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

LLETIN 644 DECEMBER 29, 1944.

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

BULLETIN 644 DECEMBER 29, 1944.

1. APPELLATE DECISIONS - CHARNACK v. SEA BRIGHT - ORDER REMANDING TO MUNICIPAL ISSUING AUTHORITY.

MAX CHARNACK,
Appellant,
-vs-
BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT,
Respondent

ON APPEAL
CONCLUSIONS AND ORDERS

Frankel & Frankel, Esqs., by Charles Frankel, Esq., Attorneys for Appellant.
Neils Jacobsen, Councilman, appearing for Respondent.
Frederic C. Ritger, Esq., Attorney for Objectors.

BY THE COMMISSIONER:

This is an appeal from an alleged denial by the respondent of an application for the issuance of a plenary retail consumption license for premises located at 1128-30 Ocean Avenue, Sea Bright, New Jersey.

The testimony adduced at the hearing developed the following state of facts: At a meeting of the Borough Council of Sea Bright, held on October 19, 1944, a public hearing was held on the application. Following this, a motion was made to deny the application. The motion was not seconded, no action was taken on the motion, and after a lapse of several minutes the Borough Council proceeded to transact the rest of its business without any ruling or action having been taken by the presiding officer upon the motion to deny the aforesaid application.

Appellant claims that the failure of the Borough Council to act upon the said motion is tantamount to a denial of the application. Hence the appeal.

Notice of Intention was first published on September 25th, The meeting at which the aforesaid application was considered was held on October 19th. Notice of appeal and petition of appeal were filed on October 25th, six days thereafter. In passing, it should be noted that the municipal Council meets monthly.

R. S. 33:1-22 provides for an appeal to me from the action of the issuing authority. A careful reading of the record discloses that the respondent took no formal action to either grant or deny the license. There has been no action of respondent from which an appeal may be taken. While it is true that one of the Borough councilmen appeared and testified that he was opposed to the granting of the application for the reason that the proposed location was next door to an already existing licensed place, this could not be considered even the formal recording of his vote on the motion to deny, much less the action of the municipal body.

In Re Babbitt v. Township Committee of the Township of Scotch Plains, Bulletin 588, Item 2, I held that, in the absence of any formal action by the municipal body, the case should be remanded to the respondent with instructions to adopt a resolution either granting or denying the application and stating reasons therefor. I shall follow the same procedure in this case. These proceedings are distinguished from those in which the failure of respondent to act on an application within a reasonable time after notice may be considered as a denial of the application. Re Salsburg, Bulletin 118, Item 11.

Accordingly, it is, on this 15th day of December, 1944,

ORDERED, that the appeal herein be and the same is hereby remanded to respondent for the purpose of taking formal action upon the appellant's application for a plenary retail consumption license; and it is further

ORDERED, that if the application for the license be denied and an appeal shall be taken from said action of respondent, the testimony heretofore taken herein shall be considered upon appeal, with leave reserved to all parties to offer additional testimony.

ALFRED E. DRISCOLL
Commissioner.

2. DISCIPLINARY PROCEEDINGS -- SALE OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF LOCAL ORDINANCE - HINDERING AND FAILING TO FACILITATE AN INVESTIGATION, IN VIOLATION OF R. S. 33:1-35 - LICENSE SUSPENDED FOR BALANCE OF TERM.

In the Matter of Disciplinary Proceedings against

SAMUEL GENTILE
T/a TOWN RENDEZVOUS
150 Neptune Highway
Neptune Township
P.O. Box 44, Neptune, N.J.,

Holder of Plenary Retail Consumption License C-6, issued by the Township Committee of the Township of Neptune.

CONCLUSIONS AND ORDER

Sidney J. Meistrich, Esq., Attorney for Defendant-Licensee.
Milton H. Cooper, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleads guilty to charges alleging, in substance, (1) the sale of alcoholic beverages during prohibited hours, in violation of an ordinance of Neptune Township, and (2) hindering and failing to facilitate an investigation by agents of the Department of Alcoholic Beverage Control, in violation of R. S. 33:1-35.

An ordinance of Neptune Township provides that there shall be no sale, service or delivery of alcoholic beverages between the hours of 2:00 A.M. and noon on Sundays. The consumption of alcoholic beverages on licensed premises is likewise prohibited between these hours.

On Sunday, August 13, 1944, at 3:40 A.M., agents of the State Department of Alcoholic Beverage Control observed the licensed premises and ascertained that the licensee was continuing his business during prohibited hours in complete disregard of the local ordinance. The file discloses that after the agents had identified themselves and endeavored to enter the licensed premises, they were refused admission. When the ABC men finally gained their objective by prying open a screen door, the reason for the licensee's refusal to admit them became apparent. Thirty-six patrons were found drinking at the bar while six were seated at a table in the service room, where they were being entertained by two musicians.

The licensee is obviously a resourceful person. Upon being caught in a clear violation of the law, he produced a tall story to the effect that he did not charge for drinks served after closing hours. The licensee further advised the agents that the service of liquor after hours on the night in question was confined to some friends who had gathered for the express purpose of sympathizing with him during a period when he was mourning the passing of an old friend (never fully identified). It is to be observed that the "friends" left rather precipitously immediately after the arrival of the ABC agents. It is to be noted that the ordinance prohibits the service or delivery of alcoholic beverages as well as the sale. For a definition of "sale", see R. S. 33:1-1(w). The defendant's bartender, apparently unaware of the licensee's story, readily admitted the sale and service of alcoholic beverages in violation of the local ordinance and, in addition, contributed the rather significant statement that the prices for drinks were increased after 2:00 A.M.

The Alcoholic Beverage Law, R. S. 33:1-35, requires licensees "to facilitate" investigations and examinations of premises by ABC agents. The law specifically states that licensees "shall not in any way hinder or delay or cause the hindrance or delay" of investigations "in any manner whatsoever." Licensees attempting to hinder or thwart the work of the ABC agents may expect stern punishment.

I have no sympathy for licensees who refuse to comply with the provisions of a local ordinance. A licensee that continues business during prohibited hours virtually turns his place into a "speakeasy." It is unfair to honest licensees to permit these cheaters to continue their dishonest practices.

A prior license for the same premises in the name of the licensee's wife, Marguerite Adell Gentile, was revoked by the Township Committee for a false answer in her application for license.

I shall suspend the defendant's license for the balance of its term.

Accordingly, it is, on this 19th day of December, 1944,

ORDERED, that Plenary Retail Consumption License C-6, issued by the Township Committee of the Township of Neptune to Samuel Gentile, t/a Town Rendezvous, for premises 150 Neptune Highway, Neptune Township, be and the same is hereby suspended for the balance of its term, effective at 2:00 A. M. December 24, 1944.

ALFRED E. DRISCOLL
Commissioner.

3. MORAL TURPITUDE - CRIME OF ARSON INVOLVES MORAL TURPITUDE.

DISQUALIFICATION - APPLICATION TO LIFT - GOOD CONDUCT FOR FIVE YEARS LAST PAST NOT SHOWN - APPLICATION TO LIFT DENIED.

In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to R. S. 33:1-31.2.

Case No. 370.

CONCLUSIONS

BY THE COMMISSIONER:

Applicant is before me pursuant to the provisions of R. S. 33:1-31.2, on petition to remove his statutory disqualification from being employed by or connected in any business capacity whatsoever with the holder of a license, because of his conviction of a crime involving moral turpitude.

The record discloses that in 1929 applicant was convicted in a Court of Quarter Sessions of the crime of arson after a plea of non vult and as a result thereof was sentenced to six months in the county jail. The crime of arson, per se, involves moral turpitude. Petitioner's only other record is an arrest in 1940, as a result of which he was convicted in a Recorder's Court of the crime of maliciously damaging property. As a result thereof he was committed to the county jail for twenty days in default of the fine assessed.

Applicant seems to have generally led a law-abiding life except on these two occasions. Disqualification, however, resulting from the conviction of a crime involving moral turpitude may be removed by me only when it appears that the petitioner has for five years last past been leading a law-abiding life. Re Case No. 62, Bulletin 334, Item 6. The continuity of the five-year period of good behavior is broken if the petitioner is convicted of any crime within that time even if the crime does not involve moral turpitude. Case No. 72, Bulletin 375, Item 6. Therefore, since petitioner's last conviction on March 14, 1940 occurred within the past five years, I cannot find that he has conducted himself in a law-abiding manner during the required period of time.

The petition is, therefore, dismissed, with leave to renew on or after April 5, 1945.

ALFRED E. DRISCOLL
Commissioner.

Dated: December 19, 1944.

APPELLATE DECISIONS - IACOVONE v. GLOUCESTER TOWNSHIP.

DANIEL J. IACOVONE,

Appellant,

-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GLOUCESTER,

Respondent

ON APPEAL

CONCLUSIONS AND ORDER

William T. Cahill, Esq., Attorney for Appellant.
George D. Rothermel, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from respondent's refusal to grant appellant's application for a plenary retail distribution license for premises located on the west side of Black Horse Pike, opposite Lake Avenue, Blackwood, Gloucester Township.

The reasons assigned by respondent in support of the denial are (1) the lack of any necessity for the license applied for, and (2) the proximity of the proposed premises to the Blackwood Junior School.

The township is a rural community having a population of approximately six thousand people. Of the twelve consumption licenses presently issued and outstanding, two are now located on Black Horse Pike. The record indicates that a distribution license, as distinguished from a consumption license, has never been issued in the municipality.

At the meeting held by respondent at which appellant's application was unanimously denied, approximately one hundred persons appeared. Although a number of these persons voiced their objections to the granting of the application, none of those present orally expressed themselves in favor of it. The only evidence produced below by the appellant as to the sentiment of the local residents was a petition bearing the signatures of several hundred persons, who made it apparent, however, that they signed solely out of personal sympathy for the appellant, who is a disabled veteran of the present war. In this connection, I should here like to repeat what I recently stated when commenting on an ordinance limiting the number of licenses in another municipality (Re Butera, Bulletin 642, Item 1):

> "Certainly no one will deny the fact that the entire nation is immeasurably obligated to its war veterans. On the other hand, we are dealing here not with the general subject of aid to veterans but with the unique subject of retail liquor licenses. Speaking generally, liquor licenses are properly issued to serve the public convenience and necessity. They are not properly issued, within the contemplation of the Alcoholic Beverage Law, to serve private, individual interests.
>
> "If a municipality changes its numerical limitation ordinance in order to issue a license to an ex-serviceman, other properly qualified and deserving ex-servicemen would appear to be unfairly discriminated against if their applications for retail licenses in that municipality should be denied. And if many returning ex-servicemen should apply for and receive licenses, the whole meaning and purpose of numerical limitation would be destroyed."

At the appeal hearing, the appellant produced only himself as a witness in his behalf. For the respondent, one of the Township Committeemen testified that, in his opinion, the residents of the community were overwhelmingly opposed to the issuance of any additional liquor license in the municipality. For that reason, it is stated, a similar application had been denied by the respondent about six weeks before the submission of appellant's application. The only other application for a distribution license which was recalled by this witness had been made some six years ago for premises located on Black Horse Pike, about four blocks from the premises in question. After it was denied, an appeal was taken. See Boody v. Gloucester, Bulletin 300, Item 11. In affirming the denial, the late Commissioner Burnett used the following language, which is equally pertinent here:

> "Determination of the number of liquor establishments to be permitted in any particular area is a matter confided to the sound discretion of the issuing authority. Santoriello v. Howell, Bulletin 252, Item 8; Mita v. Orange, Bulletin 266, Item 10; Sudol v. Wallington, Bulletin 267, Item 10. There is no proof that respondent abused that discretion in determining that a third liquor place - even though a 'package' store as distinguished from the existent consumption establishments - should not be permitted in the area in question.
>
> "Appellant contends, however, that there are, at present, only consumption places and no 'package' stores in the Township; that it is unreasonable to compel a man or woman seeking to purchase bottled liquor to walk into or through the barroom of a tavern; that, therefore, a 'package' store should be permitted in the Township.
>
> "This contention is without merit. In the first place, it does not appear that anyone in the Township is suffering inconvenience resulting from the lack of a 'package' store. Furthermore, even were appellant's argument well taken that there is need of such a store in the Township, it does not follow that the store must be located at the vicinity in question. As already stated, respondent was reasonable in determining that a sufficient number of liquor places already exist in that area."

The record further includes a stipulation that the site of appellant's premises is about 350 feet from the local public school grounds and about 500 feet from the school building. The committeeman testified that it is respondent's opinion that an establishment for the dispensing of liquor should not be permitted to exist within such close proximity to the school. This decision also rests within the sound discretion of the issuing authority. Even though the intervening distance, upon which the denial is predicated, may be greater than the statutory minimum of 200 feet (see R. S. 33:1-76), a municipality will be sustained in such denial where it is apparent that it has adopted a reasonable and bona fide policy to that effect. Cf. Neuschwender v. Fort Lee, Bulletin 475, Item 4. There is nothing in the present record to indicate that respondent's determination in this connection is either unreasonable or motivated by bad faith.

The action of respondent is affirmed.

Accordingly, it is, on this 21st day of December, 1944,

ORDERED, that the petition of appeal be and the same is hereby dismissed.

ALFRED E. DRISCOLL
Commissioner.

5. COURT DECISIONS - NEW JERSEY SUPREME COURT - VESEY v. STATE COMMISSIONER OF ALCOHOLIC BEVERAGE CONTROL - WRIT OF CERTIORARI DISMISSED - COMMISSIONER SUSTAINED.

THOMAS F. VESEY,)
Prosecutor,)
-vs-)
ALFRED DRISCOLL, Commissioner of Alcoholic Beverage Control,)
Respondent.)

NEW JERSEY SUPREME COURT
No. 250 October Term 1944

Argued October 4, 1944; decided December 15, 1944.
On certiorari.

Before Brogan, Chief Justice, and Justices Donges and Perskie.

For prosecutor; Bernard S. Wildstein; George R. Sommers, of counsel.
For respondent; Walter D. Van Riper, Attorney General: Joseph A. Murphy, Assistant Attorney General, of counsel.

The opinion of the court was delivered by

PERSKIE, J. The language of the writ in this case brings up for review the propriety of an order of the State "Commissioner" of Alcoholic Beverage Control "suspending" prosecutor's plenary retail consumption license, and allegedly "disqualifying" him from "holding a liquor license" or "being employed upon licensed premises in this state" (R. S. 33:1-25 and 26).

Prosecutor concedes that the "material and controlling" facts are not "substantially" in dispute. These facts disclose that the Commissioner, in writing, charged prosecutor, "a retail licensee," (1) with having "purchased four cases of assorted alcoholic beverages" without "special permit," from one Christopher J. Mohr, a person "not" the holder of a "New Jersey manufacturer's or wholesaler's license", in violation of Rule 15 of State Regulations No. 20, and (2) that prosecutor was convicted in the Second Criminal Court of the City of Newark of the crime of receiving stolen goods (namely, the liquor which, under the first charge, prosecutor was charged with having illegally purchased); that the crime involves moral turpitude (R. S. 33:1-25), and that such conviction was an "act or happening" which, if it had occurred before prosecutor had applied for his current license, would have prevented the Municipal Board of Alcoholic Control of Newark from having issued said license to him. R. S. 33:1-31(i).

The Commissioner fixed a time and place for the hearing on the charges and required prosecutor to show cause why the license which had been issued to him by the Newark board should not be "suspended or revoked." To the charges preferred against him by the Commissioner, prosecutor entered, in substance, the following written pleas: to the first charge he entered a plea of "non vult" and as to the second charge he admitted the conviction therein stated but denied that such a conviction involved moral turpitude within the meaning of the statute.

At the hearing the "entire file" of the criminal case was, by stipulation of counsel for the respective parties, "marked" in evidence, to be "reviewed" by the Commissioner. Because that file disclosed, among other things, that the sentence (one year's

probation) was based upon prosecutor's plea of non vult to the charge of having unlawfully and feloniously received the liquor in question, knowing that it had been feloniously stolen, counsel for prosecutor maintains here, as below, that while the judgment, on the sentence, entered in the criminal court, "amounts to a conviction in that court", nevertheless such a judgment was not dispositive of the question of whether it involves moral turpitude; but that all the facts and "circumstances attendant upon the commission of the offense usually furnish the best guide." Rudolph v. U. S., 35 App. Div. 362, 6 Fed. (2d) 487, 40 A.L.R. 1042, cer. den. 269 U. S. 559, 70 L. ed. 411. Such circumstances were urged as factors to be considered by the Commissioner in mitigation of the offense. In the words of counsel for prosecutor, "We come in on the sole question of whether or not moral turpitude is involved."

Notwithstanding prosecutor's stated defense, the parties in fact submitted their respective proofs on the merits of both charges. Upon the proofs so submitted, the Commissioner, on February 29, 1944, filed what is captioned as his "Conclusions and Order." See R. S. 33:1-38. He concluded that the crime (receiving stolen goods) to which prosecutor pleaded non vult in the criminal court was a crime which, under all the circumstances, involved moral turpitude (see caveat expressed at pp. 575, 576, in Schireson v. State Board of Medical Examiners, 130 N.J.L. 570, 33A. 2d. 911, and also 43 Harvard Law Review, pp. 117, 119); and that inasmuch as prosecutor had otherwise enjoyed a clear record for the ten years that he had been a license holder, he (Commissioner) would not revoke prosecutor's license, as he might have done (R. S. 33:1-31(i), but would only suspend prosecutor's license for the balance of its then term, which expired on June 30, 1944; the Commissioner further concluded that he would entertain a petition from a bona fide transferee of the license to lift the suspension after at least 90 days of the suspension had been served. Additionally, the Commissioner stated in his conclusions that in no event might prosecutor receive any renewal of his license because he was mandatorily disqualified from holding such a license (R. S. 33:1-31(i); 33:1-25), nor might he be employed upon licensed premises in our state. R. S. 33:1-26.

Notwithstanding the aforesaid conclusions reached and statements made by the Commissioner, the order which the Commissioner entered (February 29, 1944) pursuant thereto, and here under review, provides (1) that prosecutor's plenary retail consumption license which had been issued to him by the local board of Newark for his premises at 75 Orange Street, Newark, N. J., be suspended for the balance of its term, effective March 6, 1944, and (2) that application may be made by a bona fide transferee of the license to lift such suspension upon the expiration of 90 days from the effective date of the suspension. (Parenthetically, we mark the fact that we are told -- and it is not denied -- that the Commissioner, on June 5, 1944, lifted the suspension upon proof to his satisfaction that prosecutor had transferred his license to a bona fide purchaser).

Although the order, as we have seen, makes no provision as to the Commissioner's disqualifying statements concerning the prosecutor, nevertheless prosecutor set down and argues (1) that the Commissioner erred in ruling that prosecutor is mandatorily disqualified from holding a license or being employed upon licensed premises in the state under R. S. 33:1-25 and 26 because the statute only disqualifies one who has been "convicted" of a crime involving moral turpitude, that prosecutor has "never" been convicted of such an offense although he did plead non vult to the charge of receiving stolen goods (the liquor referred to in the first charge) and was sentenced on said

plea. Schireson v. State Board of Medical Examiners, supra. The second ground is that the crime of receiving stolen goods is not, under all the surrounding facts and circumstances, one involving moral turpitude.

In our view of this case, on the record as submitted, there is neither need to detail the argument, pro and con, of the respective parties on the stated grounds of appeal, nor warrant to determine their efficacy. For, whether the disqualifying statements made by the Commissioner in his conclusions, namely, that in no event might prosecutor receive a renewal of his license, and that prosecutor might not be employed upon licensed premises, be characterized as reasons, conclusions, or opinions, the order entered by the Commissioner "pursuant thereto" (R. S. 33:1-38) makes no adjudication of them; they simply are no part of the order. However "hurtful" such statements may be to prosecutor, they are not subject to review by certiorari. Morgan v. Burnett, 121 N.J.L. 350, 355, 2A. 2d. 339.

The view we take of this case is that we are not concerned with the reasoning or statements set down in the conclusions of the Commissioner. Our sole concern is whether the result he reached as here evidenced by the order entered is correct. McCarty v. West Hoboken, 93 N.J.L. 247, 107 A. 265; Central R. R. Co. of N. J. v. State Tax Department, 112 N.J.L. 5, 16, 169 A. 489, cer. den. 293 U. S. 568, 79 L. ed. 637; Wyckoff v. Monmouth County, 127 N.J.L. 268, 271, 21A. 2d. 791. We hold that it is correct. Prosecutor, as we have seen, pleaded "non vult" to the first charge which the Commissioner had preferred against him, namely, that he had purchased four cases of assorted liquors from Mohr contrary to Rule 15 of State Regulations No. 20. Apart from his plea of non vult to this illegal purchase of liquor, the proofs in support of prosecutor's guilt are plenary. Admittedly, these proofs, as all other "material and controlling" proofs in this case, are not in "substantial" dispute. And there is no suggestion that a violation of Rule 15 of State Regulations No. 20 does not authorize the suspension of the license here ordered.

The writ is dismissed with costs.

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6. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - DISCREPANCY IN PROOF, ACIDS AND SOLIDS - LICENSE SUSPENDED FOR A PERIOD OF TEN DAYS.

In the Matter of Disciplinary Proceedings against)

MARY MURASKA)
383 Chestnut Street
Newark, N. J.,) CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-102 issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)

Mary Muraska, Pro Se.
Edward F. Hodges, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant failed to enter a plea to a charge duly served upon her, but appeared at a hearing scheduled to be held upon said charge. Accordingly, the Hearer entered a technical plea of not guilty and proceeded to take proof in support of the charge, which alleged that:

> "On October 16, 1944, you possessed illicit alcoholic beverages at your licensed premises, viz., a 4/5th quart bottle labeled 'Calvert Reserve Blended Whiskey 86.8 Proof', and a 4/5th quart bottle labeled 'Carstairs White Seal Blended Whiskey 86.8 Proof', which bottles contained alcoholic beverages not genuine as labeled; such possession being in violation of R. S. 33:1-50."

The evidence produced discloses that on October 16, 1944 an investigator of the Department of Alcoholic Beverage Control visited defendant's premises and seized the two bottles mentioned in the charge when the contents thereof appeared, by his tests, to be not genuine as labeled. The bottles were subsequently turned over to the Department's chemist for analysis.

The investigator testified that, at the time of the seizure, defendant stated that she did not know anything about the alleged violation, and that the bartender admitted that he had refilled the Calvert Reserve bottle and that he might have refilled the other bottle.

The analysis made by the Department's chemist discloses that the contents of both of the seized bottles were slightly lower in proof and substantially lower in acids and solids than the contents of genuine samples of the respective products.

At the hearing defendant testified that she did not refill either of the seized bottles and that her bartender had made the same admission to her that he had made to the investigator at the time of the seizure.

Despite personal innocence, however, licensees are strictly responsible for any refills found in their stock of liquor. Re Kurian, Bulletin 517, Item 2. Hence I find defendant guilty as charged.

Defendant has no prior record. I shall, therefore, suspend her license for a period of ten days.

Accordingly, it is, on this 26th day of December, 1944,

ORDERED, that Plenary Retail Consumption License C-102, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Mary Muraska for premises 383 Chestnut Street, Newark, be and the same is hereby suspended for a period of ten (10) days, commencing at 2:00 A.M. January 2, 1945, and terminating at 2:00 A.M. January 12, 1945.

ALFRED E. DRISCOLL
Commissioner.

7. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)
)
JOSEPH BLAZEJEWSKI)
637 No. Clinton Avenue) CONCLUSIONS
Trenton, N. J.,) AND ORDER
)
Holder of Plenary Retail Consumption License C-146, issued by the Board of Commissioners of the City of Trenton.)
- - - - - - - - - - - - - - - - - - - -)

Stephen J. Zielinski, Esq., Attorney for Defendant-Licensee.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleads non vult to charges that he sold and served to and permitted the consumption of alcoholic beverages by minors on his licensed premises, in violation of R. S. 33:1-77 and of Rule 1 of State Regulations No. 20.

The file discloses that on the evening of December 2nd and the early morning of December 3, 1944, two girls, one of whom was nineteen and the other twenty years of age, accompanied by two servicemen, were served with whiskey and beer by the licensee and one of his employees.

Since no aggravating circumstances appear in this case, and defendant herein has no previous adjudicated record, I shall suspend his license for ten days, less five days for the non vult plea, making a net suspension of five days. Re Lombardi, Bulletin 588, Item 10.

Accordingly, it is, on this 26th day of December, 1944,

ORDERED, that Plenary Retail Consumption License C-146, issued by the Board of Commissioners of the City of Trenton to Joseph Blazejewski for premises 637 No. Clinton Avenue, Trenton, be and the same is hereby suspended for a period of five (5) days, commencing at 2:00 A. M. January 8, 1945, and terminating at 2:00 A. M. January 13, 1945.

ALFRED E. DRISCOLL
Commissioner.

8. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES DURING PROHIBITED HOURS, IN VIOLATION OF LOCAL ORDINANCE - LICENSE SUSPENDED FOR A PERIOD OF 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

JAMES F. DALY
T/a DALY'S CAFE
201 Vine Street
Camden, N. J.,

Holder of Plenary Retail Consumption License C-64, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden.

CONCLUSIONS AND ORDER

James F. Daly, Defendant-Licensee, Pro Se.
Harry Castelbaum, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Licensee has pleaded non vult to the charges that on November 10, 1944, at about 6:30 A.M., and again on November 11, 1944, at about 6:30 A.M., he sold, served and delivered alcoholic beverages in violation of Section 5 of the local ordinance of the City of Camden which prohibits such sales between 2:00 A.M. and 7:00 A.M. on week days.

Licensee gives as his reason for the said violations that, because of the scarcity of help, it became necessary for him to clean up the premises personally and that it was his practice to start cleaning up the place about six in the morning preparatory to opening for business at 7:00 A.M. He further states that some of his customers who observed his activity would come and knock on the door and ask to be served with a drink before going to work. This, however, constitutes no excuse for selling during prohibited hours.

As stated by me in Re Disbrow, Bulletin 540, Item 3, it has become necessary for me, in cases of this character, to step up the minimum suspension to fifteen days, with a remission of not more than five days for a plea.

In this case, however, licensee has a prior record. On May 31, 1936 he was fined $25.00 in the local courts for Sunday selling. Again, on November 9, 1941, his license was suspended for two days by the local Board for Sunday sales. Under the circumstances, the license will be suspended for twenty days, less five days for the plea, making a net suspension of fifteen days.

Accordingly, it is, on this 26th day of December, 1944,

ORDERED, that Plenary Retail Consumption License C-64, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden to James F. Daly, t/a Daly's Cafe, for premises 201 Vine Street, Camden, be and the same is hereby suspended for a period of fifteen (15) days, commencing at 2:00 A.M. January 3, 1945, and terminating at 2:00 A.M. January 18, 1945.

ALFRED E. DRISCOLL
Commissioner.

9. APPELLATE DECISIONS - ASBURY PARK LICENSED BEVERAGE ASSOCIATION v. ASBURY PARK AND SIRGANY.

ASBURY PARK LICENSED BEVERAGE ASSOCIATION, Appellant, -vs- CITY COUNCIL OF THE CITY OF ASBURY PARK and JOSEPH N. SIRGANY, Respondents.	)	ON APPEAL CONCLUSIONS

Durand, Ivins & Carton, Esqs., by Robert V. Carton, Esq., Attorneys for Appellant.
Charles Frankel, Esq., Attorney for Respondent City Council.
Stout & O'Hagan, Esqs., by William J. O'Hagan, Esq., Attorneys for Defendant-Licensee.

BY THE COMMISSIONER:

The Asbury Park Licensed Beverage Association appeals from the action of the respondent City Council dismissing a complaint filed by the Association against the respondent, Joseph N. Sirgany, the holder of a plenary retail consumption license. The appeal is taken pursuant to the provisions of R. S. 33:1-31.

Appellant contends that the plenary retail consumption license was issued to respondent Sirgany in violation of the terms of an ordinance of the City of Asbury Park and that Sirgany continues to hold a license contrary to a condition imposed therein.

The sole issue raised by this appeal, as in a previous appeal between the same parties (see Asbury Park Licensed Beverage Association v. Asbury Park, Bulletin 628, Item 3), is whether the establishment for which the respondent Joseph N. Sirgany holds a plenary retail consumption license issued by respondent City Council is a bona fide restaurant, as defined in R. S. 33:1-1(t).*

On the date when the license in question was issued, Section 7 of the Asbury Park Alcoholic Beverage Ordinance, adopted May 12, 1942, provided as follows:

> "Section 7. Not more than sixty plenary retail consumption licenses shall be outstanding in the City of Asbury Park at the same time, provided, however, that this shall not prevent the renewal of such licenses outstanding upon the adoption of this ordinance or the transfer of such licenses and the renewal of licenses which have been transferred. Nothing herein contained shall prevent the issuance of plenary retail consumption licenses in excess of the above

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*R. S. 33:1-1(t) defines restaurant as follows:

> "An establishment regularly and principally used for the purpose of providing meals to the public, having an adequate kitchen and dining room equipped for the preparing, cooking and serving of foods for its customers and in which no other business, except such as is incidental to such establishment, is conducted." (Underscoring ours).

quota to bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers, provided, however, such licenses shall be conditioned that the premises for which they are issued shall continue to be operated as bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers and that said licenses shall not be transferred to other premises which are not operated as bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers. All licenses issued to bona fide hotels of fifty (50) rooms or more, bona fide restaurants or bona fide recreation centers shall be included in determining whether or not the quota of sixty plenary retail consumption licenses hereinabove referred to has been reached or exceeded."

This ordinance is presently in full force and effect. It is conceded that when the Sirgany license was issued there were then outstanding more than sixty plenary retail consumption licenses in the City of Asbury Park and that this condition prevailed when the appellant filed its complaint with the respondent, City Council. The Sirgany license is conditioned upon the continued operation of the licensed premises as a bona fide restaurant.

The parties to this appeal stipulated that the physical arrangement of the licensed premises is the same as it was at the time of the prior appeal. In my earlier decision (Bulletin 628, Item 3) I stated:

"Sirgany's premises have an approximate interior width of 19 feet and an over-all depth of 72 feet. The dimensions of the single room devoted to the service of food and liquor are approximately 19 feet by 44 feet. On the left, as one enters this room from the street, there is a public bar 18 feet in length. This bar, together with a back bar and the space for the bartenders, occupies about 7 feet of the width of the room. Twelve or more stools are located in front of the public bar and take up additional floor space. In the center of the room there are six small tables. On the right hand side of the room there are five booths and two tables. Two additional small tables are located between the end of the bar and the front wall. Fifty-two persons may be seated at the tables and in the booths. In the rear of the room there is a small band stand, a music box and a storage closet for alcoholic beverages. In the back of the premises and separated from the front room by an archway, there is a kitchen occupying a space 10 feet square, equipped with a gas range, electrical refrigerator, electrical meat grinders, sink, dishes, etc."

Sirgany testified at the hearing on the present appeal that, because of ill health, he was compelled to close his business about October 20, 1944. Sirgany stated that previous to closing the premises, he tended bar himself and employed a woman who formerly helped his chef; two waitresses, one of whom helped tend bar occasionally; and a porter. Sirgany testified that, during the summer months, he employed a chef in addition to the help previously mentioned. In response to a question whether he has done any business subsequent to October 20th, Sirgany said, "Well, a few hours a week that I have been there -- I don't know which days -- sitting around -- I probably did have someone come in." When he was asked whether during those hours the restaurant was open, he said, "There was nothing open. I would not call it open today. No business at the bar. I didn't have

ice, outside of the frigidaire, and you can't do business without merchandise. I have the liquor in the cellar and the frigidaire is gone, and if anyone wants a drink I would treat them, and if someone wants to buy a drink, I sell it to them."

Respondent Sirgany further testified that he specializes in Syrian dishes and that seventy per cent of his business was done at dinner time between the hours of 6:00 p.m. and 9:00 p.m. He said that he closed his establishment between 12:00 midnight and 1:00 a.m., which is approximately one hour after the closing time of the various theatres in the city. It is apparent from the testimony that over week-ends the premises occasionally remained open until 2:00 a.m., the closing hour for licensed premises in Asbury Park. This was corroborated by the testimony of Betty Ciccolini, a waitress formerly employed by respondent Sirgany.

A copy of the records submitted to the Office of Price Administration for the months of July and August were placed in evidence. These records disclose that 7143 persons were served food during the aforesaid months. When the receipts taken in for service of food are compared with the total receipts as shown in the Cash Book, Exhibit A-4, kept by Sirgany, the income from sales of alcoholic beverages for the months of July and August, 1944 appears to be substantially in excess of that from food and other services.

In my opinion in Asbury Park Licensed Beverage Association v. Asbury Park, supra, I reached the conclusion that the definition of the word "restaurant" in the Alcoholic Beverage Law (R. S. 33:1-1(t)) was controlling. For a full discussion of this phase of the appeal reference may be made to the earlier decision.

After taking into consideration the character of the respondent Sirgany's establishment, as disclosed by its physical layout, including the size and prominence of the bar, and after a comparison of the receipts taken in from the sale of alcoholic beverages with the total receipts from all services rendered, I have again reached the conclusion that the respondent's establishment is not a bona fide restaurant as defined in the Alcoholic Beverage Law. Sirgany's establishment may have been used during the summer months "regularly" for the purpose of providing meals. It does not, however, appear that it was "principally" used for that purpose. Nor does the Sirgany establishment meet the requirement of the definition in the law that "no other business, except such as is incidental to such (restaurant) establishment" be conducted on the licensed premises. It appears from the record that the respondent Sirgany's liquor business has frequently been the dominant business. It is apparent that it was never relegated to an "incidental" role. During the period subsequent to October 20th, when admittedly no facilities have been available for the service of food, respondent Sirgany conceded that alcoholic beverages had been served and occasionally sold on the licensed premises.

The evidence establishes that respondent Sirgany is not operating a bona fide restaurant as defined by the statute. This is particularly true since October 20, 1944. Hence, he has violated the condition imposed in his license. The license issued to Sirgany was issued in violation of the terms of the local ordinance which limits the number of such licenses to sixty, with an exception in favor of bona fide restaurants. The evidence sustains the complaint filed by the appellant.

R. S. 33:1-38 empowers the Commissioner "to make all findings, rulings, decisions and orders as may be right and proper and consonant with the spirit of this chapter."

R. S. 33:1-73 provides that the chapter shall be "liberally construed."

The respondent-licensee, Joseph N. Sirgany, has been afforded full opportunity to be heard. It clearly appears that respondent City Council had no jurisdiction to issue the license, and that if proceedings had been brought by the State Commissioner of Alcoholic Beverage Control, in view of the facts presented herein, the license would have been declared void. Re Loeb, Bulletin 206, Item 14. Cf. East Brunswick Township, Board of Adjustment v. Township Committee of the Township of East Brunswick and Joseph Mills, Bulletin 223, Item 5.

Accordingly, the action of respondent City Council in dismissing the complaint is hereby reversed; the license issued to Joseph N. Sirgany for the present fiscal year is hereby declared void; all operation under said license must cease forthwith and the license certificate must be surrendered to the City Clerk of the City of Asbury Park.

Alfred E. Driscoll
Commissioner.

Dated: December 28, 1944.