V

MR. ZEMEL

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N. J. 07102

March 8, 1965

BULLETIN 1604

TABLE OF CONTENTS

ITEM

1. PETITION PROCEEDINGS - DISCRIMINATION BY IMPORTER AGAINST WHOLESALER - PETITION DISMISSED.

2. ACTIVITY REPORT FOR JANUARY 1965.

3. DISQUALIFICATION REMOVAL PROCEEDINGS - BREAKING, ENTERING, LARCENY AND RECEIVING - ASSAULT AND BATTERY AND ROBBERY - LARCENY FROM PERSON - ENTERING, LARCENY AND RECEIVING - CONSPIRACY TO ROB - ASSAULT AND BATTERY ON ABC AGENT - BOOKMAKING - PETITION DENIED.

4. DISCIPLINARY PROCEEDINGS (South River) - SALE TO A MINOR - FALSE STATEMENT IN APPLICATION FOR LICENSE - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

5. DISCIPLINARY PROCEEDINGS (Somerdale) - SALE BELOW FILED PRICE - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

New Jersey State Library

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

March 8, 1965

BULLETIN 1604

1. PETITION PROCEEDINGS - DISCRIMINATION BY IMPORTER AGAINST WHOLESALER - PETITION DISMISSED.

GARDEN STATE LIQUOR WHOLESALERS, INC. A CORPORATION, Petitioner,

v.

CANADA DRY CORPORATION, A CORPORATION, Respondent.

ON PETITION CONCLUSIONS AND ORDER

William Furst, Esq., Attorney for Petitioner.
Shanley & Fisher, Esqs., by Harold H. Fisher, Esq., and J. William Reilly, Esq. (of the New York Bar), Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Petitioner, Garden State Liquor Wholesalers, Inc. (hereinafter Garden State) seeks to compel Canada Dry Corporation (hereinafter Canada Dry) to sell its products to petitioner, claiming such right under R.S. 33:1-93.1-5.

Garden State contends in its petition that it placed two orders with Canada Dry -- one dated April 10, 1961 and the other in June 1963 -- for the purchase of various quantities of Canada Dry's products and that Canada Dry refused to honor said orders, advising the petitioner that it had appointed F & A Distributing Company (hereinafter F & A) as its exclusive distributor in New Jersey.

The gravamen of the petition is the alleged discrimination of Canada Dry in arbitrarily refusing to sell its products to Garden State. Petitioner Garden State demands that respondent Canada Dry be ordered to fill its orders "in such amounts and for such deliveries as normally existed heretofore."

Garden State is a licensed liquor wholesaler in New Jersey and has been such since December 1, 1953, at and from which time it was engaged as one of the distributors of Canada Dry's products. It continued as such distributor of Canada Dry's products until March 1961. Canada Dry was and is a distiller and importer of nationally advertised brands of alcoholic beverages within the meaning of R.S. 33:1-93.1. Its product lines include Johnnie Walker Red Label, Johnnie Walker Black label, Pedro Domecq Brandies, Powers Irish Whiskey, Strega, an Italian cordial, and several other lesser known products.

Prior to 1961 it had eight distributors in New Jersey. These were F & A Distributing Company, J & J Distributing Company, Galsworthy, Inc., Gillhaus Merchants, Flagstaff, Austin Nichols, Garden State, and Garden State subsidiary Crown Limited. By letter dated March 3, 1961, Canada Dry informed Garden State that it had appointed F & A as its exclusive distributor in New Jersey effective May 1, 1961, and that Garden State's appointment as a distributor would terminate on April 30, 1961.

On or about April 10, 1961, Garden State placed an order with Canada Dry for 305 cases of Johnnie Walker, and on June 26, 1963 for 450 cases of fifths of Johnnie Walker Red Label, 75 cases of tenths and 150 cases of fifths of Johnnie Walker Black Label. Canada Dry refused to honor these orders because, as stated heretofore, it had appointed F & A as its sole distributor. Accordingly, on September 12, 1963 Garden State filed the subject petition.

The design of the alcoholic beverage law, to which R.S. 33:1-93.1-5 is a supplement, is that the Director is "to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner as to promote temperance and eliminate the racketeer and bootlegger." R.S. 33:1-3. In order to accomplish this purpose the statute seeks to achieve the independence of wholesalers from distillers. As the court stated in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co. et als., 28 N.J. 444 (Sup.Ct. 1958), at p. 455:

> "...A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the supply at will. For the purpose of strengthening the wholesaler's resistance if confronted with a distiller's wish to over-stimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, e.g., tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler. To effectuate this end, both the statute and the authority delegated by it to the Director will be liberally construed. See Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 384 (1956); 3 Sutherland, Statutory Construction (3rd ed. 1943), § 7203. The act itself dictates such a construction. N.J.S.A. 33:1-73."

One further note. As the introducer's statement declares:

> "The purpose of this act [R.S. 33:1-93.1-5] is to insure an equitable basis for competition between all licensed wholesalers of alcoholic beverages in New Jersey and to prevent any monopolistic freezing-out of one wholesaler by another by preventing the sale of certain products to him."

As the Director pointed out in his conclusions in F & A Distributing Co. et als. v. Canada Dry Ginger Ale, Inc., Bulletin 1205, Item 1:

> "Each case (including the case in question) must be decided upon its own particular facts."

Thus, fairness to the parties involved should be the guiding principle in the light of the legislative objective.

In support of its adoption of a policy of exclusive distributorship in New Jersey and its selection of F & A as its exclusive distributor, Canada Dry first asserts that the principle of exclusive distributorship has been approved and accepted by our courts. In support of this argument it cites the language of Judge Sullivan in James M. McCunn & Co., Inc. v. Fleming & McCaig, Inc., 81 N.J. Super. 97 (1963), at p. 104:

> "On the basis of the Canada Dry decision we conclude that a prime distributorship is not per se a violation of the statute and that the taking away of a prime distributorship from one wholesaler and giving it to another is not necessarily improper. Thus, McCunn's elimination of McCaig as its prime distributor would not be contrary to N.J.S.A. 33:1-93.1 et seq., provided McCunn presented facts demonstrating that the action taken was reasonable, a proper and legitimate business decision, and not tending to defeat any relevant purpose or policy of the statute."

Canada Dry maintains that its decision to market products through an exclusive dealer is a good-faith business decision based on experience and experimentation that cannot be viewed as arbitrary. Further, that it is based on a standard reasonably related to a legitimate business goal sought to be achieved (more effective distribution and economic gain) and is not conducive to the evils which the act is designed to prevent. This must be considered in the light of the overriding and well-established principle that an individual's bona fide business policy in the field of liquor traffic must yield to the policy of the State. Guill v. Mayor etc. of Hoboken, 21 N.J. 574 (1956).

I do not conceive that an exclusive distributorship can only be established where there is only one wholesaler available for the service and sale of the distiller's products for, to argue that you may have an exclusive distributorship, and then in the same breath say that it, ipso facto, creates arbitrary discrimination against another qualified wholesaler is to raise a semantic self-contradiction vis-a-vis the concept of "exclusive distributorship." "Exclusive" is defined as "limiting or limited to possession, control, or use (as by a single individual or organization or by a special group or class) ... excluding or inclined to exclude others ... an exclusive right (as to sell a particular product in a certain area)." Webster's Third New International Dictionary Unabridged. Thus the definition in its normal context contemplates a selection from several, which inheres in the act of limiting or excluding.

In Canada Dry, supra, at p. 458, Justice Francis vigorously disagreed with the principle of exclusive distributorship as long as there were qualified wholesalers. In a separate opinion, in which he concurred with the decisional result, he asserted that the impact of the statute under ordinary circumstances is that any reasonably competent and financially capable wholesaler is entitled to be served

and cannot be discriminated against arbitrarily. In discussing the statute in Canada Dry, supra, at p. 459, he stated:

> "It is difficult to imagine more imperative language. The supervisory administrative machinery may be set in motion by refusal to sell to 'any' wholesaler 'any' amount of liquor. It is legislating rather than interpreting to read into this section the qualification that the refusal to sell must be to a wholesaler with whom the distiller has been dealing regularly."

And further:

> "The impact of the statute under ordinary circumstances is that any reasonably competent and financially capable wholesaler is entitled to be served and cannot be discriminated against arbitrarily. The fact that it would be more convenient or more feasible or more efficient for the distiller to deal with a limited number would not of itself provide an escape from condemnation as arbitrary discrimination. Such is the burden imposed by N.J.S.A. 33:1-1 et seq. on this highly regulated industry. Any lessening of that burden must come from the source which imposed it." (p. 458)

Justice Francis' reasoning and logic are persuasive, and even compelling. Nevertheless, as the court noted in James M. McCunn & Co., Inc. v. Fleming & McCaig, Inc., supra, at p. 104:

> "... However, the majority of the court did not adopt this construction and, as heretofore noted, held that the Director is not authorized to command a distiller to distribute his product to every wholesaler who desires to purchase it, and that the statute condemns a refusal to sell only when it is found to be arbitrary."

We are, therefore, enjoined to accept and operate under the majority mandate.

Thus we now accept as an operating principle that an exclusive distributorship is not, per se, a violation of the statute and that the taking away of a distributorship from one wholesaler and giving it to another is not necessarily improper provided such action is not arbitrary. What is meant by "arbitrary" has been defined in Canada Dry, supra, and need not be repeated. In the present context it means that Canada Dry must set forth certain objective criteria and present facts demonstrating that its action was reasonable, a proper and legitimate business decision, and not tending to defeat any relevant purpose or policy of the statute. McCunn v. Fleming & McCaig, supra, at p. 104.

In Hoffman v. Hock, 8 N.J. 397 (1952), the distiller, who was also a licensed wholesaler, eliminated in toto all of the wholesalers in the northern part of the State since it planned to sell directly to retailers in that particular area. The court held in that case that the Act did not prevent a distiller from acting as the exclusive distributor or wholesaler of its own products. Accordingly it further ruled that it

would be lawful not to sell through or to wholesalers at all. "Thus it is still open to the distiller to sell directly to retail dealers if licensed so to do." The court then indicated that it was not violative of the statute to sell directly to retailers in the northern area without the use of any wholesalers at all there. Hoffman v. Hock, supra, at p. 409. In other words, however, if one wholesaler were appointed to act, all other such wholesale licensees operating in the area who are similarly situated would be entitled to have their purchase orders filled. This was one objective criterion by which the court permitted a distiller to distribute its products in the State, in excluding wholesalers of its products.

In Canada Dry, supra, Canada Dry contended that it reached a policy decision whereby it sought to reduce from eleven to five its wholesale distributors in New Jersey. Among those eliminated were the petitioner in that matter. In that case Canada Dry set forth factors which it considered in making the selection. Some of those factors were subjective and others were objective. The objective factors considered were the number of competitive lines, the number of salesmen, and past sales. The majority of the court there held that the application of those factors which it denominated as of an objective nature could have been demonstrated. However, Canada Dry made no attempt to document in depth its objective criteria, and there was no showing in that case that the wholesalers who had been retained could be distinguished on the basis of these criteria from the petitioners. In this respect the majority of the court stated that the appellant had failed to reveal in depth the underlying facts "from which the Director could evaluate the reasonableness of the appellant's actions, including the basis of selection, in the light of the statutory policy described above." The court reserved "to appellant leave to apply to the Director for a rehearing...." Thus it must be implied from such expression that the court supported the premise that, if objective criteria can be demonstrated and supported, it was proper and lawful for a distiller to exclude all other wholesalers and grant an exclusive distributorship to one wholesaler. In that action the respondent did not, according to the records of this Division, make such application for a rehearing as suggested by the court, and the matter was discontinued.

However, in the instant case Canada Dry has adopted the procedure outlined by the court in the earlier case and has developed at this hearing, in depth, those factors which it considered objective criteria, on the basis of which it made its bona fide business judgment that it would operate by way of an exclusive distributorship in this State, and would appoint F & A as its exclusive distributor.

Paul J. Burnside (vice president in charge of operations of the wine and spirits division of Canada Dry) testified that, after examining all the factors involved in the distribution of Canada Dry's products in New Jersey, he decided on a policy of an exclusive distributorship for those products. He enumerated the following factors: (a) scotch whiskies were Canada Dry's principal products and its major competitiors were all marketed through exclusive distributors who were getting a larger share of the existing market in New Jersey. It was his judgment that, since an exclusive distributorship was producing better results for his major competitors, it was reasonable to believe that it would likewise produce better results for Canada Dry. He further reasoned that "we would increase our

market penetration within the State of New Jersey by appointing an exclusive distributor who naturally, since he was the only source of supply for the retailers within the state, in our opinion would put forth more intensified efforts on the sale of Johnnie Walker." (b) Burnside noted that the accepted practice in the trade in New Jersey was exclusive distributorship, and pointed out that Garden State itself had an exclusive distributorship of Ambassador. (F & A apparently was an exception. It has no prior exclusive distributorship of scotch whiskies.) (c) Burnside considered eight or nine distributors from which he intended to select an exclusive distributor. However, only three distributors (Galsworthy, F & A and Garden State) were even considered "in size and scope of their operations for the appointment as exclusive distributorship within the state." Galsworthy was eliminated because it already was an exclusive distributor of Cutty Sark, which is the leader of all scotch whisky in the State and was a major competitor of Johnnie Walker. So the choice narrowed down to that between F & A and Garden State.

In weighing its final selection it took the following factors into consideration: (1) Garden State already had an exclusive distributorship of Ambassador (a nationally advertised brand of scotch whisky) whereas F & A had no exclusive distributorship of scotch whiskies; (2) it considered the relative sales record of these two companies with respect to scotch whisky. The sales records were as follows:

"Year ending Sept. 30, 1958

Garden State		F & A	
Johnnie Walker	4511 cases	Johnnie Walker	5377 cases
Others	2757 "	Others	3303 "
All products	7268 "	All products	8680 "
	1959		
Johnnie Walker	2862 cases	Johnnie Walker	5930 cases
Others	1315 "	Others	2339 "
All products	4177 "	All products	8269 "
	1960		
Johnnie Walker	3576 cases	Johnnie Walker	6528 cases
Others	1610 "	Others	2507 "
All products	5186 "	All products	9035 "

Thus, Burnside concluded, F & A's promotion of its products and the related item Johnnie Walker for those three years was nearly twice that of Garden State. He also noted that during this period of time until the present time there has not been any restriction for allocation of Canada Dry's merchandise to Garden State; (3) Burnside considered the financial structure of both companies, and the studies show that the net worth of Garden State and Crown Limited (its affiliate) was approximately $223,000 whereas the net worth of F & A was approximately $1,500,000. "This", explained Burnside, "was a very important consideration, their ability to finance the sale of our products." He concluded that, on the basis of their financial structure, Garden State's financial position "did not justify placing its entire lines in the hands of Garden State as an exclusive distributor;" (4) Burnside stated that, in making a selection between the two companies, he considered the fact that fifty per cent. of all purchases of Garden State were made from a single distributor (the House of Seagram), whereas not more than twenty-five per cent. were made from Schenley. It was his judgment, supported by the judgment of Frank J. Cirona (credit

manager of Canada Dry) that, in the words of Cirona, "it was a very bad risk we would be taking because of the fact one principal supplier would represent the principal creditor of this particular account, Garden State." While Garden State assured them that it had received a verbal guarantee from the House of Seagram that they would make available money loans to support additional credit, Cirona felt that "in the absence of a written guarantee from the principal supplier, there was no choice." This conclusion was buttressed upon the apprehension that, in the absence of such written guarantee, Seagram's could withdraw its lines from Garden State at any time and thus seriously weaken Garden State as a wholesaler. Since Seagram was a major competitor of Canada Dry, such possibility would represent a serious financial threat if Garden State were granted the exclusive distributorship; (5) Cirona testified that his experience with Garden State indicated that its financial condition was getting progressively worse; that, therefore, he reported to Burnside, "if you decide to appoint them as exclusive, according to their balance sheet they are not in position to carry this sales volume;" (6) Finally, Garden State had somewhere between sixty-five and seventy salesmen, and F & A employed approximately one and one-half times that number. On cross examination on this point it was developed that Garden State serviced approximately seven thousand licensees whereas F & A serviced about ten per cent. more, or seventy-seven hundred accounts.

I have given careful consideration to the facts developed by the entire record and the applicable law, and make the following findings:

(1) We are dealing here with an importer (Canada Dry) who handles nationally advertised products, and with a wholesaler (Garden State) who has the financial ability to pay for its products, so that this matter clearly comes within the purview of R.S. 33:1-93.1-5.

(2) An exclusive distributorship is not, per se, a violation of the statute, and the taking away of a distributorship from one wholesaler and giving it to another is not necessarily improper. McCunn v. Fleming & McCaig, supra, at p. 104. Further, according to the majority opinion of the court and the present posture of the law, such distributorship may be, under certain conditions, a valid business policy and may be pursued by an importer in New Jersey. As was pointed out in the later case of McCunn v. Fleming & McCaig, Inc., 84 N.J. Super. 24 (App. Div. 1964): "The facts of economic life apply to the liquor industry."

(3) In order to establish its right to engage through an exclusive distributor, Canada Dry was required to present facts demonstrating that its action was reasonable, a proper and legitimate business decision, and not tending to defeat any relevant purpose or policy of the statute. I am satisfied that, on the record, Canada Dry has made such bona fide business decision and had developed objective criteria and presented facts in support of its decision. "Criterion" is defined as a standard of judging, a rule or test by which anything is tried in forming a correct judgment concerning it. The court evidently equates "factors" with "criteria."

(4) Canada Dry has decided that an exclusive distributorship is the more preferable method of operation in the sale and distribution of its products in this State and sets forth that other leading competitiors operate through exclusive distributorship It further asserts that its experience has indicated that a policy of exclusive distributorship would produce better results than a practice of distribution through multiple distributors. This is supported by the fact that practically most major wholesalers (with the significant exception of F & A) have a major, exclusive product. While there has been no affirmative evidence in the record to substantiate this contention, it seems logical to accept this hypothesis because it is postulated upon the practical experience of the other importers. If this were not the fact, it would appear to be more reasonable that the other importers would engage multiple wholesalers of their products in this State. In any event, the decision of Canada Dry to operate on that basis, on the belief that it would result in a wider distribution for its products in this State since it was producing better results for its competitors, must be considered a reasonable business judgment. Therefore, when counsel for Garden State advocates that this was merely a "hunch" rather than a fact, established on the basis of statistical evidence of competitors, he disregards the practical experience of the major distillers and importers in this field over many years. It should also be pointed out in this connection that George Harris (president of Garden State) recognized the feasibility and practicability of an exclusive distributorship. In fact, he stated that he tried hard to get Canada Dry's line "on an exclusive;" that he was not opposed to the idea of an exclusive except that he wanted it for his company. He further stated that he felt that an exclusive distributorship would be an ideal set-up for his company as well as for Canada Dry. And, finally, he admitted that an exclusive distributorship would be better for Canada Dry.

(5) One of Canada Dry's objective criteria was that it desired to deal with the largest and financially most qualified wholesaler in the State. The record shows that Garden State is a statutorily qualified wholesaler. However, as between Garden State and F & A, Canada Dry decided that F & A was the more qualified and, therefore, it chose F & A as its exclusive distributor. There is nothing in the record to indicate that this was not a <u>bona fide</u> business judgment on its part and, in the absence of affirmative proof to the contrary, the Director is required to accept the good faith of Canada Dry in its selection.

(6) Another objective criterion was that the exclusive distributor should not have other similar exclusive lines. Since Garden State does have an exclusive distributorship of Ambassador scotch whisky, this was a limiting factor which Canada Dry properly considered in making its final selection.

(7) The other factors which were properly considered by Canada Dry were the number of salesmen employed by Garden State and F & A; the number of sales of its products; the financial structure of both companies; the credit strength of both companies, and the financial dependence of Garden State upon Seagram, a leading competitor. Canada Dry has documented, in depth, these factors which it considers objective criteria (as did the majority in <u>Canada Dry</u>, <u>supra</u>), and has arrived at its <u>bona fide</u> business judgment, namely, F & A deserved selection as the wholesaler more likely to serve the ends of its business policy in the distribution of its products in this State. Such

facts, which served as a basis for selection, are clearly sanctioned by the majority decision in Canada Dry, supra, at p. 457. Having established and supported the basis for its selection, I consider that its action in appointing F & A as its sole distributor was reasonable.

(8) Since Canada Dry has established such standard, based upon objective criteria which it considered in making its selection, I conclude that its action was grounded on a legitimate business decision; that, in pursuance thereof and in consonance therewith, Canada Dry's refusal to sell its products to Garden State was not arbitrary.

(9) I further conclude that such action does not tend to defeat any relevant purpose or policy of the statute. As noted hereinabove, the Director was particularly empowered to control the activities under the relevant sections of the Act relating to wholesalers and distillers in order to prevent evils such as tie-in sales, artificial and unrelated minimum quantities required to be purchased as a prerequisite for doing business with a particular distiller. Cf. Re Boller Beverages Inc., Bulletin 838, Item 2. As the court stated, further, in Canada Dry, supra, at p. 455:

> "The ultimate goal sought to be attained by the statute in question, as in the entire scheme of liquor legislation, is the protection of the public through the promotion of temperance and elimination of the racketeer and bootlegger. N.J.S.A. 33:1-3."

(10) Under the facts and circumstances of this case, I find that the action of Canada Dry would not be inimical to the goals and objectives of the alcoholic beverage law, nor would it subserve any of the evils which the Act seeks to prevent.

(11) Finally, I find nothing in the record which would affirmatively demonstrate that public interest would be adversely affected by its action herein.

I, therefore, recommend that an order be entered dismissing the petition herein.

Conclusions and Order

Written exceptions to the Hearer's Report and written argument thereto were filed by the attorney for petitioner.

I have given careful consideration to the evidence and exhibits, the Hearer's Report, and the written exceptions and argument thereto. The main thrust of petitioner's exceptions appears to be that respondent's decision to operate on an exclusive basis with F & A Distributing Company was not bona fide because it relied upon a compilation of facts which it equated with a bona fide business judgment. It further stated that the objective criteria used by respondent did not provide meaningful differences upon which it could, in good faith, support its decision and the subsequent action taken by it.

As the Hearer pointed out, the respondent not only compiled facts upon which it established objective criteria but, in addition, made a subjective judgment based upon its own experience in the field, the experience of other liquor licensed distributors and wholesalers similarly situated in this State,

and its evaluation of these factors. The Hearer properly concluded that "There is nothing in the record to indicate that this was not a bona fide business judgment on its part and, in the absence of affirmative proof to the contrary, the Director is required to accept the good faith of Canada Dry in its selection."

This is particularly pertinent in answer to Exception #3 wherein petitioner advocates that respondent's decision "to operate on an exclusive basis was the rankest form of hearsay with no support in the record and predicated upon nothing but subjective attitudes on the part of Canada Dry." As the Hearer pointed out: While there has been no affirmative evidence in the record to substantiate respondent's position that other wholesalers have found it more desirable and practical to adopt a policy of exclusive distributorships, it is not unreasonable and indeed "it seems logical to accept this hypothesis because it is postulated upon the practical experience of the other importers."

The Hearer further emphasizes that "the decison of Canada Dry to operate on that basis, on the belief that it would result in a wider distribution for its products in this State since it was producing better results for its competitiors, must be considered a reasonable business judgment." This subjective factor, coupled as it was with the other objective criteria documented by respondent, constitutes a sufficient standard which must be sustained by this Division.

With respect to Exception #4 relating to the Hearer's finding that one of the factors taken into consideration is the financial dependence of Garden State upon Seagram, petitioner regards this language as "unwarranted" and charges that "the facts elicited at the hearing in this matter do not substantiate such language." Petitioner claims that such statement "is calculated to do irreparable damage to petitioner in its business conduct in the industry and is no proper part of the findings of fact."

My examination of the testimony satisfies me that it is not necessary to make a determination on that issue in arriving at the final determination herein and, accordingly, I dissociate myself from a specific finding with respect thereto.

With the exception hereinabove noted, which is inconsequential and not primary, I concur in the conclusions of the Hearer and adopt them as my conclusions herein.

Petitioner has filed a supplemental petition simultaneously with its exceptions, wherein it alleges that, subsequent to the receipt of the said Hearer's Report, it has discovered new evidence, as set forth in the affidavit annexed to the petition. It prays that it be granted a new hearing in order to afford it an opportunity to present such evidence "or, in the alternative, that it be given an opportunity for a hearing before the Director for purposes of presenting such evidence prior to the filing...of his Conclusions and Order."

The general rule is that newly discovered evidence is a ground for vacating a judgment, provided it could not have been discovered at the time of trial, and it is material and such as to affect the decision of the issue. 49 C.J.S. Judgments, sec. 273, p. 493. Newly discovered evidence upon which

application to reopen a hearing is predicated must be competent, and must be evidence discovered since the conclusion of the suit which could not, with reasonable diligence, have been adduced at the final hearing. Strong v. Strong, 138 N.J. Eq. 302. There must be a showing that by exercise of all due diligence, such evidence could not have been available at the trial. 536 Broad St. Corp. v. Valco Mortgage Co., 5 N.J. Super. 547, Aff'd. 7 N.J. Super. 147. The evidence must be not only competent and relevant to the issues, but must be of such weight and nature which, if added to evidence already in the case, would reasonably and probably serve to change or reverse the judgment or decree attacked. Pioneer Paper Stock Co. v. Miller Transport Co., 109 F. Supp. 502 (U.S.D.C. 1953).

My examination and evaluation of the facts and matters set forth in the affidavit annexed to the petition satisfy me that it did not contain facts and matters which were not available at the hearing herein with the exercise of due diligence; and that in any event, they would not reasonably and probably serve to change or reverse my determination herein. The application for rehearing of this matter is hereby denied.

The request of petitioner for oral argument with respect to the supplemental petition filed herein is denied since such oral argument is deemed unnecessary and unwarranted. D'Amico v. Blanck, 85 N.J. Super. 297, reprinted in Bulletin 1592, Item 1; petition for certification denied, 43 N.J. 448.

Accordingly, it is, on this 21st day of January, 1965,

ORDERED that the petition of petitioner herein be and the same is hereby dismissed.

JOSEPH P. LORDI
DIRECTOR

2. **ACTIVITY REPORT FOR JANUARY 1965**

ARRESTS:
Total number of persons arrested — 18
- Licensees and employees — 10
- Bootleggers — 8

SEIZURES:
- Stills - over 50 gallons — 1
  - 50 gallons or under — 1
- Alcohol - gallons — 4.96
- Mash - gallons — 240
- Wine - gallons — 5.25
- Brewed malt alcoholic beverages - gallons — 7.60

RETAIL LICENSEES:
- Premises inspected — 621
- Premises where alcoholic beverages were gauged — 505
- Bottles gauged — 7,400
- Premises where violations were found — 49
  - Violations found — 73
    - Unqualified employees — 24
    - Application copy not available — 13
    - Reg. #38 sign not posted — 9
    - Other mercantile business — 6
    - Disposal permit necessary — 5
    - Prohibited sign — 1
    - Other violations — 15

STATE LICENSEES:
- Premises inspected — 12
- License applications investigated — 4

COMPLAINTS:
- Complaints assigned for investigation — 358
- Investigations completed — 315
- Investigations pending — 221

LABORATORY:
- Analyses made — 126
- Refills from licensed premises - bottles — 87
- Bottles from unlicensed premises — 7

IDENTIFICATION:
- Criminal fingerprint identifications made — 5
- Persons fingerprinted for non-criminal purposes — 191
- Identification contacts made with other enforcement agencies — 134
- Motor vehicle identifications via N.J. State Police teletype — 1

DISCIPLINARY PROCEEDINGS:
- Cases transmitted to municipalities — 5
  - Violations involved — 5
    - Sale during prohibited hours — 2
    - Sale to minors — 2
    - Failure to close prem. during prohibited hours — 1
- Cases instituted at Division — 28
  - Violations involved — 37
    - Possessing liquor not truly labeled — 9
    - Sale to minors — 5
    - Sale below filed price — 5
    - Permitting lottery activity on prem. — 4
    - Fraud in application — 3
    - Sale during prohibited hours — 3
    - Permitting bookmaking on premises — 3
    - Beverage Tax Law non-compliance — 1
    - Unqualified employees — 1
    - Solicitor employed by retailer — 1
    - Permitting foul language on prem. — 1
    - Failure to close premises during prohibited hours — 1
- Cases brought by municipalities on own initiative and reported to Division — 18
  - Violations involved — 23
    - Permitting brawl on premises — 6
    - Sale to minors — 5
    - Failure to close prem. dur. proh. hrs. — 4
    - Decanting wine — 1
    - Sale during prohibited hours — 1
    - Permitting bookmaking on premises — 1
    - Employment w/o identification card (local reg.) — 1
    - Permitting lottery activity on prem. — 1
    - Employee working while intoxicated — 1
    - Permitting hostesses on premises — 1
    - Conducting business as a nuisance — 1

HEARINGS HELD AT DIVISION:
Total number of hearings held — 35
- Appeals — 7
- Disciplinary proceedings — 16
- Eligibility — 8
- Seizures — 1
- Tax revocations — 1
- Applications for license — 2

STATE LICENSES AND PERMITS ISSUED:
Total number issued — 945
- Licenses — 1
- Solicitors' permits — 43
- Employment permits — 184
- Disposal permits — 72
- Wine permits — 2
- Social affair permits — 300
- Miscellaneous permits — 139
- Transit insignia — 186
- Transit certificates — 18

OFFICE OF AMUSEMENT GAMES CONTROL:
- Licenses issued — 9
- Enforcement files established — 10

JOSEPH P. LORDI
Director of Alcoholic Beverage Control
Commissioner of Amusement Games Control

Dated: February 4, 1965

3. DISQUALIFICATION REMOVAL PROCEEDINGS - BREAKING, ENTERING, LARCENY AND RECEIVING - ASSAULT AND BATTERY AND ROBBERY - LARCENY FROM PERSON - ENTERING, LARCENY AND RECEIVING - CONSPIRACY TO ROB - ASSAULT AND BATTERY ON ABC AGENT - BOOKMAKING - PETITION DENIED.

In the Matter of an Application to Remove Disqualification because of a Conviction, pursuant to R.S. 33:1-31.2	CONCLUSIONS AND ORDER
Case No. 1884	

BY THE DIRECTOR:

Petitioner's criminal record discloses that he was convicted in the Essex County Court on December 7, 1925 for breaking, entering, larceny and receiving, on December 20, 1926 for assault and battery and robbery, on January 21, 1929 for larceny from a person, on June 15, 1931 for entering, larceny and receiving, on March 29, 1933 for conspiracy to rob, on November 21, 1951 for assault and battery, and on February 15, 1956 for bookmaking; that on his first conviction he was placed on probation for three years, on his second conviction he was sentenced to Rahway Reformatory, on his third conviction he was sentenced to serve two-and-one-half years in New Jersey State Prison, on his fourth conviction he was sentenced to serve six months in the county penitentiary, on his fifth conviction he was sentenced to serve two-to-three years in New Jersey State Prison (resentenced on April 12, 1933 to serve eighteen months in the county penitentiary), on his sixth conviction he was sentenced to serve eighteen months in the county penitentiary, and on his seventh conviction he was sentenced to serve two-to-three years in New Jersey State Prison (resentenced on March 2, 1956 to serve one-to-two-and-one-half years in State Prison). Petitioner was paroled on February 18, 1957.

It further appears that petitioner was convicted in a local magistrate's court on March 15, 1926 for loitering, on June 11, 1928 for loitering, on July 9, 1928 for adultery, on July 14, 1928 for assault and battery, on December 23, 1931 for loitering, on June 3, 1932 suspicion-loitering, on August 3, 1938 for a motor vehicle violation, on December 18, 1942 for gambling (dice), on December 22, 1942 for holding and receiving horse race bets, and on October 11, 1945 for gambling (dice). As a result of aforesaid convictions, petitioner was sentenced, respectively, to three months in jail, $5 fine, one year probation, placed on local probation, suspended sentence, six months suspended sentence, suspended sentence, $50 fine, $200 fine, and $50 fine.

Since the crimes of which petitioner was convicted on January 21, 1929, June 15, 1931, March 29, 1933 and February 15, 1956 involve the element of moral turpitude, he was thereby rendered ineligible to be engaged in the alcoholic beverage industry in this State. R.S. 33:1-25, 26. In view of this, it is unnecessary to determine whether or not petitioner's other convictions, outlined above, involve that element. Except for his conviction of adultery, petitioner's convictions in the magistrate's court are not convictions of crime.

At the hearing held herein, petitioner (57 years old) testified that he is married and living with his wife and three children; that for the past fifteen years he has lived in the same municipality where he presently resides; that he has been employed by a brother as a roofer for fifteen years and by his father in

the same capacity for fifteen years; that he does not work during the winter months; that until recently, his wife has been employed as a clerk and has contributed to the support of their family and that his wife has been forced to discontinue her employment because of illness.

Petitioner further testified that he is asking for the removal of his disqualification to be free to accept employment as a bartender in licensed premises in this State and that, ever since his parole on February 18, 1957, he has not been convicted of any crime.

The police department of the municipality wherein the petitioner resides reports that there are no complaints or investigations presently pending against petitioner.

Petitioner produced three character witnesses (a checker on docks, a retired musician and the operator of a small trucking business) who testified that they have known the petitioner for more than five years last past and, in their opinion, he is now an honest, law-abiding person with a good reputation.

The records of this Division disclose that on Sunday, January 28, 1951, petitioner was employed as a bartender by a licensee whose license was suspended by the then Director for ninety days effective March 27, 1951, for (1) sale of alcoholic beverages for off-premises consumption, (2) hindering an investigation, (3) permitting acts of violence on the licensed premises (physical attacks upon an ABC inspector, resulting in bodily injury) and (4) employing an unqualified employee (petitioner). Bulletin 902, Item 2. The records further disclose that the aforesaid sale was made by petitioner, that petitioner personally hindered the investigation and that he physically attacked the inspector. Hindering an investigation is a most serious violation which threatens the entire enforcement structure. Re Case No. 1190, Bulletin 1044, Item 6.

The file in this case discloses that petitioner's aforesaid conviction on November 21, 1951 for assault and battery resulted from his assault upon the ABC agent in the course of an investigation of the licensed premises in question.

To afford petitioner the relief requested, it is necessary that I find that he has been conducting himself in a law-abiding manner for five years last past and that his association with the alcoholic beverage industry will not be contrary to the public interest. See R.S. 33:1-31.2.

While more than five years have elapsed since his parole in 1957, I am not satisfied, by reason of his long criminal record, his assault upon an agent of this Division and his hindering of an investigation, that his association with the alcoholic beverage industry will not be contrary to the public interest. Re Case No. 1040, Bulletin 971, Item 7; Re Case No. 1267, Bulletin 1113, Item 4.

Accordingly, it is, on this 22d day of January, 1965,

ORDERED that the petition herein be and the same is hereby denied.

JOSEPH P. LORDI
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - FALSE STATEMENT IN APPLICATION FOR LICENSE - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against JOSEPH SCIORTINO t/a THUNDERBIRD BAR & GRILL 6-8 Reid Street South River, N. J. Holder of Plenary Retail Consumption License C-38, issued by the Borough Council of the Borough of South River.	CONCLUSIONS AND ORDER

Spritzer & Spritzer, Esqs., by Morris Spritzer, Esq., Attorneys for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads _non vult_ to charges alleging that (1) on December 20, 1964 he sold a mixed drink of an alcoholic beverage to a minor, age 19, in violation of Rule 1 of State Regulation No. 20, and (2) in his current application for license he failed to disclose his record of prior license suspension in violation of R.S. 33:1-25.

The licensee has a previous record of suspension of license then held for premises 66 South Orange Avenue, Newark, by the Director for twenty-five days effective June 4, 1959, for sale in violation of State Regulation No. 38 and permitting foul language on the licensed premises (_Re Sciortino_, Bulletin 1285, Item 3), non-disclosure of which suspension being the subject of the second charge.

The prior record of suspension of license for dissimilar violation occurring more than five years ago disregarded, the license will be suspended on the first charge for fifteen days (_Re Pontecorvo_, Bulletin 1583, Item 5), and on the second charge for ten days (_Re Club Rio_, Bulletin 1594, Item 3), or a total of twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days.

Accordingly, it is, on this 25th day of January 1965,

ORDERED that Plenary Retail Consumption License C-38, issued by the Borough Council of the Borough of South River to Joseph Sciortino, t/a Thunderbird Bar & Grill, for premises 6-8 Reid Street, South River, be and the same is hereby suspended for twenty (20) days, commencing at 2 a.m. Wednesday, January 27, 1965, and terminating at 2 a.m. Tuesday, February 16, 1965.

JOSEPH P. LORDI
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - SALE BELOW FILED PRICE - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

EDW. & FRANCES KURTZMAN
White Horse Pike & Crestwood Avenue
Somerdale, New Jersey

Holders of Plenary Retail Distribution License D-1, issued by the Borough Council of the Borough of Somerdale.

CONCLUSIONS AND ORDER

Grover C. Richman, Jrs., Esq., Attorney for Licensees.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

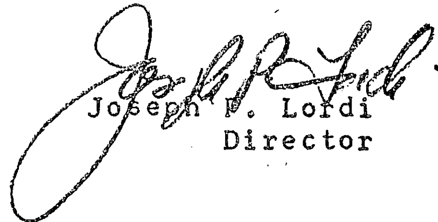
BY THE DIRECTOR:

Licensees plead <u>non vult</u> to a charge alleging that on December 30, 1964, they sold a case of twelve 4/5 quart bottles of whiskey below filed price, in violation of Rule 5 of State Regulation No. 30.

Absent prior record, the license will be suspended for ten days, with remission of five days for the plea entered, leaving a net suspension of five days. <u>Re Buikema</u>, Bulletin 1590, Item 12.

Accordingly, it is, on this 29th day of January 1965,

ORDERED that Plenary Retail Distribution License D-1, issued by the Borough Council of the Borough of Somerdale to Edw. & Frances Kurtzman, for premises White Horse Pike & Crestwood Avenue, Somerdale, be and the same is hereby suspended for five (5) days, commencing at 9 a.m. Monday, February 1, 1965, and terminating at 9 a.m. Saturday, February 6, 1965.



Joseph P. Lordi
Director

New Jersey State Library