

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2102

June 7, 1973

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS -- WENK ET ALS v. RUTHERFORD AND ELKS LODGE -- NEW JERSEY REGIONAL ADVISORY BOARD OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ET ALS v. RED BANK AND ELKS LODGE -- GOYINS ET ALS v. MADISON AND ELKS LODGE.

Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2102

June 7, 1973

1. APPELLATE DECISIONS - WENK ET ALS v. RUTHERFORD AND ELKS LODGE - NEW JERSEY
REGIONAL ADVISORY BOARD OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ET ALS v.
RED BANK AND ELKS LODGE - GOYINS ET ALS v. MADISON AND ELKS LODGE.

ELIZABETH WENK, EUGENE WENK, :
JOSEPH FLAUGHER, RITA FLAUGHER, :
DONALD MERINO, ROSEMARIE MERINO, :
EDWARD R. POSTLES, SR., and :
GRAVES B. WALKER, :

Appellants, :

v. :

MAYOR AND COUNCIL OF THE BOROUGH :
OF RUTHERFORD and RUTHERFORD LODGE NO. :
547 of THE BENEVOLENT AND PROTECTIVE :
ORDER OF ELKS OF THE U.S.A., :

Respondents. :

----- :
NEW JERSEY REGIONAL ADVISORY BOARD OF :
THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, :
ULYSSES T. SAFFORD, DONALD MARTIN, :
CLARENCE GADSEN, STAFFORD THOMPSON, :
RAYMOND WILLIAMS, CURTIS Q. MURPHY :
and KENNETH MANN, :

Appellants, :

v. :

DANIEL J. O'HERN, MAYOR, :
EDWARD L. MINEAR, JOSEPH J. FALVO, :
DR. MICHAEL J. ARNONE, THEODORE J. :
LABREQUE, as members of the :
Borough Council of Red Bank and :
THE BENEVOLENT PROTECTIVE ORDER OF :
THE ELKS OF RED BANK, :

Respondents. :

----- :
THEODORE R. GOYINS, DONALD BRUNNER :
and RONALD C. EISELE, :

Appellants, :

v. :

THE COUNCIL OF THE BOROUGH OF :
MADISON AND MADISON LODGE # 1465 :
B.P.O. ELKS, :

Respondents. :
----- :

CONCLUSIONS
AND
ORDER

I have carefully examined the entire record in the instant appeals and, as a result thereof, I hereby incorporate by reference the discussion of procedural developments and the testimony of witnesses contained in a hearing officer's report page 6, line 2 to page 8, line 1; page 10, line 7 to page 13, line 13; and page 15, line 5 to page 19, line 22; to the same effect as if set forth herein.

The said record shows that the petitions filed by each appellant alleged an avowed practice of racial discrimination by each of the respondent Lodges and, in addition, raised collateral issues outlined as follows:

In the Rutherford appeal, the application for renewal of license was said to contain "no statement or other evidence regarding the qualifications of the applicant's (Lodge or Club) officers, nor the number of its members". Further, the decision (of the municipality) was prejudiced by apparent conflict of interest in that two voting Councilmen were members of the Lodge.

In the Red Bank appeal, an allegation was advanced that the resolution adopted was prepared and substantially typed prior to its meeting, giving rise to the presumption that the municipality had effectively made its decision in advance. Thus it was contended that the hearing was a mere gesture.

In the Madison appeal, an allegation similar to that advanced in Rutherford was projected. The charter or articles of association, or certified copies thereof, was not submitted with the application as required by Rule 7 of State Regulation No. 7.

In line with the views expressed by Superior Court Judge John A. Ackerman in Lovell, et al. v. Nutley, New Jersey Lodge No. 1290, B.P.O. Elks, et al., dated July 30, 1971, it was decided to consolidate the three matters for hearing on September 14, 1971. The reason for such consolidation was the identity of legal issues involved in the various matters which would result in their expeditious handling at one hearing. At the initial hearing, however, counsel for the various parties argued that although the matters involved certain basic questions, each case contained different factual elements.

In accord with counsel's request, the Hearing Officer set down separate hearing dates for each of the present appeals.

These appeals were individually heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for counsel to present testimony under oath and to cross examine. In addition, at the conclusion of the hearings and subsequent to the receipt of the voluminous transcripts of testimony, all counsel were invited to review them, and thereafter participated in consolidated oral argument.

Final summation and oral argument pertinent to each of the appeals was heard before the Hearing Officer on April 4, 1972. Prior to that date, transcripts of all previous hearings, together with all exhibits, were made available to counsel for their examination and all were given the opportunity to present memoranda, briefs or supplemental material in connection therewith.

The Hearer's Report, recommending that the appeals be dismissed and an appropriate order be entered affirming the action of the respondent issuing authorities, was filed with me on July 26, 1972.

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report and argument in support thereof have been filed by the attorney for the appellant, Elizabeth Wenk et al.

No other exceptions have been filed nor has there been answering argument filed to the said exceptions by any of the respondents herein. In addition, oral argument was had before me and each of the parties was permitted to advance further argument in summation.

With the exception of the Rutherford case which will be discussed later in this decision, the basic issue which must be determined is whether these municipalities have abused their discretion by renewing the club liquor licenses of fraternal organizations with racially discriminatory membership policies.

Guidance in consideration of this issue is provided by Judge Ackerman in the Lovell, et al. v. Nutley, New Jersey Lodge No. 1290, B.P.O. Elks, et al., case. This class action, as pertinent to the instant appeals, sought the revocation of all liquor licenses held by the Elks throughout New Jersey. It should be noted that Rutherford is the only municipality involved in the present appeals which was also party to the Lovell case. The court agreed with the position of this Division that the action was premature and that administrative remedies should be exhausted, i.e., an appeal from the action of the municipality to the Division of Alcoholic Beverage Control. In connection with the determination the court stated:

"It is likely that hearing will be required to examine into the actual membership practices of each Elks lodge whose license is challenged...and this is an area where the Director is perhaps better qualified than the Court to handle the matter and it is a function which the Legislature has vested in him ... And the Director's problem may be somewhat eased by the fact that the Supreme Court of the United States has granted certiorari in the matter of Irvis v. Scott, 318 F.Supp. 1246 (M.D.Pa. 1970), cert. granted Moose Lodge v. Irvis, 91 S.C. 1936, 39 L.W. 3430 (1971) and a definitive decision may be forthcoming. In the Irvis case, in which administrative remedies were pursued, the liquor license of a Moose lodge was held invalid under the state action doctrine because racial discrimination was practiced by the local lodge and required by the constitution of the national organization." p. 20-21 (Emphasis added)

The Supreme Court case above referred to was decided on June 12, 1972. The impact of the decision upon the instant appeals will be discussed at length later in this determination.

I

In the Rutherford matter, the Hearer noted that the appellants, in their petition, raised a "collateral" issue that the Rutherford determination was invalid because of the "apparent conflict of interest in that two voting Councilmen were members of the (respondent) Lodge."

In considering the contention as a "peripheral" matter, the Hearer

noted that the testimony established that, of those members of the Council who voted for renewal, two were members of the respondent Lodge, and a third member was a member of another Lodge of the Elks. The Hearer then pointed out that, under the provisions of Rule 1 of State Regulation No. 4, "whenever a member of a governing body has any interest in a liquor license (other than a club license) the application concerning it must be made to the Director. While the statute and regulation are silent in respect to action taken by members of the applying club, good practice would indicate that such members should abstain from voting; should a majority of the members of the (local issuing authority) be members of the applying club, the application should be referred to the Director," I am persuaded that the Hearer did not adequately and clearly define or delineate the limitations imposed upon members of a local issuing authority in voting on club licenses, where they have an interest therein.

The 1970 amendment to N.J.S.A. 33:1-20, excludes club licenses from the categories of liquor licenses where applications would have to be made directly to the Director where any member of the issuing authority has an interest therein. Under this amendment, the entire Council is not automatically disqualified from voting merely because one or more of its members is a member of an organization applying for a club license. But it does not follow that interested Councilmen (who are club members) are themselves thereby qualified to vote. The same principles of conflict of interest still apply. See Zell v. Borough of Roseland, 42 N.J. Super. 75 (App.Div. 1956), where, in invalidating a planning board's approval of a re-zoning application because a member of the planning board was a member of the church, the court noted, p. 81, that conflict of interest:

"... is not confined to instances of possible material gain but that it extends to any situation in which the personal interest of a board member in the 'matter' before it, direct or indirect, may have the capacity to exert an influence on his action in the matter...."

"All of the members of a non-pecuniary organization must be deemed to have the same relative interest in it (although non-pecuniary) as the stockholders have in the corporation." 42 N.J. Super. at 81.

I find that while the Council was authorized to vote in this matter, the participation of the interested members in the vote (indeed, one of the interested members proposed and another interested member seconded the resolution) or even in the hearing of the application invalidated said action. The granting of a liquor license involves action judicial in nature and the standards of disqualifying interest can be no less exacting respecting municipal governing bodies acting as the local issuing authority, than in the case of a purely judicial action. See Tp. Committee of Freehold Twp. v. Gelber, 26 N.J. Super. 388 (App. Div. 1953); Bd. of Ed. of W.O. v. Intern. Union Eng., 109 N.J. Super 116 (App.Div. 1970). Accordingly, I conclude that said action of Rutherford is voidable.

I agree with the Hearer, however, that in line with the procedure defined in Blanck v. Magnolia, 38 N.J. 484 (1962), I shall mold this appeal as though it were an original application to me, and shall make a determination de novo on the merits.

II

Addressing the fundamental issue, the applicants herein have sought and been granted the renewal of their club liquor licenses. Pursuant to N.J.S.A. 32:1-12(5) such licenses may only be issued to:

"...such corporations, associations and organizations as are operated for benevolent, charitable, fraternal, social, religious, recreational, athletic, or similar purposes, and not for private gain, and which comply with all conditions which may be imposed by the Commissioner of Alcoholic Beverage Control by rules and regulations."

In accord with this legislative provision, the following regulations pertinent to club licenses, have been promulgated:

"Rule 7. A list containing the names and addresses of all members of the club as of the date of filing of a club license application shall be submitted together with the application. The charter or articles of association of the club shall also be presented for inspection or certified copy of the same submitted with the application."

"Rule 8. No club license shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage to any person not a bona fide member of the club or a bona fide guest of such member."

With regard to the above regulations, the appellants contend that the respondent clubs have not conformed to the requirements contained therein. I find, however, that the Hearing Officer correctly evaluated the situation when he determined that each applicant had substantially conformed to the above regulations when making application to the municipality and that any technical deficiency which might have existed was cured at the time of the de novo hearing before this Division.

With regard to the substance of appellants' challenge, I am persuaded that in order to judge the propriety of the municipal action it is necessary to determine whether the renewal of such licenses would be violative of one of the following:

1. The United States Constitution or the Federal Civil Rights Act;
2. The New Jersey Constitution or the New Jersey Law Against Discrimination;
3. The broad public policy of this State against discrimination.

1. Contrary to the Hearer's report I find that the recent Supreme Court case of Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 32 L.Ed. 2d 627 (1972) is particularly relevant to the federal aspect of this question. Although the factual issue involved in Irvis was somewhat different from that presently under consideration, the basic question of whether a liquor license should be granted a fraternal organization with a racially discriminatory admission policy is identical. In Irvis, a Negro guest of a Lodge member had been refused service at the club's dining room and bar solely because of his race. Irvis, the gentleman who had been refused service, sought injunctive relief claiming that the discrimination was State action because the Pennsylvania liquor board issued Moose Lodge a private club liquor license and that such action was violative of the Equal Protection Clause of the Fourteenth Amendment.

In Irvis, the Court held ultimately that the granting of a liquor license to a private organization, together with the regulatory action incident thereto, does not sufficiently implicate the State in the private club's discriminatory guest and membership policy as to make those actions "State actions" within the purview of the Equal Protection Clause of the Fourteenth Amendment.

In reaching this conclusion, the court fully considered the "private" nature of the Club finding:

"Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee." 407 U.S. at 171.

The court admitted, however, that the question of whether particular discriminatory conduct is, in reality, private or actually amounts to "State action" is not easily resolved. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 772 (1951). The Court did point out, however, that:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U.S. at 173

Prior decisions dealing with discriminatory refusal of service in public eating places were factually distinguished from the "Moose Lodge situation. With specific reference to the Burton decision, the Court stated:

"Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the State created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. Unlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."

The record before us clearly demonstrates that the present appeals involve local chapters of a national fraternal organization. As has been repeatedly affirmed by the testimony elicited in the various hearings, the national organization has well defined requirements for membership which are followed by the local chapters and which are, in fact, incorporated in the by-laws of the chapters presently involved. A person wishing to become a member of the Elks lodge must be sponsored by a member thereof who provides the aspirant with an application form. The completed form is processed by the Investigation and indoctrination Committee which makes its recommendations concerning the candidate to the Lodge members for their consideration.

Lodge activities which have been identified during the course of the hearing are supportive of the charitable activities of other organization and also represent efforts by the Lodge itself to meet various community needs. The record is completely devoid of testimony which would indicate that the Lodge provides total recreational or social activities for its members or that a substantial number of the Caucasian residents of a well-defined area belong to the Club to the total exclusion of non-Caucasian residents of the same area.

The buildings used by the local chapters are owned by them either as unincorporated associations or as corporate entities. These buildings are used by the chapters for the conduct of all "Elk" business and they house the bars which have been granted license renewals by the various municipalities. It is also evident that the existence of the bars augment the social use to which the buildings are put by club members. It was also brought out that the Elks buildings are made available to various charitable groups who request the use thereof. Such requests are considered and acted upon by the Lodge. The testimony amply showed that no charge is made for the use of the building by the various groups but that if the groups wish to, they are free to make donations to various charities. There was no testimony to the effect that the Elks lodges receive any public moneys and in this respect, the present matter is also akin to Irvis. Finally, the Moose lodge was not "open to the public" since only members and guests of members could be admitted to the licensed premises. So, too, the present appeals. It is important to note that the club license is granted solely on the basis of such "restricted" service and that service to a non-member or non-guest would constitute a violation of the A.B.C. regulation concerning Club licenses, N.J.A.C. 13:2-7.8.

Based upon these considerations, it is my determination that within the rationale enunciated by the Supreme Court in Irvis, the local chapters of the national Elks are "private" clubs within the traditional sense of the term. I find further that the renewal of the liquor licenses of the Elks lodges did not significantly implicate the State in the discriminatory practices of these private clubs and, therefore, did not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

Cases which have been decided under the relevant sections of the Federal Civil Rights Act offer guidance as to whether the challenged municipal action violates any section of this Law. 42 U.S.C.A. §2000a prohibits discrimination in

places of public accommodation, and subsection (e) provides: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public. . . ." This provision has been most recently construed by the Supreme Court in Tillman v. Wheaton-Haven Recreation Assn., Inc., 41 L.W. 4311 (February 27, 1973). The court held therein that the Recreation Club was not a "private club" within the meaning of 42 U.S.C.A. §2000(e), since membership until the association reaches its full complement, "is open to every white person within the geographic area, there being no selective element other than race." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969). Another important element involved in Tillman was the conferral upon whites in the preference area of property rights in the form of "preferences" for club membership while Negroes in the same area were denied these rights. The court held that:

"When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident." 41 L.W. at 4313

It is important to note that the present appeals involve no such property rights but rather involve a private club as fully defined by the United States Supreme Court in Irvis. The present matter is, therefore, clearly distinguishable from the factual situation involved in Tillman.

In U.S. v. Jordan, 302 F.Supp. 370 (E.D. La. 1969), 8 A.L.R. Fed.

619 the court considered whether a "dining club" was private and therefore exempt from the requirements of the Civil Rights Act of 1964. In determining that the club was not private, the court emphasized the lack of control existing members had over the admission of applicants and the absence of any real qualifications for membership other than race. In Wright v. The Cork Club, 315 F. Supp. 1143 (S.C. Texas 1970), the defendant was a business-men's dining and entertainment club. The court stated that a bona fide private club must minimally: 1) have permanent machinery established

to carefully screen applicants for membership; 2) strictly limit the use of its facilities to members and bona fide guests; 3) be controlled by the membership; 4) operate on a non-profit basis solely for the benefit of the members; and 5) direct any publicity solely to members for their information. The court found that despite the club-like trappings of the defendant, it did not in fact satisfy any of these criteria. The court also articulated the reason for excluding private clubs from the purview of the Federal Civil Rights Act:

"The Bill of Rights stands for the proposition that there are bounds beyond which the government cannot go in interfering with individual rights. The Supreme Court in numerous past decisions has drawn the lines establishing the metes and bounds of governmental authority. citations omitted

"Foremost among the protected areas is the privacy of the individual, in his home, in his private associations, and even in the very words which he utters in private. The Bill of Rights, though it does not say it in so many words, guarantees to every individual the basic right of privacy. In essence, when the courts protect the individual from governmental interference with his right of assembly or freedom of speech and press, protect him from unreasonable searches and seizures or from being forced to incriminate himself, they are protecting his integrity and privacy as an individual. Underlying the specific guarantees of the Bill of Rights is a basic concern for the integrity and privacy of the individual." 315 F.Supp. at 1157.

As has been discussed previously, the Elks Clubs are not "sham" clubs organized to escape the impact of the Federal Civil Rights. In fact, one of the clubs involved was incorporated as early as 1906. There have been no proofs that these clubs were organized for a profit making motive nor that they are the recipients of public moneys. Neither has there been any testimony which would demonstrate that these organizations are "community clubs" to which residents of an area belong and which meet the total recreational and social needs of such members. Ample evidence has been produced during the course of the hearings as to the involvement of the Elks membership in the admission of new candidates, the absence of solicitation for such membership and the criteria for membership which include qualifications apart from race.

It is my determination, therefore, that the Elks Clubs fall within the meaning of "private club" as delineated by the above cases and that the renewal of the liquor licenses of these private clubs which have racially discriminatory membership policies is not violative of the Federal Civil Rights Act.

(2) The New Jersey Constitution, addressing itself to the protection of fundamental rights, provides:

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and prosperity, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. Const., Art. I, paras. 1 and 5.

The language of paragraph 5, although it differs from the Equal Protection Clause of the Fourteenth Amendment, has been held to mean that equality of right is fundamental as in the United States Constitution. These clauses, both Federal and State, forbid "class legislation" which arbitrarily, discriminates against some and favors others in like circumstances. Washington National Ins. Co. v. Board of Review, 1 N.J. 545 (1949).

Central to appellants' challenge in the instant matter is the contention that the right to gain entrance to a private club as either a member or guest is a civil right within the meaning of Art. I, paras. 1 and 5. A reading of the Minutes of the Constitutional Convention of 1947 clearly indicates, however, that by adopting these provisions, the delegates endeavored to protect the right to attend school, to vote, to serve on juries, to run for public office and to have the benefit of the other basic rights of citizenship in a democratic society. III Minutes, Const. Convention 12, 71, 73, 250 (1947). The existence of private clubs which engaged in discriminatory membership policies was commonplace in 1947. Any intent to eliminate

or to place restrictions upon the membership requirements of such clubs not only would have been subject to considerable debate at the Convention, but would have been expressed in more specific language than the generalities of Art. I, paras. 1 and 5. Additionally, it should be noted that our courts have specifically held that there is no abstract right to be admitted to membership in a voluntary association. Trautwein v. Harbourt, 40 N.J.Super. 247 (App.Div. 1956).

Equally important is the question -- in what sense is "equal protection of the law" denied when a private membership club refuses admittance to an individual because of race? In terms of equal protection guarantees, it is appropriate to view a bona fide membership club as simply an extension of a private gathering in a home. This view is not altered simply by the fact that the club obtains a liquor license for there often is equivalent "State action" surrounding the building and continued maintenance of a private home which is the scene of discriminatory practices.

Of course, this not to imply that the Equal Protection Clause has no application to the issuance of liquor licenses. If a municipality denied a license to a club whose membership was predominantly black while granting such license to a "white" club, this apparent discriminatory treatment, if based upon no other factors, might involve a violation of the Equal Protection Clause.

The Legislature has supplemented the Constitutional provisions above discussed by enacting the Law against Discrimination, N.J.S.A. 10:5-1 et seq. The Legislature therein declared that:

"...practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, marital status or because of their liability for service in the Armed Forces of the United States, are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3

The Legislature further created the Division on Civil Rights and entrusted it with the enforcement of this Law. N.J.S.A. 10:5-6

The determination of the present appeals ultimately involves the interpretation of constitutional provisions and statutory enactments relative to discriminatory acts rather than to acts involving liquor sale or traffic. Since this determination is not within the area of expertise of this Division, the actions of the State agency responsible for the enforcement of the Law against Discrimination will be carefully studied for guidance in the resolution of the present appeals.

After defining, "a place of public accommodation," N.J.S.A. 10:5-5(e) states:

"Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students." [Emphasis added]

In order to determine whether the present action is violative of the Law against Discrimination, it is necessary to ascertain whether the Elks Clubs are bona fide clubs distinctly private in nature and therefore not within the purview of said Law.

Court decisions have provided certain broad tests to distinguish bona fide private clubs from clubs which really are public in nature. These tests consist primarily of evaluations of whether a "club" is profit-making or motivated; whether the club is truly "exclusive", i.e., whether there are ascertainable standards governing admission of members; whether finances and operations are substantially controlled by members; whether its facilities are strictly limited to members and bona fide guests; whether any publicity is directed at the public at large; and whether rules and bylaws are scrupulously observed in practice.

The leading New Jersey case and probably one of the foremost cases in

the country is Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25 (1966). That "club" was a profit-making corporation with little membership control over admission of members and none over club activities. Moreover, the club actively sought new members by advertising in the public media. The court, largely on the basis of those factors, rejected the club's assertion that it was private and emphasized that an exempt organization must be distinctly private in nature. In the penultimate sentence of its opinion, the court held that "the statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members" (emphasis added). 47 N.J. at 34. Thus it was of determinative importance that "Clover Hill originated not because residents...wishes to associate themselves in a swimming club, but rather because an entrepreneur was seeking a profitable investment." Id. at 35.

The instant appeals involve Elks clubs which result from the associational preferences of their members rather than from the ingenuity of an "entrepreneur seeking a profitable investment". These clubs, unlike the profit-making corporation in Clover Hill, evidence strong membership control and involvement in the admission of new members and in various other club activities. The Elks do not seek new members through media advertising but rather through sponsorship by current members. In fact, the Elks represent the type of club which the Court seemed to be distinguishing when it found Clover Hill to be a place of public accommodation. I find, therefore, that the Elks are bona fide clubs of a distinctly private nature.

Upon my own consideration of the facts involved in these appeals, I find that the Elks Club being a private club is not subject to the provisions of the Law against Discrimination and that the action of the municipality in renewing the liquor license of these private clubs was not violative of the provisions of the New Jersey Constitution or of the Law against Discrimination.

(3) Lastly, it is necessary to consider whether the actions of the municipalities, although not violative of specific constitutional or statutory provisions, are directly opposed to the public policy against discrimination.

In determining this issue, the countervailing constitutional questions of privacy and associational freedom must be considered. The comments of Justice Douglas in Irvis are particularly appropriate in this regard:

"My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race." 407 U.S. at 179-180

This comment brings into sharp focus the right of private, non-government regulated, association which is also at issue in the present matter and emphasizes the accuracy of the following observation:

"More often than not the resolution of constitutional disputes is accomplished, not by the application of absolute rules, but by a balancing process. The cause of racial intergration is a laudable one indeed. But to allow the government to intrude into the essentially private affairs of men, even in the name of intergration, would work a greater injustice to all citizens, no matter what may be their race, creed or religion." Wright v. Cork Club, 315 F.Supp. 1143, 1156-7 (S.D. Tex. 1970).

The strong public policy against discrimination has been distilled in the New Jersey Constitution and further articulated in the Law against Discrimination. As discussed earlier, this Law deals specifically with the subject of "public policy" involved in this case and contains an express exclusion for clubs which are "in their nature distinctly private." Furthermore, this exclusion may be fairly read as not solely an administrative exclusion of evils which are of a lesser dimension than

those covered by the Law against Discrimination, but rather as an expression of a positive public policy to safeguard private associational preferences in certain circumstances.

This interpretation is consistent with the decision in Trautwein v.

Harcourt wherein the Court held:

"...there is no 'abstract right to be admitted' to membership in a voluntary association, Mayer v. Journeymen Stonecutters' Association, 47 N.J. Eq. 519, 524 (Ch. 1890), and a court will not compel the admission of a person to membership in such an organization who has not been elected according to its rules and by-laws. Leeds v. Harrison, 7 N.J. Super. 558, 569 (Ch. Div. 1950). The general rule is that there is no legal remedy for exclusion of such an individual from admission into a voluntary association, no matter how arbitrary or unjust the exclusion." 40 N.J. Super at 260

Subsequent decisions have affirmed this basic principle but have removed from its application those clubs in which membership may be viewed as an "economic necessity". Falcone v. Middlesex County Medical Society, 34 N.J. 582 (1961); Higgins v. The American Soc. of Clinical Pathologists, 94 N.J. Super. 243 (App. Div. 1967) reversed 51 N.J. 191 (1968).

It should also be noted that "public policy" includes those considerations relative to protecting the safety and welfare of the citizens of the State. As indicated by Robert Curvin who testified in the Rutherford case, the placement of a racially discriminatory club in a mixed neighborhood could cause racial tensions which eventually might erupt in violent manifestations. However, there has been no evidence in the present appeals that the particular communities in which the Elks are situated have experienced any racial unrest because of the discriminatory admission policies of these clubs.

Based upon these considerations, it is my opinion that the public policy of New Jersey recognizes and safeguards private associational rights free from governmental interference and regulation. This recognition extends to those

discriminatory practices which are inherent to associational preferences. Evidence of this attitude is the exclusion of bona fide clubs from the impact of the Law against Discrimination. I therefore find that the municipal action involved in these appeals is in accord with the public policy safeguarding from governmental interference private associational rights. I determine further that the municipal action does not run counter to the public policy against discrimination since the specific legislative enactment relative to same excludes private clubs from the ambit of its restrictive provisions.

This determination, however, does not represent the Division's approval of the discriminatory membership practices of the Elks. This decision merely constitutes a finding that, under the present status of the law, the municipal action renewing the Elks liquor licenses violates no Federal or State constitutional provision or statutory enactment nor does it directly run counter to public policy against discrimination. Since no such violation is involved, the municipalities have not abused their discretion by renewing such license.

It is my belief that the Division would be acting beyond the scope of its authority should it burden the constitutionally protected right of association because it disagreed with the membership practices of these private groups.

Having carefully considered the entire record here, including the transcripts of the testimony, the exhibits, the Hearer's Report and exceptions thereto, I essentially concur in the findings of the Hearer but determine that such findings do not fully dispose of the issues involved. I therefore make the following findings of fact:

1. Each of the respondent Lodges is a local chapter of the national Benevolent and Protective Order of Elks. Art. 7, Section 4 of the Constitution of the National Organization and the By-Laws of each of the respondent Lodges contains a provision limiting membership to white, male citizens of the United States of America. None of the respondent Lodges has a black member.

2. The respondent Lodges do not advertise nor solicit members from the general public, nor do they permit application for membership other than those sponsored by members, nor do they approve applications for membership on other than a plenary meeting of the Lodge.

3. The respondent lodges are not profit motivated nor are they the recipients of public moneys.

4. The respondent lodges do not service the total recreational and social needs of the white community in which said clubs are situated.

5. The respondent lodges have not substantially assumed in any of the municipalities essentially governmental functions.

6. The racially discriminatory membership policies of the respondent lodges have not aggravated or stirred racial tensions in their respective communities.

7. Apart from their racially discriminatory admission policies, the respondent lodges have not violated any regulations of this Division which would render them unfit for club license renewal.

8. Each of the respondent Lodges has had its club license renewed for the past twenty or thirty years on a factual situation reasonably identical to the facts presented in the challenge to the present renewals.

9. In the Rutherford matter, two Councilmen who voted in favor of renewing the Elks liquor license were members of the applicant Lodge while a third councilman was a member of another Elks Lodge.

Based upon the foregoing, I therefore make the following conclusions of law:

1. With regard to the Rutherford appeal, the participation of the Councilmen, who were members of the applicant Elks Lodge, in the hearing of said application and the vote thereon invalidated the action of the municipality renewing the club liquor license of the Rutherford Lodge. The application for renewal of the club liquor license is therefore treated as though originally made to me and the determination relative thereto shall be made de novo on the merits.

2. The local chapters of the National Elks are "private" clubs within the traditional sense of the term. The renewal of the liquor licenses of the Elks Lodges did not significantly implicate the State in the discriminatory practices of these private clubs and, therefore, did not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

3. The renewal of the liquor licenses of the Elks lodges by the municipalities does not violate any provision of the New Jersey Constitution.

4. The local chapters of the National Elks are "private" clubs exempt from the impact of the Federal Civil Rights Act and the renewal of the liquor licenses of these private clubs which have racially discriminatory membership policies is not violative of the Federal Civil Rights Act.

5. Until such time as the Division on Civil Rights may determine otherwise, the local chapters of the National Elks are bona fide clubs of a distinctly private nature and, therefore, not subject to the provisions of the New Jersey Law against Discrimination and the action of the municipalities in renewing the liquor licenses of these private clubs was not violative of the provisions of this law.

6. The municipal action involved in the present appeals is in accord with the public policy safeguarding from governmental interference private associational rights.

7. The municipal action involved in the present appeals does not run counter to the public policy against discrimination since the specific legislative enactment relative to discriminatory practices excludes private clubs from the ambit of its restrictive provisions.

8. The respondent lodges have conformed with the application requirements of this Division and have violated no regulation thereof which would preclude them from obtaining the renewal of their respective clubs licenses.

I therefore concur in the ultimate decision of the Hearing Officer and adopt his recommendations that the action of the municipalities of Red Bank and

Madison be affirmed; that I exercise my original discretionary authority and renew the liquor license of the Rutherford Elks; and that the present appeals be dismissed. These determinations rest, however, on the bases expressed in the instant Decision.

Accordingly, it is, on this 11th day of April

1973

ORDERED, that the application for the renewal of the club license by the Rutherford Lodge #547, B.P.O. Elks be and the same is hereby granted and that the appeal of Elizabeth Wenk, et al, be and the same is hereby dismissed; and it is further

ORDERED, that the action of the respondent Borough of Red Bank in renewing the Liquor license of the B.P.O. Elks of Red Bank be and the same is hereby affirmed and that the Appeal of the Anti-Defamation League of B'nai B'rith, be and the same is hereby dismissed; and it is further

ORDERED, that the action of the respondent, Borough of Madison in renewing the liquor license of the Madison Lodge #1465 B.P.O. Elks be and the same is hereby affirmed and that the appeal of Theodore Goyins, et al., be and the same is hereby dismissed.


Robert E. Bower
Director