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

BULLETIN 273. OCTOBER 19, 1938

1. FAIR TRADE - DISCOUNTS - SPECIAL DISCOUNTS TO EMPLOYEES AND PHYSICIANS ARE NOT PERMISSIBLE.

Dear Sir:

Question arises regarding employees' discount of 10% which this Company allows to all employees and physicians on all purchases. Will you please advise me if we may continue to allow this 10% discount on liquor the price of which has been fixed in accordance with your rules and regulations.

Very truly yours,
Whelan Drug Co., Inc. (N.J.)

October 2, 1938

Whelan Drug Co., Inc.,
New York, N. Y.

Gentlemen:

The answer is in the negative. The prices posted in the official bulletin are net. The only discounts permissible are those, if any, set forth by the respective manufacturers and available to all comers. Any ruling authorizing a special discount to a privileged class would open a wide door to the very evils which the statute and rules were designed to prevent.

The discount to employees and physicians must be discontinued forthwith.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

2. DISQUALIFICATION - APPLICATION TO LIFT - DENIED IN ABSENCE OF FIVE YEAR PROBATIONARY PERIOD.

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| In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to the Provisions of R. S. 33:1-31.2 (as amended by Chapter 350, P.L.1938) | CONCLUSIONS AND ORDER |
| Case No. 31 | |

Samuel Pesin, Esq., Attorney for Petitioner.

BY THE COMMISSIONER:

In 1927 petitioner pleaded guilty to the crime of embezzlement and was placed on probation for a period of one year. On September 25, 1929 he was found guilty by a jury of the crime of second degree murder and sentenced to fifteen years in jail, but was paroled, and released from prison on December 9, 1937, after serving but eight years and two months of that term. He now prays that the

disqualification resulting from those convictions be lifted.

It is unnecessary to determine whether the conviction for embezzlement involves moral turpitude since, unquestionably, the crime of murder does involve moral turpitude. In Re Kennedy, Bulletin 118, Item 10; In Re Case No. 181, Bulletin 208, Item 2. Conviction for murder mandatorily results in disqualification from holding a liquor license or being employed by a liquor licensee in this State.

The Statute, R. S. 33:1-31.2 (Control Act, *22B) as amended by P. L. 1938, Chapter 350, provides that any person convicted of a crime involving moral turpitude may, after the lapse of five (5) years from the date of conviction, apply to the Commissioner for an order removing the resulting statutory disqualification; that whenever any such application is made and it appears to the satisfaction of the Commissioner that "at least five (5) years have elapsed from the date of conviction," that the applicant has conducted himself in a law-abiding manner "during that period" and that his association with the alcoholic beverage industry will not be contrary to the public interest, the Commissioner may, in his discretion, enter an order removing the applicant's disqualification.

The statute does not contemplate a merely automatic lifting of disqualifications. It gives the Commissioner discretion to lift only if certain requisites concur. It is clear from the above quoted language, read together, that the Legislature intended that the probationary period during which the applicant is to be law-abiding was not to start with the date of conviction but was to commence at the time the applicant reenters society after release from prison. Were it otherwise, the provision for probation would be meaningless and any petitioner might as well make application to have his disqualification lifted while he was actually incarcerated.

I have heretofore ruled that the time while one is confined for a crime is not a part of the probationary period. Case No. 16, Bulletin 222, Item 12. That period contemplates voluntary action by the petitioner while he is "on his own." Of course, his conduct in jail was "law-abiding." But he gets no credit for something he had to do anyway.

So also in Case No. 7, Bulletin 224, Item 2, I ruled that the time in jail spent in penance is not a part of the probationary period.

The petition to remove disqualification is, therefore, denied with leave reserved to file a new petition on or after December 9, 1942, which will be five years from the time that he was released.

D. FREDERICK BURNETT,
Commissioner.

Dated: October 2, 1938.

3. DISCIPLINARY PROCEEDINGS - SALES TO MINORS - INADEQUATE PENALTY.

October 4, 1938.

Carmin P. Fritts, Clerk,
Andover Township,
Newton, R. D. 1, N. J.

My dear Mr. Fritts:

I have before me staff report and copies of resolution and order, and notice of suspension dated August 30, 1938, in disciplinary proceedings conducted by the Township Committee against John Andriotis, t/a Spring Dale Park, Newton-Andover Road, charged with sale of alcoholic beverages to minors.

I note that the licensee was found guilty and the license suspended for two days, September 6th and 7th.

So far as my records indicate, this is the first disciplinary proceeding that the Township has conducted. In view of this fact, I can more readily understand the extreme meagreness of the penalty and the fact that it was made operative after Labor Day.

Sales to minors is one of the greatest problems of liquor control. Unless municipal issuing authorities are alert to stamp them out by constant supervision and the fearless imposition of substantial penalties, the problem will remain unsolved. In this case, the sale to the minors occurred on two separate occasions; not one, but four minors were served with alcoholic beverages. Certainly, that indicates a course of conduct on the part of the licensee requiring adequate punishment.

It is my recommendation that in future cases of this kind, even for first offenses, a minimum penalty of ten days be imposed. If there are aggravating circumstances present, consideration could well be given to outright revocation of the license.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. DISCIPLINARY PROCEEDINGS - SALE ON SUNDAY - TWO WEEKS' SUSPENSION MEANS BUSINESS.

October 4, 1938

Neilson Rittenhouse, Clerk,
Lambertville, N. J.

My dear Mr. Rittenhouse:

I have before me staff report and your letter of August 16th, enclosing copies of resolution and order, and notice of suspension dated the same day, in disciplinary proceedings conducted by the Board of Commissioners against A. S. Trimmer, 43 S. Main Street, charged with sale of alcoholic beverages on Sunday during hours prohibited by local resolution.

I note that licensee voluntarily came before the Board, admitted his guilt, formally waived hearing and put himself upon the mercy of the Board of Commissioners. I further note that his license was suspended for two weeks.

Expressing no opinion on the merits because the case may come before me on appeal, I nevertheless wish to express genuine appreciation for the substantial penalty that was meted out in this case. Fearless and forthright penalties should teach licensees in Lambertville that the Board of Commissioners means business.

Good work!

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

5. TWO HUNDRED FEET RULE -- APPLIED TO GATES USED AS ENTRANCE TO CHURCH ALTHOUGH NOT THE MAIN ENTRANCES.

October 13, 1938.

To: D. Frederick Burnett, Commissioner.
From: Edward J. Dorton, Attorney-in-Chief.

RE: Application of David J. Schiffman, t/a Central Beverage Company, for State Beverage Distributor's License for premises located at 52 Ann Street, Passaic, N. J.

Investigation made after application filed disclosed that the nearest entrance to the proposed licensed premises might be within two hundred feet of the nearest entrance to St. Nicholas R.C. Church, Passaic. Accordingly, the matter was set down for hearing on October 13th, and testimony taken.

Applicant and Joseph P. Betz., Esq., attorney for the Church appeared at the hearing. It is admitted that the Pastor of the Church has refused to sign a waiver as provided for in R.S. 33:1-76 (Control Act, Section 76).

A sketch made by Investigator Pfeiffer, of this Department, was introduced into evidence, from which it appears that the property owned by St. Nicholas Church is enclosed by an iron picket fence and a board fence; that the property fronts on Washington Place, State Street and Ann Street; that the main entrances to the Church are located on Washington Place and are more than two hundred feet from applicant's premises; that the fence on Ann Street, in the rear of the Church, has two gates, one opening upon a driveway and the other opening upon a lawn; that the driveway gate is 150 feet 7 inches, and the lawn gate 100 feet 5 inches from the nearest entrance to applicant's premises. There is testimony that many parishioners, especially those who park their cars on Ann Street, use the driveway gate, the driveway and a flag walk on the Church grounds for the purpose of entering or leaving the Church; that occasionally some of the parishioners use the lawn gate in order to reach the Church from Ann Street.

Under these circumstances, the gates on Ann Street are entrances to the Church. Re Ackerman, Bulletin 48, Item 11; Re F. & A. Distributing Co., Bulletin 127, Item 4; Memorial Presbyterian Church vs. Newark, Bulletin 191, Item 8; Bely vs. Bayonne, Bulletin 266, Item 4. Since these entrances on Ann Street are within two hundred feet of the nearest entrance to the licensed premises, it is recommended that the application be denied.

Edward J. Dorton
Attorney-in-Chief.

Approved:
D. FREDERICK BURNETT
Commissioner

6. DISCIPLINARY PROCEEDINGS - LICENSEE A FRONT FOR HIS BROTHER - REVOCATION INDICATED AND EFFECTED.

October 14, 1938

Philip Blacher, Esq.,
New Brunswick, N. J.

My dear Mr. Blacher:

I have before me staff report and your letter of October 11th enclosing certified copy of resolution and order adopted by the South Plainfield Borough Council on October 10, 1938, in disciplinary proceedings against Michael De Fellipo, t/a Ye Park Tavern, 2000 Park Avenue.

I note that the licensee was charged with (1) holding the license as a front for his brother, Joseph P. De Fellipo; (2) sale of alcoholic beverages during hours prohibited by local ordinance; and (3) permitting lewdness and immoral activities on the licensed premises; that he pleaded guilty to the first charge, whereupon the license was revoked outright without taking up for consideration the other charges.

It is a pleasure to express to you and the members of the Borough Council deep appreciation for prompt and effective action. The penalty of revocation was indicated and effected.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. BULLETIN ITEMS CORRECTED.

Bulletin 267 contains two items numbered "7."

The item entitled "CLUB LICENSES - QUALIFICATION OF CONSTITUENT UNITS IN NATIONAL OR STATE ORDERS", should be renumbered Item "6."

In Bulletin 267, Item 4, on Sheet 5, appear the words "Thereafter, and through December 31, 1938." "1938" should be "1937."

8. ELIGIBILITY - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

October 14, 1938

Re: Case No. 233

In the above case a hearing was held to determine applicant's eligibility to hold a liquor license or to be employed by a liquor licensee.

Applicant testified that in 1929, when he was seventeen years and six months of age, he and two other young men were arrested on a charge of larceny of an automobile; that the arrests resulted from the fact that they had entered an automobile which was parked on a business street and had driven it some distance before it ran off the road, damaging the car and injuring the young men; that they had made no attempt to sell the car; that subsequently applicant pleaded non vult to some charge, the exact nature of which he did not know, and was placed on probation for three years.

Fingerprint records failed to disclose any conviction against the applicant. A report received from the probation officer of the county in which the conviction occurred corroborated applicant's story as to the circumstances surrounding the arrest and conviction. The prosecutor's office of said county reported that the applicant had been arrested for larceny and receiving of an automobile and driving without consent of the owner; that he pleaded non vult in Special Sessions to the lesser charge of driving without consent, and was placed on probation for three years, to pay fifty cents a week.

The applicant has never before or since been arrested or convicted. In view of his youth at the time of his arrest, and the facts herein which seem to show that the car was taken for a "joy ride", I believe that the crime of which he was convicted did not involve moral turpitude. Re Hearing No. 146, Bulletin 167, Item 4.

It is recommended, therefore, that applicant be advised that he is eligible to hold a license or to be employed by a liquor licensee, despite the conviction set forth herein.

Edward J. Dorton,
Attorney-in-Chief.

Approved:
D. FREDERICK BURNETT,
Commissioner.

9. DISCIPLINARY PROCEEDINGS — NEWARK LICENSEES — SALES TO MINORS.

In the Matter of Disciplinary Proceedings against

MORRIS WOLFMAN,
209 Sherman Avenue,
Newark, New Jersey,

Holder of Plenary Retail Consumption License No. C-374, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

A. W. Wasserman, Esq., Attorney for the Licensee.
Stanton J. MacIntosh, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charges were served upon the licensee alleging, in substance, that on September 10, 1938 he sold an alcoholic beverage, to wit: beer, to a minor, William Paraski, in violation of R.S.33:1-77 (Control Act, Section 77) and in violation of Rule 1 of State Regulations No. 20.

William Paraski testified that he was born on July 3, 1920; that on or about September 10, 1938 he entered the tavern of Morris Wolfman and purchased a quart bottle of beer from the licensee, who was then in charge of the premises; that, prior to making the sale, the licensee asked Paraski how old he was and that Paraski told the licensee he was twenty-one.

Detective Volz, of the Newark Police Department, testified that, on September 10, 1938, at about 10:25 P.M., he saw Paraski leave the side door of Wolfman's premises with a package which he subsequently discovered contained a bottle of beer; that he returned to the licensed premises with Paraski, who identified Wolfman as the man who had sold him the beer; that he placed both of them under arrest.

The licensee testified that he had never seen Paraski prior to September 10, 1938; that, prior to making the sale, he had asked Paraski how old he was and that Paraski had answered he was twenty-one in June, whereupon the licensee sold Paraski a bottle of beer without asking him any further questions. It further appears from Paraski's testimony that he subsequently pleaded guilty to a charge of misstating his age for the purpose of inducing a licensee to sell him alcoholic beverages and was adjudged to be a disorderly person and sentenced to a year's probation and $26.00 fine.

The fact that the boy misrepresented his age does not excuse the licensee. State v. Koettgen, 89 N. J. L. 678 (E. & A. 1916); Re Lozier, Bulletin 204, Item 11; Re Gott, Bulletin 245, Item 5. The licensee is guilty as charged. The only question is whether there are any mitigating circumstances which should reduce the punishment ordinarily imposed in the case of a sale to a minor. The Hearer reports that the minor is tall but has a youthful appearance. The licensee evidently was in doubt, as evidenced by the fact that he asked the boy's age. The licensee resolved the doubt in his own favor, taking the boy's word without requiring any further proof. The licensee has been in business since Repeal and has never been convicted of any previous charges although, in 1936, he was tried by the Municipal Board of Alcoholic Beverage Control of the City of Newark on a charge of possessing illicit alcoholic beverages, which charges were dismissed with a warning.

Considering all the circumstances, I shall impose a penalty of five days' suspension instead of the usual suspension of ten days in a case of a first conviction for sale to minors.

Accordingly, it is on this 16th day of October, 1938,

ORDERED that Plenary Retail Consumption License No. C-374, issued to Morris Wolfman by the Municipal Board of Alcoholic Beverage Control of the City of Newark, shall be and is hereby suspended for five (5) days, effective 3:00 A.M. on October 21, 1938.

D. FREDERICK BURNETT,
Commissioner.

10. APPELLATE DECISIONS - HALL'S DINER v. MT. EPHRAIM.

CLAUD R. HALL, Proprietor of Hall's Diner,
Appellant,
-vs-
BOARD OF COMMISSIONERS OF THE BOROUGH OF MT. EPHRAIM,
Respondent

ON APPEAL
CONCLUSIONS

Henry M. Evans, Esq., Attorney for the Appellant.
George D. Rothermel, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

At its meeting at the end of June 1938, respondent granted a plenary retail consumption license to appellant for the current fiscal year for premises located at the intersection of Black Horse Pike and Kings Highway, in the Borough of Mt. Ephraim. The premises consist of a "diner" and adjoining grill and bar rooms.

The Ordinance of June 23, 1938 provides:

> "1. Premises covered by plenary retail consumption licenses in the Borough of Mt. Ephraim, shall be permitted to be open for business between the hours of eight o'clock A.M. and three o'clock A.M. each and every day of the week except Sundays; and that on Sundays the bars of premises so licensed shall be permitted to be open between the hours of two o'clock P.M. and three o'clock A.M., providing that when a portion of the premises so licensed shall contain a public dining room where food is served, alcoholic beverages may be served in said dining room on Sundays from two o'clock P.M. to three o'clock A.M. and providing further that any and all doors from the outside of the licensed premises opening directly into the bars shall remain closed and locked until six o'clock on Sundays."

It is stipulated that the sole question raised by this appeal is whether appellant may be permitted to operate the diner (where only food is sold with 24 hour service) continuously if the bar located in the attached building is closed and locked at the times required by the ordinance.

The answer lies deeper. It involves the validity of the ordinance itself - it is a matter of the efficacy rather than of the mere application of the ordinance.

Licensees are privileged to remain open for business at all hours, except to the extent that they are validly restricted by regulation. The learned attorney for the respondent, speaking of the ordinance, says: "Under the regulations adopted.....all such licensed premises are permitted to remain open until 3 o'clock A.M. and are required to close between 3 o'clock A.M. and 8 o'clock A.M. on weekdays and to close between 3 o'clock A.M. and 2 o'clock P.M. on Sundays." But where do the italicized words appear in the ordinance? If the ordinance actually read as the attorney has interpreted it, the stipulated question would arise. But the ordinance does not say that. There are no words of exclusion, no negatives, - only affirmative permissions. It merely declares that such licensed premises "shall be permitted to be open for business" between certain hours. There is no declaration that they must be closed down during all other hours. In fact, there is not a word in the ordinance which negatives the right or prohibits the doing of business during such other hours. True, it is a fair and probable inference that, if one is permitted to be open for business during certain named hours, he is required to be closed during all other hours. Certainly that result would follow if the ordinance had provided that the permission to be open was good only during the hours named. But it did not say that. As it stands, it is only an inference - a conjecture as to what was intended. There is a vast difference between construction and conjecture. Construction is the effort to ascertain what one meant by what he said, whereas conjecture is the effort to ascertain what he meant to have said but didn't. The ordinance is a penal regulation and, therefore, must be strictly construed. It cannot

depend on inference or conjecture. It must stand or fall on its own language. It cannot be enlarged beyond its express terms. Marter v. Repp, 80 N. J. L. 530, aff. 82 Id. 531; Public Service Co. v. Public Utility Board, 84 N. J. L. 463, 468. Under this strict construction the regulation may not be expanded by inference to require that consumption places be closed during the hours not mentioned in the ordinance. It follows that the ordinance sets no closing hours. Re Franco, Bulletin 231, Item 5; Re Ennis, Bulletin 232, Item 10.

I therefore am obliged to find and rule that appellant's licensed premises need not be closed by force of the ordinance since it is without effect so far as closing hours are concerned.

D. FREDERICK BURNETT,
Commissioner.

Dated: October 17, 1938.

11. DISQUALIFICATION - APPLICATION TO LIFT - GRANTED.

In the Matter of an Application to Remove Disqualification because of Convictions, Pursuant to the Provisions of R. S. 33:1-31.2, as Amended by Chapter 350 of the Laws of 1938.

Case No. 41.

CONCLUSIONS AND ORDER

Frank I. Casey, Esq., Attorney for Petitioner.

BY THE COMMISSIONER:

In June, 1918, the petitioner was convicted of atrocious assault and battery with an automobile and fined $100.00 and costs. In June, 1922, he was convicted of receiving stolen goods and sentenced to one year's imprisonment, his sentence, however, being reconsidered after he had spent three months in jail and changed to a fine of $100.00 and costs. In July, 1924, he was convicted of selling liquor in violation of the National Prohibition Act, and sentenced to three months' imprisonment.

The petitioner has been married for the last 24 years. Since his release from prison in 1924, he has continuously resided in Trenton with his family. Until 1927 or 1928, he there operated a peddler's route, selling fruit to storekeepers. Since then, he has been on part-time employment with a fruit and produce wholesaler.

One of the character witnesses whom petitioner presented on his behalf, is a retired Trenton Police Captain who has known petitioner for 14 or 15 years as a neighbor. This witness was a Mercer County Freeholder from 1904 to 1910; the Excise Inspector in Trenton from 1910 to 1912; a Police Sergeant in that city from 1912 to 1922, and a Police Captain thereafter until 1935, when he voluntarily retired. From 1910 until Prohibition, liquor licenses in Trenton were granted primarily on his recommendation.

The second character witness presented by petitioner has known the petitioner since 1911. He is the proprietor of one of Trenton's leading department stores, is a member of the Trenton Traffic Commission and the city's Annexation Commission, and is a director of the Trenton branch of the "Y.M.H.A.", having been president thereof from 1929 to 1934.

The third character witness, a Councilman and Overseer of the Poor in Trenton many years ago, is Secretary of the Trenton Lodge of Elks and has known petitioner as a fellow member since petitioner joined that Lodge six years ago.

These witnesses testified that, to their knowledge, the petitioner has been in no trouble since his release from prison in 1924; that his reputation and character are good; that, in their opinion, it will not be prejudicial to the public interest or to the liquor industry in this State to remove the mandatory disqualification imposed upon petitioner by reason of his above criminal convictions.

Petitioner's fingerprint record corroborates the testimony that he has been in no trouble since 1924.

From all of the foregoing, I conclude that the petitioner has led a sober and law-abiding life since his release in 1924, and that his association with the alcoholic beverage industry in this State will not be prejudicial to that industry or other business interest. Accordingly, his disqualification will be removed.

It is, therefore, on this 16th day of October, 1938, ORDERED that the petitioner's disqualification from holding a license or being employed by a licensee because of the convictions above set forth, be and the same is hereby removed in accordance with R.S. 33:1-31.2, as amended by Chapter 350 of the Laws of 1938.

D. FREDERICK BURNETT,
Commissioner.

12. DISCIPLINARY PROCEEDINGS - SALES TO MINORS - NECESSITY FOR CONTINUOUS SUPERVISION AND VIGOROUS PENALTIES.

October 17, 1938

Wilbur S. Lippincott, Esq.,
Attorney for Springfield Township (Burlington County),
Mount Holly, New Jersey.

My dear Mr. Lippincott:

I have before me staff report and your letter of October 7th enclosing copy of resolution and order, notice of suspension and memorandum of testimony in disciplinary proceedings conducted by the Township Committee on October 4, 1938, against Verona Johnson, t/a Golden Moon Cafe, Chambers Corner.

I note that the licensee was charged with sale of alcoholic beverages to two girls, aged 17, and pleaded not guilty. I further note that she was found guilty and the license suspended for four days.

Expressing no opinion on the merits because perchance the case may come before me by way of appeal, I nevertheless wish that you would express to the members of the Township Committee my appreciation for their prompt action. I urge, however, that in future cases of this kind, a minimum suspension of ten days be imposed. In the presence of aggravating circumstances, outright revocation of the license should be considered.

According to the staff report, the sale of alcoholic beverages to these minors was followed by an attack on one of them which fortunately got no further than the striking of several blows before

she succeeded in making her escape. Occurrences of this sort bring into sharp relief the necessity of continuous supervision of licensed places to see that no sales to minors occur and the imposition of vigorous penalties when sales occur despite such supervision.

I earnestly recommend that in future cases involving sales to minors, that the members of the Township Committee bear in mind that the same thing might have happened to their own daughters.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

13. SPECIAL CONDITIONS - REQUIRING COMPLIANCE WITH LOCAL ORDINANCE - APPROVED.

October 17, 1938

Miss Ethel M. Hoyt,
City Clerk,
Hackensack, N. J.

My dear Miss Hoyt:

I have before me resolutions adopted by the Council authorizing the issuance of plenary retail consumption, plenary retail distribution and club licenses "after the receipt of a report from the Chief of Police and Health Officer, to the effect that the licensees have complied with the ordinance."

The ordinance referred to, I take it, is Ordinance No. 226 governing the sale of alcoholic beverages in the City of Hackensack and prescribing the penalties for violation thereof as adopted on September 16, 1935 and amended by Ordinance No. 247, adopted October 4, 1937. With that understanding, I am approving the special conditions as submitted.

Of course, such special conditions, strictly speaking, are superfluous, for the ordinance must be complied with in any event whether called for in the resolutions granting the licenses or not. I have no objection, however, if the Council, out of caution or as an express reminder to its subordinates or as a follow-up for themselves, wishes to repeat it in the resolutions. In fact, I think it very good practice. But if you do so, I wish that henceforth you would refer to the ordinance in each case by number and date, so as to properly identify it, instead of indefinitely merely as "the ordinance."

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

14. APPELLATE DECISIONS - KREAMER'S LIQUOR STORE v. MILLVILLE.

EDWARD KREAMER, trading as KREAMER'S LIQUOR STORE,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE,

Respondent.

ON APPEAL

CONCLUSIONS

Nathaniel Rogovoy, Esq., Attorney for the Appellant,
H. R. Waltman, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

Appellant held a plenary retail distribution license during the last term for his drug store at the southeast corner of High and Main Streets in Millville.

On August 27, 1937, respondent adopted the following regulation whose validity is not here contested:

> "The holder of a Plenary Retail Distribution License shall not conduct any other line of business in connection with the sale of alcoholic beverages, beginning with July 1, 1938". (Section 13B, Ordinance #403)

To meet the requirements of this regulation, appellant partitioned off a corner of his drug store and applied for a renewal of his license for the current term for the partitioned area. Respondent denied this application on the ground that the drug and liquor premises were not sufficiently separated to satisfy the regulation. Hence, this appeal.

The liquor store is 12½ feet deep and 9 feet wide, and fronts directly on the street, where it has its own entrance and display window. The only communication between the liquor and the drug store is a narrow service door, 20 inches wide, located at the rear of both stores and opening on an aisle behind a counter in each.

In determining in cases arising under such ordinances, whether liquor premises are disqualified because of their connection with an adjoining store, the general test is whether the conduct, layout and locations of the respective stores render them substantially separate and distinct. See Re Ramsey, Bulletin 200, item 1, and items cited below. While each case which calls for

this test must largely be determined on the basis of its own particular facts, the test itself is to be realistically administered in each instance.

Thus, in Owl Drug Company v. Elizabeth, Bulletin 68, Item 7, it was held that where premises were divided into two stores by a solid partition which allowed no communication between them, the stores, although under the same roof and operated by a common owner, were separate and distinct. On the other hand, it has been held that where there is an archway or door in the partition through which the public may freely pass from one premises to the other, the stores are not sufficiently distinct. See Shapiro v. Trenton, Bulletin 34, Item 8; Re Millville, Bulletin 35, Item 15; Reed v. Independence, Bulletin 57, Item 10; Re Highlands, Bulletin 212, Item 10.

In the present case, it is stipulated that the service door is intended to be used only by the appellant and his clerks and is not intended to be used by customers. But why should there be any service door if the ordinance which requires separation is to be honored? Why should the appellant and his clerks intend to pass from one store to the other? How can two stores be separate and distinct if the same clerk can take care of both by using the common doorway?

It is not a matter, as the learned attorney of the appellant contends, whether a liquor store may have a back entrance, but, rather, whether the local ordinance shall be defied and flouted. Appellant's device does just that.

The action of respondent is reversed on condition that appellant shall, on or before October 29, 1938, seal up the connecting door and make a solid, permanent partition between the two stores whereupon the respondent is directed to issue a license to appellant as applied for. In default of the performance of this condition, the action of respondent is affirmed, in which event the order of extension made July 1, 1938, pending the determination of this appeal, will be cancelled.

D. FREDERICK BURNETT,
Commissioner.

Dated: October 18, 1938.

15. APPELLATE DECISIONS - BELLUSCI v. NEWARK.

ALESSANDER BELLUSCI, )

Appellant, )

-vs- ) ON APPEAL CONCLUSIONS

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, )

Respondent. )

Samuel S. Ferster, Esq., Attorney for the Appellant.
Joseph B. Sugrue, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

This is an appeal from a refusal to renew appellant's plenary retail consumption license for the current fiscal year for premises at 303 Sherman Avenue, Newark.

During the last fiscal year (ending June 30), I found the appellant, under the name of Alexander Bellucci, guilty of allowing a known prostitute and person of ill repute upon his licensed premises and of permitting his business to be used in aid of furnishing her for immoral purposes, whereupon his license was suspended from May 29, 1938 through the balance of its term, and it was ordered that no renewal or other license be issued to him before July 27, 1938. Re Bellucci, Bulletin 248, Item 3.

A stipulation submitted by the parties on this appeal sets forth:

> "That on August 3, 1938, the Municipal Board of Alcoholic Beverage Control of the City of Newark, having before it the record of the proceedings hereinabove referred to, decided not to grant the renewal application made by the appellant, Alessander Ballusci, because it felt that inasmuch as Commissioner D. Frederick Burnett heard the evidence supporting the suspension, it was the opinion of the Municipal Board of Alcoholic Beverage Control of the City of Newark, that Commissioner Burnett should determine whether the appellant is entitled to renewal of his license for 1938-1939.
>
> That the said Municipal Board of Alcoholic Beverage Control of the City of Newark did not conduct a hearing on his application for renewal and said Board did not make any finding as to whether the appellant, Alessander Ballusci was a fit person for a license."

The misconduct of which appellant was found guilty did not mandatorily disqualify him from holding a liquor license. The statute imposes such mandatory disqualification only upon persons convicted of a crime involving moral turpitude, or found guilty of two or more violations of the statute, or whose license has been revoked. R.S. 33:1-25,31 (Control Act, Secs. 22,28).

However, no one, even though meeting the requirements of the statute, is entitled to a license, renewal or original, as a matter of right. Accordingly, in the present case, it lay within respondent's sound discretion and it was respondent's duty to determine whether or not appellant, in view of his previous misconduct, should be entrusted with a renewal license.

In Kaplan vs. Newark, Bulletin 269, item 6, where, as in the present case, there had been misconduct during the previous term for which the license had been suspended, this respondent denied the application for renewal upon the ground that the applicant was personally unfit by reason of such previous violations. On appeal the denial was sustained. I there said:

> "It is essential to sound control of the liquor traffic that issuing authorities shall have full right to deny renewals to those who violate the rules.
>
> Case after case (citing them) has been decided where renewals have been denied and upheld on appeal because of previous misconduct of the licensee."

On the other hand, in Lewis vs. Orange et al., Bulletin 268, item 3, where there had likewise been previous misconduct followed by suspensions, the Orange Board granted renewal licenses. The appellant there contended that because the respondent might have denied the renewals therefore it must deny them, which is a conclusion that does not follow. The real question was one of sound discretion. I affirmed the renewals, saying:

> "In order to reach a conclusion herein that the action of the Municipal Board should be reversed, I would have to find that said Board had abused its discretion in renewing these licenses for the present fiscal year. The nature of the charges upon which each of said licensees was found guilty was not of such a character as to show that any of them was permanently unfit. They were punished. They ought to have been punished. Apparently, the Municipal Board believed that each of said licensees had been sufficiently punished, and decided to give them another chance. I cannot say that, in so doing, the Municipal Board abused its discretion."

The stipulation, above quoted, specifically shows that respondent reached no conclusion upon the issue of appellant's fitness but denied the renewal on the theory that the Commissioner, having heard the evidence concerning appellant's misconduct, was better qualified than respondent to determine whether he merited a renewal, and that the question should, therefore, be determined by the Commissioner.

This procedure was erroneous. Determination of an applicant's worthiness for a municipal license, whether renewal or original, is a matter committed to the sound discretion of the local issuing authority. That discretionary function is to be exercised by the issuing authority itself and may not, as here, be delegated, committed, or referred by it to any other board or person. Miner vs. Larney, 87 N.J.L. 40 (Sup. Ct. 1915); Re Cliffside Park, Bulletin 65, item 6; Re Guttenberg, Bulletin 66, item 8; Re Mt. Ephraim, Bulletin 98, item 13; Re Ewing Township, Bulletin 108, item 1; Re Asbury Park, Bulletin 192, item 7. See extensive discussion in Ricker & Bauer vs. West New York, Bulletin 229, item 1, as to the inability of an Excise Board to redelegate discretionary powers confided to it.

Hence, in the present case, respondent itself, in the first instance, must determine the question of appellant's worthiness for a renewal.

Accordingly, this case is remanded to respondent to reach its own determination whether or not appellant should be entrusted with a renewal license.

COMMISSIONER.

Dated: October 18, 1938.