

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 665

MAY 3, 1945.

1. DISCIPLINARY PROCEEDINGS - CHARGE OF SELLING ALCOHOLIC BEVERAGES TO A MINOR, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20, DISMISSED - DEPARTMENT FAILED TO SUSTAIN THE BURDEN OF PROOF.

In the Matter of Disciplinary Proceedings against

MORRIS DIANGELO, by
DAVID DIANGELO, Atty-in-Fact
T. a CLUB LIDO
1418 Broadway
Camden, N. J.,

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-29, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden.

Benjamin J. Dzick, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant pleads not guilty to charges alleging that he sold to and allowed, permitted and suffered the consumption of alcoholic beverages by a minor on his licensed premises, in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20.

Verna ---, who was born on February 1, 1926, testified that she visited the defendant's licensed premises on October 12, 1944, and also on November 24, 1944. She testified that on the former occasion alcoholic beverages were served to her by a bartender and on the latter date by a waitress. Verna --- stated that on her first visit to the defendant's establishment she was accompanied by a girl and two sailors and on the other occasion by the same girl, a sailor and a male civilian. Verna further testified that she had visited the tavern on divers other times but could not recall the exact dates; that she jotted down the two dates aforementioned in a small memorandum book but that due to restrictions imposed by the penal institution wherein she is an inmate, she could not produce the book at the instant hearing. She also described the bartender alleged to have served her with alcoholic beverages thusly: "He has black hair, sort of baldy, short and stout." Both at the tavern in the presence of the ABC agents and also at the departmental hearing, Verna identified Dorothy Van Austin as the waitress who had served her. She denied, however, ever seeing David DiAngelo, attorney-in-fact for the licensee.

Dorothy, twenty-two years of age, the companion of Verna ---, testified that she remembered being at the defendant's licensed premises on October 12, 1944 and November 24, 1944, and that Verna had been served with alcoholic beverages on each occasion. She testified that she recalled their male companions paying thirteen cents for a glass of beer but later contradicted this statement, saying that fifteen cents was paid for a glass of beer. She also stated that Verna's description fitted a bartender employed at the licensed premises of Dominic J. Colangelo, t/a Happy Hour Club, and that thirteen

cents was charged for a glass of beer at said licensed premises. Dorothy finally admitted that she was confused as to whether she had been ordered from the premises of the defendant or the Happy Hour Club.

David DiAngelo testified that he had no recollection of ever seeing either Verna or Dorothy until the evening when they were in the licensed premises in the company of the two investigators of the Department of Alcoholic Beverage Control. He further testified that he had no bartender in his employ on the days in question who answered the description given by the girls.

Dorothy Van Austin and Elaine Reeves, waitresses employed by defendant, testified that they were working on the nights in question but they had never seen the minor or her girl companion on those evenings, nor had they ever seen the girls previous to the time when they visited the premises with the ABC agents.

In view of the lapse of time between the dates of the alleged violations and knowledge of same by the Department, the male companions alleged to have been with the girls on the occasions in question were unavailable as witnesses in the instant proceedings.

The within charges were instituted as a result of the statements given by the girls to police authorities in an extraneous matter when apprehended on a criminal complaint. Simultaneous charges alleging sales and service of alcoholic beverages to Verna --- were instituted against Dominic J. Colangelo, t/a Happy Hour Club. In the latter proceedings, the licensee pleaded non vult to said charges. See Re Colangelo, Bulletin 648, Item 4.

The general behavior of Verna and Dorothy during the present hearing detracts from the trustworthiness of their testimony. On the other hand, I am impressed by the apparent honesty and sincerity of the testimony of David DiAngelo, attorney-in-fact, and that given by the two waitresses who were working on the licensed premises during the evenings in question. These employees emphatically denied seeing Verna or Dorothy on the licensed premises.

After carefully considering all the evidence, and in particular the discrepancies in the testimony of the Department's witnesses, I conclude that, on the testimony presented, the Department has not sustained the burden of proof in establishing the guilt of defendant. Hence I shall order that the charges be dismissed.

Accordingly, it is, on this 23rd day of April, 1945,

ORDERED, that the charges herein be and the same are hereby dismissed.

ALFRED E. DRISCOLL
Commissioner.

2. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - PREVIOUS RECORD - LICENSE SUSPENDED FOR A PERIOD OF 30 DAYS, LESS 5 FOR PLEA.

DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS BY PERMITTEE, IN VIOLATION OF R. S. 33:1-77 - PERMIT SUSPENDED FOR A PERIOD OF 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against D. DALE BRANDT T/a RANCH O HOTEL Route 6, bet. Bridgeville and Delaware White Township P.O. Belvidere R.D., N. J.,

Holder of Plenary Retail Consumption License C-3 issued by the Township Committee of White Township.

In the Matter of Disciplinary Proceedings against

ABBIE L. MILLER Delaware Avenue Portland, Pa.,

Holder of Employment Permit 3934 issued by the State Commissioner of Alcoholic Beverage Control.

CONCLUSIONS AND ORDER

D. Dale Brandt, Defendant-licensee, Pro se. Abbie L. Miller, Defendant-permittee, Pro se. Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

Defendant-licensee has pleaded non vult to charges that (1) on March 23, 1945, he sold alcoholic beverages to minors, in violation of R. S. 33:1-77; and (2) on March 23, 1945, he sold, served and delivered and allowed, permitted and suffered the service of alcoholic beverages to, and allowed, permitted and suffered the consumption thereof by, said minors, in violation of Rule 1 of State Regulations No. 20.

Abbie L. Miller, defendant-permittee, has pleaded non vult to charges that on March 23, 1945, she, as an employee of defendant-licensee, sold alcoholic beverages to minors, in violation of R. S. 33:1-77.

The record of the investigation in this matter discloses that on the day in question a number of minors were dancing, eating and drinking non-alcoholic beverages in defendant-licensee's premises. ABC investigators observed a party of nine, including four girls, at one table. During an intermission in the dancing, the waitress (defendant-permittee Miller) took an order from this table and, shortly thereafter, delivered seven glasses of what subsequently were found to be alcoholic beverages, and two non-alcoholic drinks. Glasses of alcoholic beverages were served to and partially consumed by the four girls.

The beverages were seized, and statements taken from the four girls proved them to be, respectively, seventeen years, seventeen years, eighteen years and nineteen years of age. The minors stated that they had never been questioned as to their age by anyone in the licensed premises until the Department investigators so questioned them.

A statement by the permittee (Miller) admits the service and her failure to question the minors at that time as to their age. She says that some time prior thereto she had asked one of the minors her age and had been assured verbally by said minor that the minor was over twenty-one. No written statements of age were ever secured.

The defendant-licensee seeks to minimize his responsibility by blaming the permittee in not following his definite instructions. This does not excuse the licensee, who must be held strictly accountable for the actions of his employees. Further, it appears that licensee has not adopted measures sufficiently designed to prevent the sale to minors. He has had the license only since February 1944; yet his license was suspended for six days by the local issuing authority in August 1944 for permitting a sale to minors.

Licenses have been repeatedly warned that, if they choose to permit groups of minors to frequent their premises, they must accept the full responsibility of keeping within the law.

As to defendant-licensee: His previous record disclosing a similar violation within the year, and the fact that two of the minors were only seventeen years of age, are aggravating circumstances. His license will be suspended for thirty days, with five days remitted for the plea. Cf. Re Gajewski, Bulletin 551, Item 1.

The employment permit of defendant-permittee will also be suspended for thirty days, less five days for the plea. Cf. Re Gajewski, supra.

Accordingly, it is, on this 19th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-3, issued by the Township Committee of White Township to D. Dale Brandt, t/a Ranch O Hotel, for premises on Route 6 between Bridgeville and Delaware, White Township, be and the same is hereby suspended for a period of twenty-five (25) days, commencing at 12:01 a.m. April 26, 1945, and terminating at 12:01 a.m. May 21, 1945; and it is further

ORDERED, that Employment Permit 3934, issued to Abbie L. Miller by the State Commissioner of Alcoholic Beverage Control, be and the same is hereby suspended for a period of twenty-five (25) days, commencing at 12:01 a.m. April 26, 1945, and terminating at 12:01 a.m. May 21, 1945.

ALFRED E. DRISCOLL
Commissioner.

By: Edward J. Dorton
Deputy Commissioner.

- 4. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - EMPLOYMENT OF MINOR, IN VIOLATION OF R. S. 33:1-26 AND RULE 1 OF STATE REGULATIONS NO. 11 - PERMITTING FEMALE EMPLOYEE TO ACCEPT ALCOHOLIC BEVERAGES AT THE EXPENSE OF PATRONS, IN VIOLATION OF RULE 22 OF STATE REGULATIONS NO. 20 - PERMITTING LICENSED PREMISES TO REMAIN OPEN DURING PROHIBITED HOURS, IN VIOLATION OF RULE 2 OF STATE REGULATIONS NO. 40 - PREVIOUS RECORD - LICENSE SUSPENDED FOR BALANCE OF TERM.

In the Matter of Disciplinary)
 Proceedings against)

MARY ULIKOWSKI)
 248 Secaucus Road)
 Secaucus, N. J.,)

CONCLUSIONS
 AND ORDER

Holder of Plenary Retail Consump-)
 tion License C-23, issued by the)
 Town Council of the Town of)
 Secaucus.)

 Archie Elkins, Esq., Attorney for Defendant-licensee.
 Harry Castelbaum, Esq., appearing for Department of Alcoholic
 Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleaded not guilty to charges that (1) on November 24, 1944, and on various dates prior thereto, she sold and served to and permitted the consumption of alcoholic beverages by Helen --- and Ann ---, minors, in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20; (2) she knowingly employed a minor on her licensed premises in violation of R. S. 33:1-26 and Rule 1 of State Regulations No. 11; (3) she allowed, permitted and suffered a female employee to accept beverages at the expense of or as a gift from patrons, in violation of Rule 22 of State Regulations No. 20; (4) that between 12:00 o'clock midnight, Saturday, March 3, 1945 and 7:00 a.m. Sunday, March 4, 1945, she sold, served and delivered and permitted the consumption of alcoholic beverages, in violation of Rule 1 of State Regulations No. 40 and (5) that between 12:00 o'clock midnight, March 3, 1945 and 7:00 a.m. Sunday, March 4, 1945, she failed to have her entire premises closed and she permitted persons other than herself and her bona fide employees to be and remain on the licensed premises, in violation of Rule 2 of State Regulations No. 40.

Two investigators of the Department of Alcoholic Beverage Control testified that on November 24, 1944, they observed Helen ---, seventeen years of age, drinking beer in the defendant's licensed premises. Subsequent investigation, according to the testimony of the ABC agents, disclosed that Helen and a girl companion, Ann ---, also seventeen years of age, had visited the defendant's tavern on numerous occasions prior to November 24, 1944.

The testimony of Helen --- and Ann --- was in agreement that they first visited the defendant's establishment a few weeks after Labor Day, September, 1944. On their first visit they each consumed four or five drinks of whiskey. On subsequent visits to defendant's tavern, four or five days a week, including Friday, Saturday and Sunday nights of each week, they also consumed alcoholic beverages. Helen testified that she voluntarily assisted in the tavern, waiting on patrons seated at tables and at times accepted drinks of beer at the expense of the customers. Ann --- corroborated Helen's testimony relative to helping on the licensed premises.

Defendant-licensee denied ever serving alcoholic beverages to either Helen or Ann at any time. Walter Klui and Frances Klui, bartenders, however, admitted serving alcoholic beverages to the two minor girls but expressed the opinion that they believed the girls to be of age.

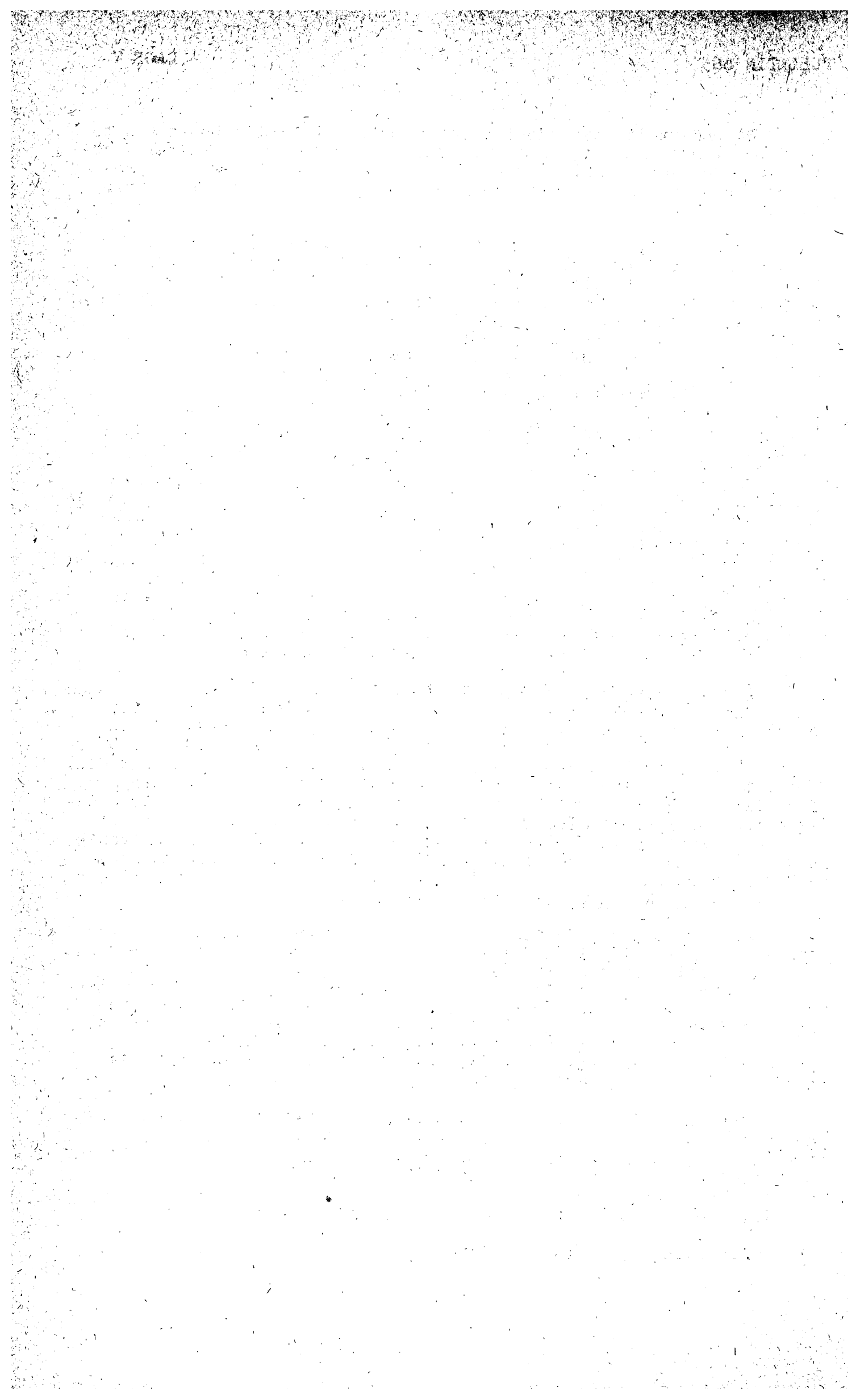
On March 4, 1945, during the period when the charges relating to the minors, Helen and Ann, were pending, two other investigators visited defendant's licensed premises. These investigators testified that they arrived at the place of business of defendant at 12:55 a.m. and observed through a glass panel on the door of the main entrance, two men standing at the bar. Walter Klui, bartender, was standing behind the bar. One of the men, they stated, was wearing an overcoat whereas the other was wearing a light leather jacket. According to the investigators' testimony, a glass of beer which had been on the bar in front of one of the men was removed by the bartender before they were able to gain admittance to the premises. The ABC agents claimed that Walter Klui told them that one of the men was waiting for him to close up to go to a restaurant to eat; and he let the other man stay there -- he was a neighbor who lived two or three houses away. He stated they were patrons of the place. Walter Klui denied making such assertion and claimed that the men were there to help him remove the old bar preparatory to installing a new bar. In any event, I am satisfied that these men were not bona fide employees of defendant. Walter Klui also testified that there were two glasses on the bar, one to hold the stick customarily used in the trade to comb the excess foam from a glass of beer, and the other holding cocktail mixers. This was corroborated by the testimony of one of the witnesses who was present on the night in question.

After giving careful consideration to all the testimony adduced in the instant proceeding, I conclude that the defendant is guilty of all charges preferred, with the exception of charge (4). There appears to be some doubt as to the actual presence of a glass of beer on the bar prior to the entrance of the ABC agents and the agents did not witness the sale, service or consumption of alcoholic beverages. I shall resolve the doubt as to charge (4) in favor of the defendant-licensee and I shall dismiss charge (4). Even though the defendant may be personally innocent of the violation of the Alcoholic Beverage Law and the Rules and Regulations of the Department of Alcoholic Beverage Control, she is nonetheless responsible for the acts of her employees. Re Kneller, Bulletin 49, Item 4.

Defendant has a previous adjudicated record. Her license was suspended by the local municipal authority for a period of fifteen days, effective January 15, 1940, when found guilty of a sale to minors. Again defendant's license was suspended by the State Commissioner for a period of twenty days commencing August 4, 1944, when she was found guilty of possession of several bottles of liquor not genuine as labeled. In view of the findings in the instant case, coupled with defendant's prior record, I shall suspend defendant's license for the balance of its term.

Notice, pursuant to R. S. 33:1-31, was served upon the defendant requiring her to show cause why, in the event of revocation of the license, the licensed premises should not be declared ineligible to become the subject of any further license for a period of two years. Inasmuch as no revocation of the license has been ordered herein, the aforesaid order to show cause will be dismissed.

Accordingly, it is, on this 25th day of April, 1945,



The defendant, however, has a previous adjudicated record. Her license was suspended for ten days by the State Commissioner of Alcoholic Beverage Control, effective August 30, 1943, upon being found guilty of sale, bottling and advertising "home made wine" for sale. Re Porcoro, Bulletin 582, Item 9.

Under all of the circumstances, I shall suspend the defendant's license for twenty-five days, less five days for the plea of non vult, or a net suspension of twenty days.

Accordingly, it is, on this 25th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-3, issued by the City Council of the City of Garfield to Mrs. Salvatrice Porcoro, t/a Porcoro's, for premises 129-133 Monroe Street, Garfield, be and the same is hereby suspended for a period of twenty (20) days, commencing at 12:01 a.m. May 2, 1945, and terminating at 12:01 a.m. May 22, 1945.

ALFRED E. DRISCOLL
Commissioner.

- 5. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 40 - PERMITTING LICENSED PREMISES TO REMAIN OPEN, IN VIOLATION OF RULE 2 OF STATE REGULATIONS NO. 40 - LICENSE SUSPENDED FOR A PERIOD OF 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)
 MARY McDONALD)
 T/a MAY-MAC BAR AND GRILL)
 Route 17 and Vincent Ave.)
 Hackensack, N. J.,)
 Holder of Plenary Retail Consumption License C-37 issued by the)
 City Council of the City of)
 Hackensack.)
 -----)

CONCLUSIONS
AND ORDER

Walter Jones, Esq., Attorney for Defendant-licensee.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant pleaded non vult to the following charges:

"1. Between 12 o'clock midnight, Friday, March 2, 1945 and 7:00 a.m. Saturday, March 3, 1945, viz., until at least 12:50 a.m. of the latter date, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages and permitted the consumption of alcoholic beverages upon the licensed premises, in violation of Rule 1 of State Regulations No. 40.

"2. Between 12 o'clock midnight, Friday, March 2, 1945 and 7:00 a.m. Saturday, March 3, 1945, viz., until at least 12:50 a.m. of the latter date, you failed to have your entire premises closed and you permitted persons other than yourself and your bona fide employees to be and remain on the licensed premises, in violation of Rule 2 of State Regulations No. 40."

It appears from the file in this case that defendant does not conduct a bona fide restaurant.

On Saturday, March 3, 1945, at about 12:50 a.m., police officers of the City of Hackensack observed a number of cars parked outside defendant's premises. They knocked on a side door and were admitted by defendant's husband, who was in charge of the licensed premises. The police officers say that they saw twelve people seated at the bar with drinks in front of them. They warned Mr. McDonald to put the patrons out, and then left the premises. The police officers returned about 2:00 a.m. and again observed some cars parked outside. After they had knocked at the door, Mr. McDonald admitted them but there were no patrons in the barroom at that time.

On behalf of defendant, her husband has stated that he served the last drinks shortly before midnight and that he believed he was within his legal rights "so long as I did not serve, sell or give any alcoholic beverages to the customers or patrons after 12:00 o'clock." Rule 1 of State Regulations No. 40, of course, forbids also the consumption of alcoholic beverages on the licensed premises after midnight. Mr. McDonald has also stated that sandwiches and coffee were being served to these patrons in the kitchen when the police returned about 2:00 a.m. The patrons apparently left the licensed premises shortly after 2:00 a.m.

The defendant is guilty as charged.

Defendant has a prior record for a dissimilar violation. In March 1944 her license was suspended for ten days after she had pleaded guilty to a charge of possessing one bottle of illicit liquor. Re McDonald, Bulletin 609, Item 11.

The fact that doors of the licensed premises were apparently closed to the general public after midnight, and the absence of any evidence that alcoholic beverages were sold, served or delivered to patrons after midnight, are mitigating circumstances in the present case. In view thereof, I shall not increase the period of suspension in this case because of the prior record. Defendant's license will be suspended for fifteen days, less five days for the plea, making a net suspension of ten days.

Accordingly, it is, on this 26th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-37, issued by the City Council of the City of Hackensack to Mary McDonald, t/a May-Mac Bar and Grill, for premises at Route 17 and Vincent Avenue Hackensack, be and the same is hereby suspended for ten (10) days, commencing at 12:01 a.m. May 1, 1945, and terminating at 12:01 a.m. May 11, 1945.

ALFRED E. DRISCOLL
Commissioner.

APPELLATE DECISIONS - FALKNER v. EGG HARBOR TOWNSHIP AND GILL.

ALBERT FALKNER,)
)
 Appellant,)
)
 -vs-)
)
 TOWNSHIP COMMITTEE OF THE)
 TOWNSHIP OF EGG HARBOR,)
 ROY J. WALSH, Chairman, and)
 ELIZABETH M. P. GILL,)
)
 Respondents)
 -----)

ON APPEAL
CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Appellant.
William Charlton, Esq., Attorney for Respondents.

BY THE COMMISSIONER:

This is an appeal from the action of the respondent Township Committee in adopting an ordinance increasing the number of plenary retail consumption licenses in the Township of Egg Harbor from twenty-six to twenty-seven, and from the subsequent issuance of a plenary retail consumption license to respondent Mrs. E. M. P. Gill for premises located at 1549 Washington Avenue, Cardiff, Township of Egg Harbor.

The petition of appeal sets forth, in substance, as grounds of appeal, that the action of the Township Committee was unreasonable and contrary to public necessity and convenience.

The Township of Egg Harbor had a population of 5,066 according to the 1940 Federal census. Prior to December 5, 1944, twenty-six plenary retail consumption licenses, or one for each 118 persons, had been issued by the respondent Township Committee and were then in existence. On December 5, 1944 the Township Committee adopted an ordinance increasing the number of plenary retail consumption licenses from twenty-six to twenty-seven. Respondent Elizabeth M. P. Gill applied for and was granted a plenary retail consumption license on December 19, 1944. Appellant, a resident and taxpayer in the Township of Egg Harbor, has filed this appeal.

At the hearing, Committeeman Eccles testified that there was no public demand for an additional license. He said that he voted in favor of the increase in the quota because of the proposed post-war construction of a race track five miles from the premises in question and because of the naval air base situated about two miles from the licensed business where he stated thousands of men are now stationed. Another reason which influenced him to vote in favor thereof was the need of additional revenue by the Township.

Committeeman Fisher testified that the controlling reason which prompted him to vote for the increase in licenses was because of the revenue to be received for the additional license. He admitted that he had never even considered whether the liquor licensees in existence previous to the granting of the license to Mrs. Gill could amply supply the demands as he "really had no interest in the liquor places."

Committeeman Morgan testified that he voted against the adoption of the ordinance increasing the quota of plenary retail consumption licenses as he was of the opinion that "we had a sufficient number of saloons on the Black Horse Pike. We have ten within a mile and a half."

Respondent Elizabeth M. P. Gill testified that she has never been engaged previously in the liquor business and that she applied for a liquor license because she and her husband had purchased the premises. She said that she believed there was need for an additional license at her premises because there will be a lot of traffic there due to the Naval Station and the race track. There is little, if any, evidence, other than that set forth above, as to the need of an additional license in the Township of Egg Harbor.

R. S. 33:1-40 provides that the governing board of each municipality may, as regards said municipality, by ordinance, limit the number of licenses to sell alcoholic beverages at retail. R. S. 33:1-41 provides that if any person affected or who might be affected by any limitation of the number of licenses or of the hours between which sales of alcoholic beverages at retail may be made shall consider himself aggrieved thereby, he may appeal to the Commissioner in respect thereto and thereupon the Commissioner, after public hearing, may set aside, vacate and repeal the limitation complained of or change, alter, amend or otherwise modify the same.

In Board of Commissioners of the Town of Phillipsburg v. Burnett, 125 N. J. L. 157, the Court says:

"The invalidating of an ordinance fixing a maximum in the number of licenses is not reasonably essential, in our opinion, to the accomplishment of any of the designated purposes inasmuch as the actual limitation in the issuance of licenses may be kept by the Commissioner, as the appellate authority under R. S. 33:1-22, at a lesser number when the circumstances justify."

Upon the facts submitted herein, I find that public necessity and convenience did not warrant the granting of an additional license to respondent Elizabeth M. P. Gill and, hence, under the authority granted to me under R. S. 33:1-38, I shall order that the issuance of said license be set aside. Under the circumstances, it is not necessary for me to vacate the ordinance. Phillipsburg v. Burnett, supra.

Accordingly, it is, on this 26th day of April, 1945,

ORDERED, that the action of respondent Township Committee of the Township of Egg Harbor in issuing a plenary retail consumption license to respondent Elizabeth M. P. Gill, for premises at 1549 Washington Avenue, Cardiff, Township of Egg Harbor, be and the same is hereby reversed; and it is further

ORDERED, that said license be and the same is declared void, effective May 2, 1945, at 12:01 a.m.; that all operations thereunder cease at that time, and that the license certificate be surrendered to the Township Clerk of the Township of Egg Harbor.

ALFRED E. DRISCOLL
Commissioner.

8. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR (REFILLS) - LICENSE
SUSPENDED FOR A PERIOD OF 30 DAYS.

In the Matter of Disciplinary
Proceedings against)

MARY MITCHELL)
240 Elm Street)
Newark 5, N. J.,)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consump-)
tion License C-504 issued by the)
Municipal Board of Alcoholic)
Beverage Control of the City of)
Newark.)

E. D. Masucci, Esq., Attorney for Defendant-licensee.
Anthony Meyer, Jr., Esq., appearing for Department of Alcoholic
Beverage Control.

BY THE COMMISSIONER:

Defendant pleaded non vult to charges alleging that on March 10, 1945, she possessed eight bottles of alcoholic beverages which were not genuine as labeled, in violation of R. S. 33:1-50.

On March 10, 1945, after his preliminary tests indicated that the contents were not genuine as labeled, an ABC investigator seized the following bottles in defendant's premises: two 4/5 quart bottles labeled "Calvert Special Blended Whiskey", two 4/5 quart bottles labeled "Three Feathers Blended Whiskey Reserve", two 4/5 quart bottles labeled "P M DeLuxe Blended Whiskey", a 4/5 quart bottle labeled "Carstairs White Seal Blended Whiskey", and a 4/5 quart bottle labeled "Golden Wedding Blended Whiskey." Subsequent analysis by the chemist employed by the Department of Alcoholic Beverage Control disclosed that the contents of all of the seized bottles varied in proof, acids and solids from the contents of genuine bottles of the same product.

At the time of the seizure the licensee admitted that she was over-stocked with "Gold Coin" whiskey and that she had used the latter whiskey to refill each of the seized bottles. Even if some unauthorized person told her that this practice was permissible, that fact constitutes no excuse and cannot be considered as a mitigating circumstance. This practice constitutes a deliberate fraud upon the public and, unless stopped, might lead to a complete breakdown of proper liquor control.

Defendant has no prior record. Under the circumstances, her license will be suspended for a period of thirty days. Re Brooks, Bulletin 633, Item 11.

Accordingly, it is, on this 26th day of April, 1945,

ORDERED, that Plenary Retail Consumption License C-504, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Mary Mitchell, for premises 240 Elm Street, Newark, be and the same is hereby suspended for thirty (30) days, commencing at 12:01 a.m. May 2, 1945, and terminating at 12:01 a.m. June 1, 1945.

ALFRED E. DRISCOLL
Commissioner.

9. APPELLATE DECISIONS - NEW JERSEY LICENSED BEVERAGE ASSN. AND ELIZABETH BEVERAGE DEALERS ASSN., DIV. 2, v. ELIZABETH AND FRATERNAL ORDER OF EAGLES, NEW ELIZABETH AERIE 0667.

NEW JERSEY LICENSED BEVERAGE ASSN. and ELIZABETH BEVERAGE DEALERS ASSN., DIVISION 2,

Appellants,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ELIZABETH and FRATERNAL ORDER OF EAGLES, NEW ELIZABETH AERIE 0667,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Appellants.
Raymond A. Leahy, Esq., Attorney for Respondent Board.
Giuliano & Giuliano, Esqs., by Anthony Giuliano, Esq., Attorneys for Respondent, Fraternal Order of Eagles, New Elizabeth Aerie 0667.

BY THE COMMISSIONER:

Appellants appeal from the action of respondent Municipal Board in granting a club license to Fraternal Order of Eagles, New Elizabeth Aerie 0667, for premises at 1109 Elizabeth Avenue, Elizabeth.

At the hearing held herein it was agreed that the only meritorious question to be considered was that set forth in Paragraph 3 of the petition of appeal, wherein it was alleged that:

"To grant the application and issue the license would be in direct violation of the terms of the resolution adopted by the City Council of the City of Elizabeth, on November 6, 1935, which reads,

"Be it resolved that no licenses whatsoever excepting renewals, shall be granted for any premises within the area of a circle having a radius of 1500 feet and having as its central point an existing licensed premises."

The facts are not in dispute. The license in question, which is a new license, was granted on January 24, 1945, after respondent Board had conducted a hearing upon written objections filed by the appellants herein. The resolution set forth in Paragraph 3 of the petition of appeal was approved by the Commissioner on November 18, 1935, subject, however, to appeal.

Appellants contend that the words "no licenses whatsoever", as used in the resolution, prohibit the issuance of a club license as well as a plenary retail consumption license or plenary retail distribution license for any premises within 1500 feet of any existing licensed premises.

The resolution in question has heretofore been considered by the State Commissioner on appeal in Gural and Toplovich v. Elizabeth, Bulletin 153, Item 7; Fine v. Elizabeth, Bulletin 346, Item 18; and Elizabeth Beverage Dealers Association v. Municipal Board of Alcoholic Beverage Control of Elizabeth and Fenik, Bulletin 514, Item 3. In the latter appeal from the issuance of a plenary retail consumption license, I found the resolution to be valid and reasonable in itself and as applied to Fenik, and ordered the license declared void as having been issued in direct violation of the City's resolution. I find the resolution equally applicable and reasonable in respect to the issuance of the club license in the instant appeal.

In its plain language -- "no licenses whatsoever" -- the resolution clearly contemplates and includes club licenses. There is no room or ground for construction of that language.

Furthermore, the resolution was and is binding upon the Municipal Board. A municipal regulation prescribing the minimum permissible distance between licensed premises is in its nature and general effect a limitation upon the number of licenses. As such a limitation the resolution adopted November 6, 1935 was and will "continue in full force and effect until repealed, amended or otherwise altered by ordinance." (R. S. 33:1-40). And even if it should be assumed, for purposes of argument, that the resolution does not constitute a limitation upon the number of licenses but is, instead, a "regulation concerning the sale, transportation, delivery, serving, mixing, distribution, storing or possession of alcoholic beverages at retail, or the conduct of any business licensed to sell alcoholic beverages at retail, or the nature and condition of the premises upon which the sale of alcoholic beverages at retail may be made...." -- even upon that assumption, the resolution would "continue in full force and effect until repealed, amended or otherwise altered or changed by ordinance." (P. L. 1939, c. 234; R. S. 33:1-94).

Although the "distance" resolution adopted November 6, 1935 is in its natural and general effect a limitation upon the number of licenses, it is not a numerical limitation in the sense of limiting licenses to a definite, prescribed number. If it were -- if it restricted the issuance of club licenses to a designated number -- my conclusions herein might well be different. (Cf. Vasa Temple Association of Kearny v. Kearny, Bulletin 509, Item 6; and Irish American Association of Kearny v. Kearny, Bulletin 293, Item 11). But in the instant case the resolution does not prevent issuance of a club license to the respondent Club; it merely fixes the minimum distance between licensed premises. An ordinance amending the City's "distance" resolution so as to except club licenses from its operation would permit issuance of a club license (newly applied for, of course) to the respondent Fraternal Order of Eagles for premises at 1109 Elizabeth Avenue irrespective of the nearness of that location to other licensed premises.

Since the license here in question was issued in direct violation of a valid resolution of the City Council, it follows that the respondent Board had no authority to issue the license, I shall, therefore, reverse its action and declare the license void.

Accordingly, it is, on this 26th day of April, 1945,

ORDERED, that the action of the respondent Board of Alcoholic Beverage Control of the City of Elizabeth in issuing a club license to Fraternal Order of Eagles, New Elizabeth Aerie 0667, for premises at 1109 Elizabeth Avenue, Elizabeth, be and the same is hereby reversed; and it is further

ORDERED, that said license be and the same is hereby declared void, effective May 1, 1945, at 12:01 a.m.; that all operations thereunder cease at that time; and that the license certificate be surrendered as soon as possible thereafter to the Secretary of the Municipal Board of Alcoholic Beverage Control of the City of Elizabeth.

ALFRED E. DRISCOLL
Commissioner.

10. FAIR TRADE - NOTICE OF SUPPLEMENTAL PUBLICATION.

The next official supplemental publication of Minimum Resale Prices, pursuant to Fair Trade rules (Regulations No. 30), will become effective on Monday, May 21, 1945. New items and changes in old items must be filed at the offices of this Department not later than Monday, May 7, 1945.

It is suggested that wholesalers and manufacturers refer to their price listings in the complete and official wholesale price pamphlet effective April 1, 1945 and the first supplement thereto effective May 1, 1945, in order to determine that retailers are afforded the proper mark-ups in accordance with OPA regulations. In the event that items listed in the current Minimum Resale Price Pamphlets (January and February 1945) do not reflect the true permitted OPA mark-ups to the retailers, or if prices are in excess of the OPA maximums, submit corrected listings for the items involved.

Notification of the proportionate share of the aggregate expense involved will be made to participating companies as soon as the supplemental price list is mailed to all retail licensees.

Alfred E. Driscoll
Commissioner.

Dated: April 30, 1945.