNOTES

Intoxicating Liquors--Licenses--Sale to Minor

(1) In a proceeding to review a determination of the State Liquor Authority finding petitioner guilty of the sale of alcoholic beverages to a minor and suspending petitioner's liquor license for 10 days, a judgment of the Appellate Division, which confirmed the determination, is affirmed for the reasons stated in the memorandum at the Appellate Division, which concluded that the determination was supported by substantial evidence, that the minor's presence three feet from the bar where four or five bartenders were working when the drink was purchased for, and given to, the minor was sufficient to support the conclusion that petitioner's illegal conduct was open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented, and that the penalty of a 10-day license suspension was not so disproportionate to the offense as to be shocking to one's sense of fairness.

APPEARANCES OF COUNSEL

Richard J. Oddo for appellant.

Sharon L. Tillman and Roberta L. Hiller for respondent.

OPINION OF THE COURT

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), judgment affirmed, with costs, for the reasons stated in the memorandum of the Appellate Division (147 AD2d 476).

Concur: Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y. 1989.

Matter of Austin Lemontree v New York State Liq. Auth.

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
(Cite as: 147 A.D.2d 476) 147 A.D.2d 476 537 N.Y.S.2d 575

**In the Matter of Austin Lemontree, Inc., Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Second Department, New York

February 6, 1989

OPINION OF THE COURT

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Liquor Authority, dated February 16, 1988, which, after a hearing, found the petitioner guilty of the sale of alcoholic beverages to a minor and suspended the petitioner's liquor license for 10 days.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, with costs.

The determination of the New York State Liquor Authority that the petitioner violated Alcoholic Beverage Control Law § 65 by selling, delivering or giving away or causing or permitting or procuring to be sold, delivered or given away alcoholic beverages *477 to a person under the age of 21 years is supported by substantial evidence. The minor's presence three feet from the bar where 4 or 5 bartenders were working when the drink was purchased for, and given to, the minor was sufficient to support the conclusion that the petitioner's illegal conduct was "open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented" (Matter of 4373 Tavern Corp. v New York State Liq. Auth., 50 AD2d 855, 856; Matter of Cat & Fiddle v New York State Liq. Auth., 24 AD2d 753; Matter of Park II Villa Corp. v New York State Liq. Auth., 141 AD2d 646; cf., Matter of Panacea Tavern v New York State Liq. Auth., 144 AD2d 562).

The penalty imposed, a 10-day suspension of the petitioner's liquor license, is not so disproportionate to the offense as to be shocking to our sense of fairness (see, Matter of Pell v Board of Educ., 34 NY2d 222, 233).

Brown, J. P., Rubin and Spatt, JJ., concur.

Lawrence, J. dissents and votes to grant the petition, annul the determination, on the law, and vacate the penalty imposed, with costs, with the following memorandum decision in which Kooper, J., concurs:

The respondent New York State Liquor Authority alleged that the petitioner had violated Alcoholic Beverage Control Law § 65 in that it sold, delivered or gave away or permitted to be sold, delivered or given away alcoholic beverages to a person or persons under the age of 21 years (see, Alcoholic Beverage Control Law §65 [1]). The competent evidence adduced at the hearing, which was supplied exclusively by the minor to whom the alcoholic beverage was allegedly provided, disclosed that the minor was approximately three feet from the bar counter in the establishment when she received a drink from an unidentified male patron who had offered to buy her a drink. No further testimony was adduced with respect to the manner in which the unidentified male patron obtained the drink. Nor did the male patron testify at the hearing.

In view of the position taken by this court in Matter of Panacea Tavern v New York State Liq. Auth. (144 AD2d 562), Matter of Park II Villa Corp. v New York State Liq. Auth. (141 AD2d 646), and Matter of 4373 Tavern Corp. v New York State Liq. Auth. (50 AD2d 855, 856), I must conclude that the record herein lacks substantial evidence to establish that the petitioner knew or should have known, of the manner in which the drink was obtained by the male patron, or that it was *478 ultimately intended for delivery to the minor for consumption.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1989. AUSTIN LEMONTREE, INC. V NEW YORK STATE LIQUOR AUTHORITY

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
197 A.D.2d 625 602 N.Y.S.2d 673

***625 In the Matter of Jo Mar Jo Restaurant Corp., Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Second Department, New York

(October 18, 1993)

SUMMARY

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Liquor Authority, dated February 13, 1991, which, after a hearing, suspended the petitioner's liquor license for a period of 15 days and ordered a \$1,000 bond forfeiture.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, with costs.

The determination of the respondent New York State Liquor Authority that the petitioner violated Alcoholic Beverage Control Law § 65 (1) by selling an alcoholic beverage to a minor is supported by substantial evidence. The evidence adduced at the administrative hearing established that the petitioner's premises was not crowded on the night in question and that the petitioner's bartender sold and delivered alcoholic beverages to an adult male, who in turn handed one of those beverages to his underage friend, who began consuming the drink. Although the minor was seated at a table, the bartender had an unobstructed view of her and thus, the evidence was sufficient to support the conclusion that the petitioner's conduct was "open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented" (Matter of 4373 Tavern Corp. v New York State Liq. Auth., 50 AD2d 855, 856; see, Matter of Culligan's Pub v New York State Liq. Auth., 170 AD2d 506).

Additionally, the penalty imposed is not so disproportionate to the offense as to be shocking to one's sense of fairness (see, Matter of Wyman, Inc. v New York State Liq. Auth., 170 AD2d 991; Matter of Larowe v New York State Liq. Auth., 170 AD2d 905).

Thompson, J. P., Sullivan, Miller, Ritter and Santucci, JJ., concur.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D.,1993.

Matter of Jo Mar Jo Rest. Corp. v New York State Liq. Auth.

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
170 A.D.2d 506 565 N.Y.S.2d 851

**In the Matter of Culligan's Pub, Inc., Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Second Department, New York

(February 11, 1991)

SUMMARY

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Liquor Authority, dated April 18, 1989, which, after a hearing, found that the petitioner had violated Alcoholic Beverage Control Law § 65 (1) by selling an alcoholic beverage to a minor and suspended its on-premises liquor license for a period of 15 days.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, without costs or disbursements.

The determination of the respondent New York State Liquor Authority, adopting the findings of the Hearing Officer which credited the testimony of the witnesses that the petitioner violated Alcoholic Beverage Control Law § 65 (1) by selling alcoholic beverages to a minor is supported by substantial evidence. The petitioner's contention that there was insufficient evidence that the person who purchased the alcoholic beverage was a minor because his age was established by his own testimony rather than by an official document is without merit. The courts of this State generally permit a witness to testify to his own age, even though that testimony is based essentially on hearsay evidence, upon the theory that it is common knowledge in the family (see, Koester v Rochester Candy Works, 194 NY 92, 97; Matter of 36 W. Main v New York State Liq. Auth., 285 App Div 756, 757-758; see generally, Richardson, Evidence §§ 319, 329, 364 [k] [Prince 10th ed]). Moreover, the strict rules of evidence do not apply to administrative proceedings and, thus, hearsay evidence is admissible in such proceedings (see, e.g., Matter of Harry's Chenango Wines & Liq. v State Liq. Auth., 158 AD2d 804; Matter of Lane v State of New York Liq. Auth., 127 AD2d 922, 924). The evidence establishing the minor's age was unrebutted and presented a question of credibility. This court will not substitute its own judgment for that of an administrative agency on the question of credibility (see, Matter of Silberfarb v Board of Coop. Educ. Servs., 60 NY2d 979; Matter of Simpson v Wolansky, 38 NY2d 391, 394; Matter of Ahsaf v Nyquist, 37 NY2d 182).

The evidence adduced at the administrative hearing established that the petitioner's bartender sold and delivered two pitchers of beer to a group of four males including the minor and that, upon request, the bartender produced five glasses which the minor took to a table situated seven or eight feet from the bar and of which the bartender had an unobstructed *507 view. The minor and his four companions each poured themselves a glass of beer at the table. The petitioner's premises was not crowded on the night in question. The record further indicates that the bartender served the beer without asking the minor or any of his companions for identification. Under these circumstances, the evidence was sufficient to support the State Liquor Authority's conclusion that the petitioner's illegal conduct was "open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented" (Matter of 4373 Tavern Corp. v New York State Liq. Auth., 50 AD2d 855, 856; see, Matter of Al Ronick, Inc. v New York State Liq. Auth., 157 AD2d 656; Matter of Austin Lemontree v New York State Liq. Auth., 147 AD2d 476, 477, affd 74 NY2d 869).

Additionally, the penalty imposed, a 15-day suspension of the petitioner's on-premises liquor license, is

not so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness (see, Matter of Pell v Board of Educ., 34 NY2d 222, 233; Matter of Austin Lemontree v New York State Liq. Auth., *supra*).

Thompson, J. P., Lawrence, Harwood and Balletta, JJ., concur.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1991.

Matter of Culligan's Pub v New York State Liq. Auth.

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
170 A.D.2d 506 565 N.Y.S.2d 851

**In the Matter of Culligan's Pub, Inc., Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Second Department, New York

(February 11, 1991)

SUMMARY

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Liquor Authority, dated April 18, 1989, which, after a hearing, found that the petitioner had violated Alcoholic Beverage Control Law § 65 (1) by selling an alcoholic beverage to a minor and suspended its on-premises liquor license for a period of 15 days.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, without costs or disbursements.

The determination of the respondent New York State Liquor Authority, adopting the findings of the Hearing Officer which credited the testimony of the witnesses that the petitioner violated Alcoholic Beverage Control Law § 65 (1) by selling alcoholic beverages to a minor is supported by substantial evidence. The petitioner's contention that there was insufficient evidence that the person who purchased the alcoholic beverage was a minor because his age was established by his own testimony rather than by an official document is without merit. The courts of this State generally permit a witness to testify to his own age, even though that testimony is based essentially on hearsay evidence, upon the theory that it is common knowledge in the family (see, Koester v Rochester Candy Works, 194 NY 92, 97; Matter of 36 W. Main v New York State Liq. Auth., 285 App Div 756, 757-758; see generally, Richardson, Evidence §§ 319, 329, 364 [k] [Prince 10th ed]). Moreover, the strict rules of evidence do not apply to administrative proceedings and, thus, hearsay evidence is admissible in such proceedings (see, e.g., Matter of Harry's Chenango Wines & Liq. v State Liq. Auth., 158 AD2d 804; Matter of Lane v State of New York Liq. Auth., 127 AD2d 922, 924). The evidence establishing the minor's age was unrebutted and presented a question of credibility. This court will not substitute its own judgment for that of an administrative agency on the question of credibility (see, Matter of Silberfarb v Board of Coop. Educ. Servs., 60 NY2d 979; Matter of Simpson v Wolansky, 38 NY2d 391, 394; Matter of Ahsaf v Nyquist, 37 NY2d 182).

The evidence adduced at the administrative hearing established that the petitioner's bartender sold and delivered two pitchers of beer to a group of four males including the minor and that, upon request, the bartender produced five glasses which the minor took to a table situated seven or eight feet from the bar and of which the bartender had an unobstructed *507 view. The minor and his four companions each poured themselves a glass of beer at the table. The petitioner's premises was not crowded on the night in question. The record further indicates that the bartender served the beer without asking the minor or any of his companions for identification. Under these circumstances, the evidence was sufficient to support the State Liquor Authority's conclusion that the petitioner's illegal conduct was "open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented" (Matter of 4373 Tavern Corp. v New York State Liq. Auth., 50 AD2d 855, 856; see, Matter of Al Ronick, Inc. v New York State Liq. Auth., 157 AD2d 656; Matter of Austin Lemontree v New York State Liq. Auth., 147 AD2d 476, 477, affd 74 NY2d 869).

Additionally, the penalty imposed, a 15-day suspension of the petitioner's on-premises liquor license, is

not so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness (see, Matter of Pell v Board of Educ., 34 NY2d 222, 233; Matter of Austin Lemontree v New York State Liq. Auth., *supra*).

Thompson, J. P., Lawrence, Harwood and Balletta, JJ., concur.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1991.

Matter of Culligan's Pub v New York State Liq. Auth.

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
147 A.D.2d 901 537 N.Y.S.2d 352

**In the Matter of Lakeside Inn Supper Club, Inc., Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Fourth Department, New York

February 3, 1989

Determination unanimously confirmed and petition dismissed without costs.

OPINION OF THE COURT

This is a proceeding transferred to this court pursuant to CPLR 7804 (g) to review a New York State Liquor Authority determination that petitioner violated Alcoholic Beverage Control Law § 65 (1), which prohibits the sale or delivery of alcoholic beverages to persons under the age of 21.

The record demonstrates without contradiction that on July 8, 1986 petitioner's bartender served an alcoholic beverage to a minor without having required the minor to produce proof of age. The bartender testified that he served the patron because on previous dates she had presented photographic identification in the form of a motor vehicle operator's license reflecting that she was 21 years old.

Alcoholic Beverage Control Law § 65 (4) provides in relevant part: "In any proceeding pursuant to subdivision one of this section, it shall be an affirmative defense that such person had produced a photographic identification card apparently issued by a governmental entity or institution of higher education and that the alcoholic beverage had been sold, delivered or given to such person in reasonable reliance upon such identification."

Although the Administrative Law Judge who presided at the hearing credited the testimony of the bartender, he found nevertheless that the affirmative defense of reasonable reliance was not established. He ruled that the defense could only be ***902** established by showing that the photographic identification was presented on the occasion of the specific sale or delivery underlying the alleged violation. By adopting the findings of the Hearing Officer, the State Liquor Authority necessarily adopted his interpretation of Alcoholic Beverage Control Law § 65 (4). That interpretation by the agency charged with the responsibility for administration and enforcement of the statute must be upheld since it is neither irrational nor unreasonable (see, *Matter of Howard v Wyman*, 28 NY2d 434, 438, lv granted 29 NY2d 481, rearg denied 29 NY2d 749, *Matter of Reader's Digest Assn. v State Tax Commn.*, 103 AD2d 926, 927). We conclude, therefore, that the determination is supported by substantial evidence and that the penalty of a 10-day suspension of petitioner's license is not so disproportionate to the offense as to be shocking to one's sense of fairness (see, *Matter of Pell v Board of Educ.*, 34 NY2d 222, 233). (Article 78 proceeding transferred by order of Supreme Court, Erie County, Fallon, J.)

Present--Dillon, P. J., Doerr, Green, Pine and Davis, JJ.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D., 1989.

LAKESIDE INN SUPPER CLUB, INC. V NEW YORK STATE LIQUOR AUTHORITY

END OF DOCUMENT

Copr. © 1999 Alexander Treadwell, Sec of State, NY
232 A.D.2d 947 649 N.Y.S.2d 83

**In the Matter of Dark Horse Tavern, Inc., Doing Business as Dark Horse Tavern,
Petitioner,
v.
New York State Liquor Authority, Respondent.**

Supreme Court, Appellate Division, Third Department, New York
(October 30, 1996)

OPINION OF THE COURT

Mercure, J.

SUMMARY

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Cortland County) to review a determination of respondent which suspended petitioner's on-premises liquor license.

The undisputed evidence adduced at the administrative hearing conducted in this matter established that on February 12, 1994, Krista Krueger and Rebecca Garrett, both 20 years old, gained admission to petitioner's licensed establishment by displaying genuine New York State driver's licenses belonging to other individuals who were over the age of 21. Garrett did the same on March 31, 1994. Under the system petitioner established on each of those occasions, the patrons exhibited identification at the sole entrance to the premises, thereby ostensibly ensuring that only patrons of legal drinking age were present inside and obviating the need for bartenders to check patrons' identification. On each of the dates at issue here, the minor's payment of a \$3 admission charge entitled her to consume an unlimited quantity of beer during the evening. *948 Without doubt, Krueger and Garrett were served and consumed beer on the respective occasions. Petitioner's affirmative defense that the minors had each "produced a photographic identification card apparently issued by a governmental entity and that the alcoholic beverage had been sold, delivered or given to such person in reasonable reliance upon such identification" (Alcoholic Beverage Control Law § 65 [4]) was rejected by respondent.

In our view, respondent's determination that petitioner failed to sustain its burden with respect to the affirmative defense defined in Alcoholic Beverage Control Law § 65 (4) is supported by substantial evidence on the record and is by no means arbitrary or capricious (see, Matter of Roc's Z-Bar v State of New York Liq. Auth., 189 AD2d 1077, 1078, appeal dismissed 81 NY2d 1006; Matter of Lakeside Inn Supper Club v New York State Liq. Auth., 147 AD2d 901, 902). Because Krueger destroyed the driver's license that she exhibited to petitioner's employee on February 14, 1994, petitioner was unable to present any reliable evidence as to Krueger's likeness to the person portrayed on the license. Moreover, Krueger's testimony established that she had brown eyes, whereas the license indicated that its holder had blue eyes. With regard to Garrett, the evidence established that she obtained entrance to petitioner's premises by exhibiting her 25-year-old sister's license. Our examination of photographs of Garrett and her sister's license, which were received in evidence at the administrative hearing, supports the Hearing Officer's conclusion that Garrett had a "youthful appearance" and "[did] not appear to be as old as the person portrayed" on the license.

Under the circumstances, we need not consider respondent's legal bases for rejecting petitioner's affirmative defense.

Cardona, P. J., Casey, Spain and Carpinello, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petition dismissed.

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.
N.Y.A.D., 1996. Matter of Dark Horse Tavern v New York State Liq. Auth.

END OF DOCUMENT