STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N.J.

BULLETIN 1566 June 25, 1964

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
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June 25, 1964

1. APPELLATE DECISIONS - D.E.L. CORP. v. UNION CITY

D.E.L. Corp., Appellant, v. Board of Commissioners of the City of Union City, Respondent.	On Appeal CONCLUSIONS and ORDER

Robbins & Reger, Esq., by Malcolm J. Robbins, Esq., Attorneys for Appellant
Cyril J. McCauley, Esq., by Edward J. Lynch, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report.

This is an appeal from the action of the respondent whereby on November 7, 1963, it suspended appellant's Plenary Retail Consumption License C-11 for ninety days effective November 17, 1963, after finding appellant guilty of a charge alleging sale of alcoholic beverages to a minor in violation of Rule 1 of State Regulation No. 20. Appellant's premises are located at 519-25 Paterson Plank Road, Union City.

Upon the filing of the appeal, an order dated November 14, 1963, was entered by the Acting Director staying respondent's order of suspension until further order herein. R.S. 33:1-31.

Appellant in its petition of appeal alleges that the action of respondent was erroneous and should be reversed for reasons which may be summarized as follows: (a) no credible evidence, directly or indirectly, was adduced before respondent to establish that appellant had served a bottle of beer to the minor; (b) the evidence adduced "unerringly and inescapably indicated the innocence of the appellant."

Respondent in its answer denies the allegations set forth in appellant's petition of appeal and contends that (a) "The testimony of the witnesses, the police records and the admissions made by an officer of the corporation during the hearing substantiate the finding of the Board of Commissioners that the defendant did in fact sell liquor to a minor" and (b) the admissions of Lillian Mastellone ("a stockholder of the corporation") at the hearing and in a voluntary signed statement made by her to the police a short time after the alleged violation, together with a statement made to the police by the minor in question, warranted the finding of guilt by respondent of the appellant herein.

William --- (18 years of age) testified that on August 3, 1963, "maybe about, about eight or nine o'clock or ten o'clock, somewhere around there," he visited appellant's premises and had "about two or three" bottles of Schlitz beer, paying sixty cents per bottle; that Lillian Mastellone, whom he identified at the hearing herein, sold the said beer to him; that "her hair was up in curlers. She had a kerchief around her (hair) or something like that. A kerchief;" that she wore "a skirt and blouse or dress. I don't know. A short skirt. I wouldn't say definitely" which "I suppose it was red;" that she did not inquire as to his age; that he had been in the appellant's premises "about three or four or five times" on other occasions since he was fifteen years of age; that, after he left appellant's establishment, he went to another tavern where he drank "coke" and played "pool with a Spanish fellow" and, after defeating his opponent, the latter refused "to pay me the sixty cents" and, when his opponent left, he (William) followed him out and engaged in a fist fight, as a result of which "the cops came"; that he was taken to police headquarters where he made a statement wherein he stated that he had been sold beer at appellant's tavern; that, in the company of Detective Goi, he was taken to appellant's premises and, upon entering same, he observed that Phil (Philip Mastellone) was behind the bar; that Detective Goi inquired the whereabouts of "Phil's wife" and was told by Phil that she was "upstairs sleeping, going to bed;" that the wife then entered by the front door of appellant's premises, at which time he (William) identified her as the person who sold and served him the Schlitz beer; that he did not hear what Lillian Mastellone said to the police.

During cross examination William testified that he remembered things that actually happened on August 3, 1963, but admitted that he was drunk on that date although, when apprehended by the police, was not drunk but "high" and excited; that "about seven" on the date in question he was alone when he went to New York where he visited a liquor establishment, at which place he guessed that he had consumed "two or three" drinks of "Seagram's Seven and Seven-ups;" that he did not remember testifying on a prior occasion that he had had five or six more of said drinks. The attorney for appellant, in an effort to bring out inconsistencies in the testimony of William, confronted him with a transcript wherein were questions and answers given by him in another proceeding entitled "The State of New Jersey v. Philip Mastellone," held on September 30, 1963, in the Union City Municipal Court wherein William testified as a complaining witness. His testimony at the instant hearing in many particulars varied from that given at the prior hearing held in the Municipal Court aforementioned as to the number of drinks consumed in New York, the question of his sobriety before and after arrest by the police officer, the means of transportation to and from New York, and whether he had gone alone to New York or if he had been accompanied by a male companion. However, although he could not remember many things which allegedly occurred from the time he left his home to go to New York, his return to New Jersey and what happened thereafter and despite extensive cross examination by the appellant's attorney, William testified at the Municiapal Court hearing and at the instant hearing that on August 3, 1963, he visited appellant's licensed premises and, while there, was served beer.

Detective Nat Goi testified that he was dispatched to 10th Street and Bergenline Avenue on the night in question where a fight was alleged to be in progress; that on said night, as a result of the investigation, he escorted William to appellant's premises and inquired of Philip Mastellone, who was tending bar, about the whereabouts of his wife; that she came through the front

door, at which time William identified her as the person who sold him the beer. At police headquarters, Detective Goi added, Lillian Mastellone denied the accusation in a signed statement (marked Exhibit R-4).

Detective Goi, when questioned by the attorney for appellant regarding the sobriety of William, stated that, when he arrived at the place wherein the incident took place, he "wouldn't say that he (William) was drunk. I don't think he was drunk ... he answered my questions."

Police Captain Bolte testified that Lillian Mastellone came to his office and he informed her that she had been accused of serving several bottles of beer to William and that "she was wearing what appeared to be a reddish type dress" and "had her hair up in curlers" at the time and "I believe, a bandanna or something;" that she stated that she was in the bar "between ten and ten-thirty" and "was tending bar for about fifteen minutes to cover up for her husband;" that, when he informed Lillian Mastellone that William had said he had been drinking in appellant's premises, she stated "No, I never saw him before."

Lillian Mastellone (president of appellant corporation) testified that at about 10 P.M. on August 3, 1963, her husband Philip left the licensed premises for "ten minutes or twelve minutes, but in that area," during which time she tended bar. She denied that she had ever seen William prior to the time he and Detective Goi came into the licensed premises on the evening when the alleged sales of beer were to have taken place.

Louis W. Raino testified that he is a private investigator retained by appellant to conduct an investigation on its behalf; that on August 23, 1963, outside the courtroom of the Union City Municipal Court, he interviewed William, who signed a statement that he did not obtain any beer at appellant's premises; that William was confused when testifying at the Municipal Court hearing on the aforesaid date but did not appear to be confused prior to the hearing when he gave the statement to him. The attorney for respondent then asked:

"Q He was calm, cool; it was only when he got on the stand that he was confused?

A Counselor, if you will take the trouble to read the record, a transcript of that trial, where that boy, with a sixth-grade education, tried to defend himself, it was the most pitiful, sorrowful thing I've seen in my life."

Patrick DiMartini, appearing as attorney for appellant at the Municipal Court hearing on August 23, 1963, testified that he spoke to William outside the courtroom and was told by him that he did not purchase any beer or other liquor at appellant's premises. On cross examination at the hearing herein he was asked whether, from his observation of William, he concluded the youth might have only gone to the sixth grade in school. Mr. DiMartini said, "Well, I certainly couldn't specify the exact point of where his intellectual abilities ended, but he was a bright boy. He could speak English, he understood my questions, he answered them correctly."

I might add that, from my observation of William during the instant hearing, his educational background appeared to be as limited as that expressed by Raino.

It is the function of an administrative agency to weigh the evidence, to determine the credibility of witnesses, to draw inferences and conclusions from the evidence, and to resolve conflicts therein. Cf. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (App. Div. 1956).

I am not unmindful that, when confronted with questions by the attorney for Philip Mastellone at a preliminary hearing on September 30, 1963 (heretofore referred to), some of the answers given by William varied from those given at the present appeal hearing. However, I believed the testimony of William which was given at both hearings -- that he purchased beer at appellant's licensed premises on the date in question. William also identified Lillian Mastellone as the person who waited on him and made service of the beer, her attire, the manner in which her hair was arranged, and the fact that he had paid sixty cents for a bottle of Schlitz beer. I might add that the description given by Captain Bolte as to the appearance of Lillian Mastellone that night was in substantial agreement with that given by William. There appears to be no dispute that Schlitz is the only brand of bottle beer sold by appellant, and that sixty cents is charged therefor. I am not impressed with the testimony of Lillian Mastellone whereby she denied the sale of beer to William and, furthermore, that she had never seen William at any time prior to the night when he was brought into the premises by Detective Goi. I find as a fact that William was in appellant's premises on August 3, 1963, and that Lillian Mastellone (president of appellant corporation) sold and served one or more bottles of Schlitz beer to him.

Under the circumstances, and after careful examination of all the testimony herein, it is recommended that an order be entered affirming the action of the respondent, fixing the effective dates of the ninety-day suspension imposed by respondent, and dismissing the appeal filed herein.

Conclusions and Order

Pursuant to the provisions of Rule 14 of State Regulation No. 15, exceptions to the Hearer's Report and written arguments thereto were filed with me by the attorneys for appellant, and written answering argument was filed by the attorney for respondent.

I have carefully considered the evidence and oral argument made by the attorneys for the respective parties at the hearing of the appeal. I have also considered appellant's exceptions to the Hearer's Report and the written arguments thereto as well as the written answering argument filed by the attorney for respondent. I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 28th day of April, 1964,

ORDERED that the action of respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-11, issed by the Board of Commissioners of the City of Union City to D.E.L. Corp. for premises 519-25 Paterson Plank Road, Union City, be and the same is hereby suspended for the balance of its term, viz., until midnight, June 30, 1964, commencing at 3:00 a.m. Tuesday, May 5, 1964; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3:00 a.m. Monday, August 3, 1964.

JOSEPH P. LORDI
DIRECTOR

2. APPELLATE DECISIONS - OCEAN COUNTY LICENSED BEVERAGE ASSOCIATION v. LAKEWOOD and STAMATO.

Ocean County Licensed Beverage Association, Appellant, v. Township Committee of the Township of Lakewood, and Vito Stamato, Respondents.	)	On Appeal CONCLUSIONS and ORDER

Novins and O'Connor, Esqs., by Robert J. Novins, Esq., Attorneys for Appellant
Albert Spitzer, Esq., Attorney for Respondent Township Committee
Heller & Laiks, Esqs., by Richard Heller, Esq., Attorneys for Respondent Vito Stamato

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report.

This is an appeal from the action of respondent Township Committee (hereinafter Committee) whereby it granted an application for a plenary retail consumption license to repondent Vito Stamato for premises known as Allaben Hotel, 501 Monmouth Avenue, Lakewood.

The vote on the application was three for and two against the grant of the license.

The Committee approved the application for the said license under and by virtue of the statute authorizing the issuance of a new license to the operator of a hotel containing fifty sleeping rooms. R.S. 33:1-12.20.

Appellant alleges in its petition of appeal that the action of the Committee was erroneous for the following reasons:

"(a) The proposed premises for which the contemplated license is to be issued does not constitute a 'hotel' within the meaning and definition of the provisions

of N.J.S. 33:1-12.20

"(b) The said premises do not have 50 sleeping rooms in accordance with the definition of the State Housing Code and with Township ordinances referring to the same.

"(c) The said license is not designated to subserve the public interest and there is no present need therefor.

"(d) The proposed license, if issued, will service a clientele not properly falling into the category of hotel guests, but will cater to a transient trade.

"(e) The said premises were inspected by the Business Manager and Building Inspector of the Township of Lakewood who reported directly to the Township Committee after their inspection that the premises do not contain 50 legal sleeping chambers and that the rooms were so constituted and so erected that they could not be turned into livable sleeping quarters by reason of inadequate floor space, window area, ceiling height, electrical outlets, wall construction and depth of floor below grade.

"(f) That the Township Committee was advised by its legal counsel that they were committing an unlawful act in granting a (hotel) plenary retail consumption license to the Hotel Allaben in that the said hotel did not conform with the prerequisites necessary for the obtaining and issuance of the 'hotel' license.

"(g) That the granting of a plenary retail consumption license for a hotel to the Hotel Allaben is not in accordance with the ordinances of the Township of Lakewood or the rules and regulations of the Alcoholic Beverage Control."

The answers filed by the respective respondents deny the allegations contained in the petition of appeal and contend that the granting of the said license to respondent licensee was a lawful exercise of discretion vested in the Committee.

For the purposes of this appeal I shall initially discuss what I consider the most important ground urged by appellant, to wit, that the Committee was without legal authority to grant the license in question because several rooms to be used for sleeping quarters fail to meet the requirements of the New Jersey State Housing Code as adopted and incorporated by the Township of Lakewood in an ordinance known as "The Housing Code" approved on February 14, 1963. The pertinent provisions of the ordinance are as follows:

"29.01 TITLE. This Chapter shall be known and cited as The Housing Code of the Township of Lakewood."

"29.03 The Building Inspector of the Township of Lakewood be and he is hereby designated as the officer to exercise the powers prescribed by the within ordinance, and he shall serve in such capacity without any additional salary."

"29.05 The Building Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming units, and premises located within the Township of Lakewood in order that he may perform his duty of safeguarding the health and

safety of the occupants of dwellings and of the general public. For the purpose of making such inspections the Building Inspector is hereby authorized to enter, examine and survey at all reasonable times all dwellings, dwelling units, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, and rooming unit, or the person in charge thereof, shall give the Building Inspector free access to such dwelling, dwelling unit or rooming unit and its premises at all reasonable times for the purpose of such inspection, examination and survey. Every occupant of a dwelling or dwelling unit shall give the owner thereof, or his agent or employee, access to any part of such dwelling or dwelling unit, or its premises, at all reasonable times for the purpose of making such repairs or alterations as are necessary to effect compliance with the provisions of the ordinance or with any lawful rule or regulation adopted or any lawful order issued pursuant to the provisions of this ordinance."

"29.08 No person shall occupy as owner occupant or rent to another for occupancy any dwelling or dwelling unit for the purpose of living therein which does not conform to the provisions of the 'New Jersey State Housing Code' established hereby as the standard to be used in determining whether a dwelling is safe, sanitary and fit for human habitation."

The definitions of the pertinent provision of Section 2 of the New Jersey State Housing Code referred to in the ordinance are as follows:

"2.2 'Building' shall mean any building or structure, or part thereof, used for human habitation, use, or occupancy and includes any accessary buildings and appurtenance belonging thereto or usually enjoyed therewith."

"2.3 'Dwelling' shall mean a building or structure or part thereof containing one or more dwelling units or lodging units."

"2.4 'Dwelling Unit' shall mean any room or group of rooms or any part thereof located within a building and forming a single habitable unit with facilities which are used, or designated to be used for living, sleeping, cooking, and eating."

"2.6 'Habitable Room' shall mean a room or enclosed floor space within a dwelling unit used or designed to be used for living, sleeping, cooking, or eating purposes, excluding bathrooms, water closet compartments, laundries, pantries, foyers or communicating corridors, closets, and storage spaces."

"2.8 'Lodging House' shall mean any building, or that part of any building containing one or more lodging units, each of which is rented by one or more persons not related to the owner."

"2.9 'Lodging Unit' shall mean a rented room or group of rooms, containing no cooking facilities, used for living purposes by a separate family or group of persons living together

or by a person living alone, within a building."

The pertinent provisions of Section 11 of the said Code ("Use and Occupancy of Space") provide:

"11.1 Every dwelling unit shall contain at least 150 square feet of floor space for the first occupant thereof and at least 100 additional square feet of floor space for every additional occupant thereof, the floor space to be calculated on the basis of total habitable room area.

"11.2 In every dwelling unit of two or more rooms, every room occupied for sleeping purposes by one occupant shall contain at least 70 square feet of floor space, and every room occupied for sleeping purposes by more than one occupant shall contain at least 50 square feet of floor space for each occupant thereof. Notwithstanding the foregoing, in every lodging unit every room occupied for sleeping purposes by one occupant shall contain at least 80 square feet of floor space, and every room occupied for sleeping purposes by more than one occupant shall contain at least 60 square feet of floor space for each occupant thereof.

"11.3 At least one-half of the floor area of every habitable room shall have a ceiling height of at least 7 feet. The floor area of that part of any room where the ceiling is less than 5 feet shall not be considered as part of the floor area in computing the total floor area of the room for the purpose of determining the maximum permissible occupancy thereof.

"11.4 No room in a dwelling may be used for sleeping if the floor level of the room is lower than three and one-half feet below the average grade of the ground adjacent to and within 15 feet of the exterior walls of the room.

"11.5 A room located below the level of the ground but with the floor level less than three and one-half feet below the average grade of the ground adjacent to and within 15 feet of the exterior walls of the room may be used for sleeping provided that the walls and floor thereof in contact with the earth have been damp-proofed in accordance with a method approved by the Administrative Authority; and provided that the windows thereof are at least 15 feet from the nearest building or wall."

William J. Sprinkle, building inspector of the Township of Lakewood, testified that during the early part of September 1963 he was accompanied by Matson Conyers, sanitary inspector for the municipality, and Grayce Houston, manager of the Allaben Hotel, on an inspection of the subject premises and, after measurements of seven rooms located in the basement of the main building and two rooms located in the basement of the adjacent building, advised Mrs. Houston that the rooms did not meet the requirements specified in the local ordinance. Inspector Sprinkle further testified that on Thursday, January 30, 1964, one day prior to the instant hearing, he and Inspector Conyers made an inspection of the hotel premises and, as a result thereof, found "Some of the wooden floors had been removed from the rooms

bringing the ceiling height to approximately six foot six, but on the average, the floors were still within six foot six or six foot four. The window area had not been increased and primarily the rooms were the same as they were before they had been painted. The floors had been painted but as far as the other requirements they still exist." He also testified, when cross examined by the attorney for the respondent Stamato, that on December 12, 1963, a certificate of occupancy had been issued for the adjacent building after a fire escape had been erected thereon. Thus two certificates of occupancy (one for the main and the other for the adjacent building) were issued, indicating that the building could be used as a hotel.

Matson Conyers, sanitary inspector aforementioned, testified that, when he accompanied Inspector Sprinkle on two occasions to the premises now under consideration, "We inspected the main building, which is called the Allaben Hotel, and the adjoining building, which is called the annex. And at the time of our first inspection the main building had nine rooms which Mrs. Houston anticipated using for sleeping rooms. These rooms were in bad condition, two of them, I told her right off the bat, she could not use because of the low hanging pipes -- and you bang your head on them the moment you walk in, and they're all cut up -- and the other seven rooms I told her would have to be ventilated and even to the renovation I wasn't sure that they would comply because of the ceiling heights and the windows being too small, but she went ahead anyway and made the improvements. On our second inspection the rooms had been cleaned up and they made a much better appearance, but they still did not comply with our State Housing Code, and as of yesterday's inspection they still do not comply in all the respects."

Stanley E. Brower, Township Clerk, testified that he had issued a mercantile license to the hotel for fifty-one rooms.

Grayce Houston, manager of the hotel, testified that "The rooms are very clean and they're freshly painted, they each have a bed, a dresser, chair, curtains through the window, and dressers with a scarf, portable closet for the hanging of clothes, and on the same floor with these seven rooms we have a bathroom with a bath and toilet."

Philip Katz, a member of the Township Committee when the license in question was voted on, testified that he voted in favor thereof after he learned from Inspector Sprinkle that the nine rooms in question all contained seventy or more square feet. He, however, asserted that he was aware of the fact that the rooms in question may have been a couple of inches short in height, and also a couple of inches short as far as the ground level was concerned, but he felt that they had substantially met the requirement outlined in the ordinance. He further testified that, since Lakewood was not a new community and that the buildings are from forty to perhaps eighty years old, it cannot be expected that they comply with the requisites mentioned in the ordinance which had been passed in February 1963.

There is no question but that the sleeping rooms do not comply with the Housing Code contained in the local ordinance. However, Judge Gaulkin, in Lubliner et al. v. Paterson et al., 59 N.J. Super. 419 (1960), stated that the matter of a violation of a zoning ordinance, building codes, health codes and the like, would not in itself prevent a local issuing authority from granting a license to a particular premises but, before the liquor licensee could operate the establishment, he must comply with all applicable statutes

and ordinances. On appeal to the Supreme Court of New Jersey, Justice Jacobs, speaking for the court, with reference to an alleged zoning violation, stated (33 N.J. 428):

> "*** In dealing with that contention the Appellate Division properly pointed out that the grant of Mr. Hutchins' application would in nowise permit him to operate in contravention of any applicable zoning provisions; if he ever attempts to so operate, relief is readily available. See Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953)."

Thus it is unnecessary to consider the ground alleged by appellant that the Committee should have withheld grant of the license until all statutory prerequisites had been met.

As pointed out by Director Davis in Bayshore Tavern Owners Association et al. v. Sea Bright et al., Bulletin 1378, Item 2, the State Limitation Law does not define the words "sleeping rooms". It was found by the Director in that case that:

> "*** each of the fully equipped and sizeable bedrooms established by erection of room-dividers is a sleeping room within the meaning and intendment of R.S. 33:1-12.20."

Furthermore:

> "*** that each of the formerly-styled 'Cabana' rooms, though somewhat minimal in furnishing and accommodation, is sufficiently equipped to constitute a sleeping room within the meaning and intendment of R.S. 33:1-12.20."

Hence, so far as the Limitation Law is concerned, the emphasis is on equipment rather than size, location, fenestration or other considerations.

I have carefully considered the additional grounds mentioned in the petition of appeal, in addition to that heretofore discussed, and conclude that there has been insufficient proof with reference thereto which might warrant the reversal of the action of the Committee.

The burden of proof to establish that the action of the Committee was erroneous rests with the appellant. Rule 6 of State Regulation No. 15. The evidence presented does not in any manner indicate improper motivation on the part of the members of the Committee, and their approval of the grant of the license in question appears to be a reasonable exercise of their discretion. I find that the premises in question contain fifty-one sleeping rooms under the cited section of the Limitation Law. I therefore recommend that an order be entered affirming the action of the Committee and dismissing the appeal.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully examined the entire record herein, including the evidence adduced and exhibits introduced at the hearing, I concur in the Hearer's findings and conclusions and

adopt his recommendations. I shall enter an order affirming respondent Committee's action.

Accordingly, it is, on this 27th day of April, 1964,

ORDERED that the action of respondent Township Committee of the Township of Lakewood be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

JOSEPH P. LORDI
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL CONCLUSIONS AND ORDER ON REMAND FROM APPELLATE DIVISION - PRIOR DETERMINATION RE-AFFIRMED.

In the Matter of Disciplinary Proceedings against	)	
Hala Corporation t/a Montanaro's 7400 S. Crescent Blvd., Pennsauken, N.J.	)	On Remand
Holder of Plenary Retail Consumption License C-27, issued by the Township Committee of the Township of Pennsauken.	)	SUPPLEMENTAL CONCLUSIONS AND ORDER

Frank M. Lario, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following Supplemental Report herein:

Supplemental Hearer's Report

There is presently pending before the Appellate Division of the Superior Court of New Jersey an appeal from the determination of the Acting Director of the Division of Alcoholic Beverage Control entered on June 25, 1963, whereby he found the licensee herein guilty in disciplinary proceedings of violating Rule 27 of State Regulation No. 20 and R.S. 33:1-25, and suspended its license for a period of fifty-five days.

On January 22, 1964, the Appellate Division of the Superior Court of New Jersey entered an Order of Remand which reads in part as follows:

> "*** ORDERED that the entire case be remanded to the Acting Director of the Division of Alcoholic Beverage Control, and that both parties be permited to introduce any further evidence they may wish, heretofore not introduced."

Pursuant to said Order, the Acting Director notified licensee's attorney by letter dated February 3, 1964, that he had scheduled a hearing for Monday, February 17, 1964, at 2 p.m., at the

Division's offices, for the purpose of receiving evidence in conformity with the Order (Exhibit SS-5).

When the matter came on for hearing, the attorney for the Division offered in evidence the following documents: a certified copy of the Order of Remand; a certified copy of report of chemical analysis, dated October 2, 1962, prepared by the Division's chemist Menoth G. Battista (now deceased), certified under the hand and seal of the Acting Director of the Division on February 13, 1964; a certified copy of report of chemical analysis, dated January 28, 1963, made by John P. Brady, then Division chemist, certified under the hand and seal of the Acting Director on February 13, 1964; and a true copy of the original transmittal receipt, showing the bottles seized from Hala Corporation and submitted to the chemist for laboratory analysis, dated September 27, 1962, certified under the hand and seal of the Acting Director on February 13, 1964.

The aforesaid documents were received in evidence (the last three over the objections of the licensee) and marked Exhibits SS-1, SS-2, SS-3 and SS-4 respectively. The Division then rested.

It appears from the record herein that the licensee was unprepared to adduce any new evidence at the hearing herein and that the sole purpose of appearing was to seek a continuation of the matter for at least two weeks. Licensee's attorney at first wanted copies of Exhibits SS-2, SS-3 and SS-4 notwithstanding the fact that he had them in his file. He then wanted the Acting Director to issue subpoenas for the appearance of chemist John Brady so that he could cross examine him respecting his report notwithstanding the fact that he had cross examined him at length at the prior hearing; for the appearance of former ABC Agent O to further cross examine him respecting criminal charges preferred against him; for officers of the Union County Prosecutor's office and the Elizabeth and Sayreville Police Departments to testify respecting their investigation of Agent O's case; and for federal agents to dispute some of Agent O's previous testimony. Licensee's attorney also stated that he wanted samples of the liquor in question and that he would get a chemist to disprove the testimony of chemist Brady and would bring in "an individual learned in the alcoholic beverage trade who can testify to the unworthiness and the fact that the reports of Dr. Battista are not based upon sound reasoning nor justification."

The Division's attorney objected to any continuance of the matter and, to expedite it, stipulated the following:

(1) The Division does not base its findings upon formulas submitted to it by distillers;

(2) The labels on the bottles in question do not bear anything other than the proof of the alcoholic content and the brand name;

(3) The bottles in question and their contents were destroyed and are not in existence;

(4) Since the last hearing Agent O was arrested on a criminal charge having to do with another licensee and that he has been bound over to the Grand Jury which has not as yet returned a true bill.

Considering the facts stipulated by the Division's attorney and the fact that I indicated that testimony respecting the criminal charge preferred against Agent O was neither relative nor competent evidence, and considering the fact that the subpoenas requested by licensee's attorney could have been in his hands long before the date of the supplemental hearing had he telephoned or written the Division for them, and considering the other factors hereinabove referred to, I was of the opinion that a continuation of the matter for the purposes expressed by licensee's attorney would be futile. However, since licensee's attorney was adamant in his contention that the Court, by virtue of the Order of Remand, gave him the right to call the aforesaid witnesses, I was inclined to grant his request for a two week continuance and make my rulings respecting the admissibility of their testimony at that time.

The Acting Director having been informed of my intentions, the stipulations offered by the Division's attorney and the fact that the only new evidence which licensee might try to introduce would be the criminal charge preferred against Agent O respecting that agent's subsequent involvement with a different licensee, he saw no reason for a continuance of the hearing and so advised me. Complying with his prerogative, I then concluded the matter.

Since no additional testimony was offered by the licensee, I recommend that the determination of the Acting Director entered in this case on June 25, 1963, remain undisturbed.

Conclusions and Order

Written exceptions to the Hearer's report and written argument in support thereof were filed with me by the licensee pursuant to Rule 6 of State Regulation No. 16. The licensee's principal contentions are:(1) that the hearing held on February 17, 1964, should have been continued to another date in response to its motion and (2) that Exhibits SS-2, 3 and 4 were improperly admitted into evidence.

I have carefully considered the entire original and remand record herein and, as a result, I concur in, and adopt, the findings and conclusions of the Hearer as set forth in his Supplemental Hearer's Report and shall also adopt his recommendation.

With respect to the denial of licensee's motion to continue the hearing by the Hearer at the direction of the Acting Director, it is clear that the Hearer conducts the hearing as the agent of the Director, with no independent authority to conduct the hearing contrary to the policy or direction of the Director in whose behalf the Hearer acts. Otherwise, the tail would wag the dog. It is also clear that the licensee appeared at the hearing held on February 17, 1964 without any intention of then offering any evidence, although it had been afforded sufficient notice of the hearing. The licensee had not previously requested any postponement of the hearing in order that it might be in a position to obtain any evidence not then available. In fact, there is no claim that the evidence that it now wishes to produce was not available on the date of the hearing.

Moreover, the proffered evidence concerning Agent O's

arrest on charges not involving the licensee, upon which the licensee relies as its principal ground for the continuance, would not be admissible for the purpose of establishing "the criminal propensities of the Agent" as maintained by the licensee in its exceptions and argument. I also find the other urged grounds, namely, (1) to produce a chemist (whose identity has not yet been disclosed),(2) to prove that no distiller has submitted to the Division the chemical formula of its alcoholic beverages, and (3) to have an "opportunity to counteract" the above mentioned Exhibits SS-2,3 and 4, did not warrant the grant of a continuance.

As to the admissibility of the exhibits in question, the licensee in its written argument first has attacked the constitutionality of R.S. 33:1-37, which authorizes the admission into evidence of certain certificates issued by the Director of Alcoholic Beverage Control. However, it has consistently been held that the determination of the consitutionality of an act of the Legislature rests exclusively with the Courts. See Schwartz v. Essex County Board of Taxation, 129 N.J.L. 29 (Sup.Ct. 1942), aff'd 130 N.J.L. 177 (E. & A. 1943).

It next argues that the cited statute authorizes only the certification of findings by a graduate chemist employed by the Division, citing the second sentence of the second paragraph of the statutory section in question. However, the preceding sentence specifically provides for the certification of "any facts concerning the records and files" of the Division. I find that the statute is ample authority for the admission into evidence of all three exhibits.

Under the circumstances, I shall enter an order as recommended by the Hearer. Since the prior order entered herein suspending the license of the licensee for fifty-five days has been stayed by order of the Superior Court, Appellate Division, pending determination of the appeal herein, no dates may now be fixed for the effective period of any suspension.

Accordingly, it is, on this 27th day of April, 1964,

ORDERED that Plenary Retail Consumption License C-27, issued by the Township Committee of the Township of Pennsauken to Hala Corporation, t/a Montanaro's, for premises 7400 Crescent Blvd., Pennsauken, be and the same is hereby suspended for fifty-five (55) days, the effective dates of such suspension to be fixed after the determination by the Superior Court, Appellate Division of the pending appeal.

JOSEPH P. LORDI
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - ALLEGED MITIGATION - LICENSE SUSPENDED FOR 45 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
Coleman Bros., Inc. t/a Dreamboat 43-57 Passaic Street Newark, N.J.	)	CONCLUSIONS AND ORDER
Holder of Pleanary Retail Consumption License C-283, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark	)	

Joseph A. D'Alessio, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on February 17, 1964, it possessed alcoholic beverages in thirteen bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Even assuming, as claimed by the licensee, that the bottles were refilled by employees without the knowledge or consent of the licensee, this constitutes no defense. Cedar Restaurant & Cafe Co., Inc. v. Hock, 135 N.J.L. 156, reprinted in Bulletin 748, Item 9. Nor does it constitute mitigation warranting imposition of less than the established minimum penalty customarily imposed in similar cases since patrons are defrauded to the same extent by being served something other than ordered whether the substitution be made with or without the knowledge of the licensee. Re C.A.R. Corporation, Bulletin 1560, Item 9.

Absent prior record, the license will be suspended for forty-five days, with remission of five days for the plea entered, leaving a net suspension of forty days. Re Santora, Bulletin 1547, Item 5.

Accordingly, it is, on this 29th day of April, 1964,

ORDERED that Plenary Retail Consumption License C-283, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Coleman Bros., Inc., t/a Dreamboat, for premises

43-57 Passaic Street, Newark, be and the same is hereby suspended for forty (40) days, commencing at 2:00 a.m. Wednesday, May 6, 1964, and terminating at 2:00 a.m. Monday, June 15, 1964.

JOSEPH P. LORDI
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - POSSESSION OF NUMBERS SLIPS - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
MILDRED EMBERLAND, EXECUTRIX OF THE ESTATE OF UMBERTO LIDOLI 526 Fourth Street Union City, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-95, issued by the Board of Commissioners of the City of Union City.	)	

Mario M. Polcari, Esq., Attorney for Licensee
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on March 2, 1964, she possessed and permitted numbers slips on the licensed premises, in violation of Rule 6 of State Regulation No. 20.

Absent prior record and since the violation occurred previous to my notice of April 27, 1964, to all retail licensees concerning increased penalties to be imposed in bookmaking and numbers cases (Bulletin 1560, Item 6), in fairness, the heretofore existing minimum penalty will be imposed as in similar cases, viz., suspension of license for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Re Gerofsky, Bulletin 1495, Item 9; Re Trawinski, Bulletin 1555, Item 2.

Accordingly, it is, on this 13th day of May 1964,

ORDERED that Plenary Retail Consumption License C-95, issued by the Board of Commissioners of the City of Union City to Mildred Emberland, Executrix of the Estate of Umberto Lidoli, for premises 526 Fourth Street, Union City, be and the same is hereby suspended for twenty (20) days, commencing at 3 a.m. Wednesday, May 20, 1964, and terminating at 3 a.m. Tuesday, June 9, 1964.

Joseph P. Lordi
Director