Mr. MacIntosh

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

BULLETIN 460 MAY 19, 1941.

TABLE OF CONTENTS

ITEM

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

BULLETIN 460 MAY 19, 1941.

1. ELIGIBILITY - BETS ON HORSE RACES - APPARENT EMPLOYMENT AS AGENT FOR BOOKMAKER - NOT MORAL TURPITUDE - APPLICANT NOT DISQUALIFIED BY SUCH CONVICTIONS.

May 9, 1941

Re: Case No. 378

Applicant has twice been convicted of holding bets on horse races - once in 1937 when he was sentenced to sixty days in jail and once again in 1941 when he received a suspended sentence of ten months and was placed on probation for three years and ordered to pay a fine of $1,000.00. His record is otherwise clear.

The first conviction arose after a special police investigator had observed applicant taking bets and search of applicant's person had disclosed horse race betting slips, racing forms, a book with records of plays on horses and a quantity of cash.

The second conviction came about as a result of an admission, on the part of a second person who was subsequently convicted on other charges, that he had placed horse race bets with applicant over a long period of time.

As regards this latter conviction, applicant, at the hearing, admitted having taken the bets from the other person, with whom he was "quite friendly," and having placed them with a bookmaker, along with his own bets. He claimed that he had acted as a gratuitous intermediary for his friend, and at his request, because the friend had "welched" on a prior bet and the bookmaker with whom he had been placing his wagers had refused to take further bets from him. As regards the first conviction, applicant claimed that the betting paraphernalia found on his person represented material used in connection with his own personal betting transactions.

Convictions for commercialized gambling may or may not involve moral turpitude, depending upon the circumstances of each individual case. Re Derrico, Bulletin 444, Item 5. Independent investigation by this Department has disclosed no concrete evidence that applicant was, at the time of either conviction, the principal bookmaker or an aide intimately connected with the bookmaking enterprise. He appears to have been, at most, merely an agent of a bookmaker. Under these circumstances, neither conviction, standing independently, involves moral turpitude. Re Case No. 354, Bulletin 435, Item 2; Re Case No. 315, Bulletin 396, Item 4; Re Case No. 296, Bulletin 353, Item 12; Re Case No. 295, Bulletin 351, Item 10; Re Case No. 286, Bulletin 337, Item 14. While multiple convictions for the same type of offense may show such a reckless disregard for law as to warrant the conclusion that the last offense actually involves the element of moral turpitude (see Re Case No. 314, Bulletin 393, Item 9), I do not think that, in the present case, a mere second conviction for holding bets on horse races, following, as it does, a similar conviction four years prior thereto and without aggravating circumstances appearing, warrants such a conclusion. See Re Case No. 354, supra (conviction for conspiracy to conduct a lottery following a conviction for possession of lottery slips held not to involve moral turpitude); Re Case No. 315, supra (second conviction for aiding and abetting in bookmaking on horse races held not to involve moral turpitude).

It is recommended, therefore, that applicant be advised that he is not disqualified, despite the aforesaid convictions, from holding a liquor license or being employed by a liquor licensee in this State.

Robert R. Hendricks,
Attorney.

APPROVED:
E. W. GARRETT,
Acting Commissioner.

2. APPELLATE DECISIONS - MOOSE v. WASHINGTON.

APPLICATION FOR CLUB LICENSE DENIED BECAUSE OF UNSUITABLE PREMISES - DENIAL AFFIRMED.

WASHINGTON LODGE NO. 512, LOYAL ORDER OF MOOSE,
Appellant,
-vs-
COMMON COUNCIL OF THE BOROUGH OF WASHINGTON,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

- - - - - - - - - - - - - - - - - - -

Robert B. Woodward, Esq., Attorney for Appellant.
Wilbur M. Rush, Esq., Attorney for Respondent.

This is an appeal from denial of a club license for premises located on the second floor of 14 East Washington Avenue, Borough of Washington.

The application was denied for the stated reason that "The liquor ordinance grants only two (2) club licenses and two club licenses are now in force."

On June 18, 1956 respondent adopted an ordinance limiting the number of club licenses to two. At or about the same time it issued club licenses to Washington Maennerchor, and Washington Lodge of Elks, which licenses have been renewed from year to year since that time. The ordinance is still in effect.

On April 21, 1959 appellant obtained its charter from the Supreme Lodge of the World, Loyal Order of Moose; thereafter, it held its meetings in Bryant's Hall, Borough of Washington, until about seven months ago, when it moved to the quarters which it now occupies. Since it has been credentialed by a national order, which has been in active operation in this State for more than three years prior to the date of the application, it appears to be qualified to hold a license. State Regulations No. 7. Appellant has one hundred and twenty-nine paid-up members, about one-half of whom reside outside of the borough. It contends that its application should have been granted because the ordinance is unreasonable.

If there were no question involved other than the mere existence of the ordinance limiting the number of club licenses, the action of respondent could not be sustained for the reasons set forth

in Irish American Association v. Kearny, Bulletin 295, Item 11, and John Adams Post v. Wildwood, Bulletin 456, Item 9, and on the authority of those decisions I would be compelled to decide that if the local Maennerchor and Elks may have a license, the local Moose, apparently equally qualified, should likewise be entitled to a license. However, it appears that when the application was considered by the Common Council, the matter was referred to the chairman of the ordinance committee to recommend as to whether the ordinance should be amended to provide for a third club license; that said chairman, after considering the matter, came to the conclusion that the majority of voters of the borough opposed the issuance of a third club license and that appellant did not have "the best quarters for that type of license," whereupon he recommended to the Council that the ordinance be not amended at the present time. Thereupon the Council unanimously denied the application.

Aside from the question of sentiment of the majority of the voters, it appears that appellant lodge meets on the second floor of a three-story brick building; that the building is located in a mixed business and residential area, with stores on the street level and apartments located above; that in the same building in which appellant lodge is located, a family resides on the third floor; that families reside on the second floors of buildings located to the east and west. While no complaints have been received from tenants who presently reside nearby, the location of the place to be licensed is a matter to be carefully considered by the issuing authority. Thus, in Nuova Vita Lodge v. Plainfield, Bulletin 355, Item 8, the Commissioner sustained the action of respondent in denying a license to a club whose quarters were located on the second floor in a business and apartment building, with families above and on both sides of the club quarters. While there was evidence of noise in that case, I believe that the principles set forth therein should be extended so as to allow an issuing authority to decide, even in the absence of evidence of past misconduct, whether or not a club license should be issued for premises so located that the existence of a license might create an unsatisfactory condition in so far as families residing in nearby apartments are concerned. The present case turns not upon the reasonableness of the ordinance, but upon the location of the premises sought to be licensed. Since, as appears from the evidence, respondent has concluded that these premises are not a proper place for a license, I cannot say that its action in refusing to amend the ordinance and in denying appellant's application was unreasonable. Even if there had been no limiting ordinance, the denial would have been proper. Hence I shall affirm respondent's action.

Accordingly, it is, on this 13th day of May, 1941,

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

E. W. GARRETT,
Acting Commissioner.

3. DISCIPLINARY PROCEEDINGS - FRONT - FALSE STATEMENT IN APPLICATION FOR LICENSE - AIDING AND ABETTING A NON-LICENSEE TO EXERCISE THE RIGHTS AND PRIVILEGES OF THE LICENSE - FAILING TO NOTIFY MUNICIPALITY OF CHANGES IN FACTS SET FORTH IN APPLICATION - BOTH PERSONS QUALIFIED - NO APPARENT FRAUDULENT PURPOSE OR INTENT - SITUATION CORRECTED - 10 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against ANTONI KRASILOWSKI, 60 Martha Street, East Paterson, N. J., Holder of Plenary Retail Consumption License C-2, issued by the Mayor and Council of the Borough of East Paterson.	ON HEARING CONCLUSIONS AND ORDER

R. Sery Nicosia, Esq., Attorney for Defendant-Licensee.
Richard E. Silberman, Esq., Attorney for Department of Alcoholic Beverage Control.

The defendant-licensee has pleaded guilty to charges of (1) falsifying his application for license for the year 1940-41 in that he concealed the interest of Rudy Yagnesak in the license applied for and in the business to be conducted thereunder, in violation of R. S. 33:1-25; (2) aiding and abetting Yagnesak, a non-licensee, to exercise the rights and privileges of his license, contrary to R. S. 33:1-26, in violation of R. S. 33:1-52; and (3) failing to notify the local issuing authority of the change in facts set forth in his application for license for the year 1939-40, occasioned by Yagnesak's subsequent acquisition of interest in the license and business conducted thereunder, in violation of R. S. 33:1-34.

On August 4, 1940 police officers of the Borough of East Paterson who had entered the above premises, licensed in the name of Antoni Krasilowski, to investigate a noise complaint, found Rudy Yagnesak behind the bar and in charge of the premises. Yagnesak, upon being questioned, admitted that he was, and had been since January 1940, the proprietor of the tavern, whereupon he was arrested by the officers and charged with selling alcoholic beverages without a license.

In statements subsequently given to investigators of this Department, both Yagnesak and Krasilowski, the defendant-licensee, frankly admitted that the former had been operating the business since January 15, 1940 under a lease and option to purchase arrangement.

The defendant-licensee, who appeared at the hearing in order to show that the unlawful situation had been corrected, testified that in January 1940 he decided, because of ill health, to sell his tavern business; that Yagnesak, knowing of his desire to sell, entered into negotiations with him concerning purchase of the same; that on January 15, 1940 he leased the entire licensed premises, together with all fixtures and equipment, to Yagnesak for a term of seven months at a monthly rental of $75.00; that it was agreed that if Yagnesak, after operating the business under the lease arrangement, made a success of it, he would buy the business; that Yagnesak operated the business, pocketing the profits and paying him the monthly

rental, up until August 4, 1940, the day of Yagnesak's arrest; that immediately upon being apprised of the illegality of the lease arrangement, Yagnesak severed all interest in, and all connection with, the licensed business and turned the place over to Krasilowski; that he (Krasilowski) has, since that time, operated the business as his own.

There is nothing in the record or in the Department file on this matter which would tend to indicate that the "lease" of the liquor license to Yagnesak, who appears to have been fully qualified, was motivated by any fraudulent purpose or with intent to circumvent the Alcoholic Beverage Law.

Krasilowski maintains that he was unaware of the fact that a transfer of his license to Yagnesak was necessary in order to enable the latter to lawfully carry on the licensed business. I am satisfied that he is telling the truth and that the unlawful situation has been corrected by the withdrawal of Yagnesak and the resumption, by Krasilowski, of full control and proprietorship of the licensed business.

Licensees, however, must learn to abide by the law and regulations. The license, therefore, will be suspended for ten days. Cf. Re Tessieri, Bulletin 443, Item 3.

Accordingly, it is, on this 13th day of May, 1941,

ORDERED, that Plenary Retail Consumption License C-2, heretofore issued to Antoni Krasilowski by the Mayor and Council of the Borough of East Paterson, be and the same is hereby suspended for ten (10) days, effective May 19, 1941, at 7:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

4. ELIGIBILITY - LARCENY - MORAL TURPITUDE - APPLICANT DECLARED INELIGIBLE TO HOLD A LIQUOR LICENSE OR TO BE EMPLOYED BY A LIQUOR LICENSEE - APPLICATION FOR EMPLOYMENT PERMIT DENIED.

May 13, 1941.

Re: Case No. 376

This proceeding is to determine applicant's eligibility for an alien's employment permit to work as a cook and server of food at a tavern in this State. R. S. 33:1-26.

The Alcoholic Beverage Law prohibits anyone convicted of a crime involving moral turpitude from working in any capacity for a liquor licensee or obtaining any liquor license in New Jersey. R. S. 33:1-25, 26.

In February 1941 applicant, pursuant to his plea of non vult, was convicted on two indictments, one alleging the theft and receiving of a $1700.00 diamond pin on November 14, 1940, and the other alleging the theft and receiving of a $1,000.00 diamond ring on December 18, 1940. As to the first crime, applicant was sentenced to eighteen months' imprisonment, execution of such sentence being suspended and applicant being released on probation for five years. As to the other, imposition of sentence was apparently suspended.

The facts as to these thefts appear to be: That applicant at one time worked as chauffeur and handy man for a certain employer in this State; that, on October 12, 1940, he lost this job (apparently because of laxity and indulgence in drink); that, on November 14, 1940, he returned to his old employer's home, was let in by a maid, went to a bedroom and stole the diamond pin; that later, on December 18, 1940, when hired for the day by this old employer, he again went to the bedroom and stole the ring; and that he pawned these items of jewelry.

As to why applicant committed these thefts, report from the police shows that applicant, on his arrest, stated that he had been unable to get other employment and needed money for himself and his family. At the hearing before this Department he mentioned only theft of the ring (and made no reference to the pin) and explained such theft by stating that he had been drinking and, although not drunk, was in a "fog."

Theft (i.e., larceny) is a crime which ordinarily involves moral turpitude. Re Case No. 184, Bulletin 209, Item 8. While in the present case it appears that applicant is not a hardened criminal and has a clear record except for these two missteps, nevertheless the fact remains that he deliberately committed these two substantial thefts scarcely a month apart. In such case the crimes, despite the circumstances of unemployment and drink which may have prompted them, must be deemed to involve moral turpitude. See Re Case No. 184, supra, where two offenses (theft and knowingly receiving stolen goods) were deemed to involve that element despite the fact that trying circumstances prompted the offenses.

Accordingly, it is recommended that applicant be declared disqualified from holding any type of liquor license or working for any liquor licensee in this State by reason of his said record, and that his application for alien's employment permit therefore be denied.

Nathan Davis,
Attorney-in-Chief.

APPROVED:
E. W. GARRETT,
Acting Commissioner.

5. ELIGIBILITY - BREAKING, ENTERING AND LARCENY - IN VIEW OF APPLICANT'S YOUTH, NOT MORAL TURPITUDE - APPLICANT NOT DISQUALIFIED BY SUCH CONVICTION - EMPLOYMENT PERMIT GRANTED.

May 15, 1941.

Re: Case No. 380

In his application for an employment permit because of his failure to qualify as to age, applicant disclosed that he was convicted of the crime of breaking and entering. His fingerprint records show that on February 28, 1941 he was convicted of breaking, entering and larceny, received a suspended sentence, ordered to pay a fine of $100.00, and placed on probation for five years.

In explanation of his offense, applicant, who is now seventeen years of age, stated that while in the company of a boy fifteen years of age, who had a bad record, and another boy nineteen years of age, the latter suggested that they break into a home; that he and the fifteen year old boy were caught and the other boy was

subsequently arrested. One of his companions was sentenced to the Reformatory and the other to the State Home for Boys.

This is applicant's only conviction, although the local Police report that when applicant was fifteen years of age he was accused of theft, and again when sixteen years of age he was accused of receiving stolen goods. Apparently applicant was not arrested or convicted in either case.

Ordinarily the crime of "breaking, entering and larceny" involves moral turpitude, hence would disqualify applicant, under R. S. 33:1-25, 26, from being employed by a liquor licensee of this State. Re Case No. 231, Bulletin 271, Item 10. However, since he is under eighteen years of age, his youth is a pertinent circumstance to be considered in determining whether that element is present. Re Case No. 36, Bulletin 149, Item 1.

Considering all the facts, especially that applicant was not the ringleader, but followed the lead of evil companions, as indicated by their respective sentences, his series of misdeeds appear in a less harsh light. I shall, therefore, give him the benefit of the doubt and decide that the crime of which he was convicted did not involve moral turpitude. Cf. Re Case No. 279, Bulletin 324, Item 11; Re Case No. 298, Bulletin 355, Item 2; Re Case No. 321, Bulletin 396, Item 12.

It is, therefore, recommended that his application for employment permit be granted.

Harry Castelbaum,
Attorney.

APPROVED:
E. W. GARRETT,
Acting Commissioner.

6. RETAIL INSPECTIONS - CITY MANAGER AND COMMISSION ELECTIONS - MAY 13, 1941.

MUNICIPALITY		ASSIGNED	NO. OF CALLS MADE	VIOLATIONS
Bergen County	Hackensack	76	100	None
	Lyndhurst	55	55	"
Burlington "	Bordentown	10	50	"
Cape May "	Cape May City	17	34	"
	Sea Isle City	9	27	"
Cumberland "	Millville	22	44	"
	Vineland	18	36	"
Essex "	Newark	1260	1206	"
Hudson "	Jersey City	724	704	1
Monmouth "	Keansburg	29	29	None
	Monmouth Beach	1	1	"
	Asbury Park	79	79	1
	TOTAL	2300	2365	2

Preliminary reports appear to disclose violations on the following licensed premises:

HUDSON COUNTY

Jersey City	Michael J. Keaveney 48 Bergen Avenue	C-48

MONMOUTH COUNTY

Asbury Park	Thomas Davis 107 Prospect Ave.	C-58

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7. CANCELLATION PROCEEDINGS - FAILURE OF CLUB LICENSEE TO HAVE EXCLUSIVE, CONTINUOUS POSSESSION AND USE OF CLUB QUARTERS FOR THREE YEARS - LICENSE CANCELLED.

In the Matter of Cancellation Proceedings against SCHWIMM & SPORT CLUB, INC., Flanders, Roxbury Township, Morris County, N. J., Holder of Club License CB-1, heretofore issued by the Township Committee of the Township of Roxbury.	CONCLUSIONS AND ORDER

Schwimm & Sport Club, Inc., by Edward Muecke, President.
Stanton J. MacIntosh, Esq., Attorney for Department of Alcoholic Beverage Control.

Notice was served upon the licensee to show cause why its license should not be cancelled for the following reason:

> "Said license was issued in violation of R. S. 33:1-12(5) in that your club had not been in exclusive, continuous possession and use of a clubhouse or club quarters for three (3) years continuously immediately prior to your application for said license as required by Rule 2 of State Regulations No. 7."

The evidence shows that in the application for license dated June 4, 1940 the following questions and answers appear:

> "Question 21: Has the club been in exclusive, continuous possession and use of the premises for which license is sought for at least three years immediately prior to this application?
> A. No.
> Q. If not, state reason.
> A. We only leased the present premises a little more than two years ago."

Apparently the club has been in existence since at least 1929 and was incorporated under its present name on July 9, 1937. For many years it met at different premises but was never in exclusive possession of a clubhouse or club quarters until October 25, 1937, when it obtained a lease on the premises for which the license was issued.

While no question of fraud is involved, it appears that the license was improvidently issued. Cf. Gesang-Verein Boonton, Inc. v. Montville, Bulletin 453, Item 10. Under the circumstances, the license should be cancelled.

Accordingly, it is, on this 15th day of May, 1941,

ORDERED, that Club License CB-1, heretofore issued to Schwimm & Sport Club, Inc. by the Township Committee of the Township of Roxbury, be and the same is hereby cancelled, effective immediately.

E. W. GARRETT,
Acting Commissioner.

8. DISCIPLINARY PROCEEDINGS - FRONT - FALSE STATEMENT IN APPLICATION FOR LICENSE - AIDING AND ABETTING A NON-LICENSEE TO EXERCISE THE RIGHTS AND PRIVILEGES OF THE LICENSE - CONCEALMENT OF ASSETS APPARENT MOTIVE - BOTH PERSONS QUALIFIED - PRIOR ILLICIT LIQUOR VIOLATION - SUSPENSION FOR BALANCE OF TERM, WITH LEAVE TO PETITION TO LIFT AFTER 20 DAYS IF SITUATION CORRECTED.

In the Matter of Disciplinary Proceedings against JENNIE LIPITZ, 199 W. Ingham Avenue, Trenton, N. J., Holder of Plenary Retail Consumption License No. C-56, issued by the Board of Commissioners of the City of Trenton.	CONCLUSIONS AND ORDER

Jennie Lipitz, Defendant-Licensee, Pro Se.
Charles Basile, Esq., Attorney for State Department of Alcoholic Beverage Control.

The defendant, holder of a plenary retail consumption license for a tavern in Trenton, pleads guilty to charges that she violated the Alcoholic Beverage Law by -

(1) Falsely denying in her application for her current license that Morris Lipitz (her husband) had any interest in the tavern. R. S. 33:1-25.

(2) Permitting him to exercise the rights and privileges of her license. R. S. 33:1-26, 52.

The defendant and her husband admit, in a signed statement to the investigators of this Department, that he has actually owned and operated this tavern since Repeal; that his son first held the license as a "front" for him (i.e., until March 1940); that thereafter his wife (present defendant) held the license in continuance of the "front."

Lipitz appears to have been qualified throughout to seek the license in his own name. Apparently his motive in operating the

tavern through the device of a "front" has been to keep his business hidden from a large creditor on a bond of some ten or fifteen years' standing.

Because of the plea of guilt in this case, the fact that the real proprietor was himself qualified to hold the license and the close family relationship among the parties, penalty in this case, where Lipitz purposefully had his son and later his wife "front" for him to avoid a creditor, would normally be a suspension of the license for the balance of the term but with leave, if the "front" be satisfactorily corrected, to petition to lift the suspension after at least ten days thereof had been served. Cf. Re Russo, Bulletin 455, Item 9.

However, I note from this Department's records that, in April 1939, the then existing license for this tavern was suspended for fifteen days by Trenton because of possession of illicit ("refilled") liquor at the tavern in violation of the Alcoholic Beverage Law. Although at that time the license was still nominally in the son's name (the transfer over to Lipitz's wife, the present defendant, not occurring until about a year later), nevertheless that violation will here be considered as a past record in meting out proper penalty since Morris Lipitz has been the actual proprietor and operator of this tavern throughout.

Hence, in view of such past record, even should the "front" be satisfactorily corrected, the suspension of license will in no event be lifted before at least twenty (instead of ten) days have been served.

Accordingly, it is, on this 15th day of May, 1941,

ORDERED, that the plenary retail consumption license heretofore issued by the Board of Commissioners of the City of Trenton to Jennie Lipitz, for premises at 199 W. Ingham Avenue, Trenton, N. J., be and hereby is suspended for the balance of its term, effective May 20, 1941 at 2:00 A.M. (Daylight Saving Time), with leave reserved to seek, by verified petition, to lift this suspension on proper proof that the "front" in question has been satisfactorily corrected; provided, however, that such lifting shall not occur before twenty (20) days of such suspension have been served.

E. W. GARRETT,
Acting Commissioner.

9. APPELLATE DECISIONS - CURRY v. MARGATE CITY.

SUFFICIENT LICENSES IN VICINITY - DENIAL AFFIRMED.

ELIZABETH CURRY,
Appellant,
-vs-
BOARD OF COMMISSIONERS OF THE CITY OF MARGATE CITY,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Glenn & Glenn, Esqs., by Milton W. Glenn, Esq. and Emory J. Kiess, Esq., Attorneys for the Appellant.
Enoch A. Higbee, Jr., Esq., Attorney for the Respondent.
James N. Butler, Esq., Albert A. F. McGee, Esq., William Charlton, Esq., Frank P. Mulligan, Esq., Attorneys for the Objectors.

Respondent denied appellant's application for a person-to-person and place-to-place transfer of a plenary retail consumption license for premises 9 South Granville Avenue, Margate City. Hence this appeal.

Margate City is a summer seashore resort several miles below Atlantic City. It has a permanent population of 3500 and a summer influx of about 1200. It contains sixteen consumption and four distribution establishments.

The premises are located on the east side of South Granville Avenue about midway between Ventnor and Atlantic Avenues and extend to the westerly side of Gladstone Avenue. Although located in a business zone, the vicinity is residential in character. The business zone begins on the easterly side of Granville Avenue and extends a distance of seven short blocks easterly to Delavan Avenue. The southerly boundary of the business zone is the north side of Atlantic Avenue and the northerly boundary is the depth of the lots facing on the north side of Ventnor Avenue. In this zone, which contains a great deal of vacant land, the homes outnumber the businesses by almost two to one. The Hearer, who, with consent of the parties, took a view of the neighborhood, reports that its appearance is decidedly residential with the majority of the business places located either on Atlantic or Ventnor Avenues.

In this vicinity there already exist two consumption licenses and three distribution licenses. In addition, there has been issued to a restaurant known as Risley's, located within four blocks of appellant's premises, a seasonal consumption license for every summer season since 1937.

As one reason for its denial to place another licensed establishment in this vicinity, respondent assigns:

> "That the transfer of the license was properly refused because there are an adequate number of licensed places existing in a business neighborhood near enough to the premises in question as to adequately serve all persons desiring to purchase and consume alcoholic beverages."

If this were all, there would be no question as to an affirmance of respondent's action. The number of licensed premises to be permitted in any particular area is a matter confided to the sound discretion of the local issuing authority. Santoriello v. Howell, Bulletin 252, Item 8; Sudol v. Wallington, Bulletin 267, Item 10; Pitman v. Pemberton, Bulletin 277, Item 6; Boody v. Gloucester, Bulletin 300, Item 11; Smith v. Winslow, Bulletin 334, Item 1; Alpert v. Asbury Park, Bulletin 380, Item 2; Winslow v. Pennsauken, Bulletin 401, Item 11; Bodrato et al. v. Northvale, Bulletin 433, Item 1; Roberts v. Delaware, Bulletin 447, Item 11; Peroni et al. v. Washington, Bulletin 458, Item 6. The privilege of a place-to-place transfer of an outstanding license is subject, among other things, to the reasonable and bona fide exercise of that discretion. Lingelbach v. North Caldwell, Bulletin 180, Item 8; Ninety-One Jefferson St., Passaic, Inc. v. Passaic, Bulletin 255, Item 9; Polansky v. Millburn, Bulletin 258, Item 2; Mita v. Orange, Bulletin 266, Item 10; Gomulka v. Linden, Bulletin 294, Item 8; Smith v. Winslow, supra; Alpert v. Asbury Park, supra; Winslow v. Pennsauken, supra. In view of the number of licensed places now located there, it would appear that respondent's determination that such number is sufficient for that area is not unreasonable.

However, appellant argues that such determination is arbitrary as applied to her place of business. The evidence shows that she has been operating a bona fide restaurant at the premises in question for the past four years. Her premises, with a seating capacity of 215 persons, are open for business from May 15th to September 15th, during which time she caters in the main to summer residents, her testimony being that "Ninety per cent are people that are summer residents that rent cottages or patronize the guest houses." She testified that her only reason for desiring a liquor license is to retain the good will of certain of her patrons that desire a cocktail with their meals and that she would be satisfied to have no bar, no entertainment or dancing, and to serve liquor only at tables with food. Indeed, to demonstrate that she was in good faith in her assertion that the license would be merely incidental to her restaurant business, she stated that such license, if issued, could be conditioned that no liquor signs of any kind, exterior or interior, should be exhibited at her premises.

Were I a member of the local issuing authority, I might well have voted to grant the application to transfer the license to this appellant. There would seem to be no great harm in permitting an establishment of the kind in question to be privileged to serve liquor in the manner in which appellant indicated she would if given a license. In a summer resort of this type, a restaurant where one can also obtain alcoholic refreshments with meals is very often essential to the needs of persons who reside there only during the summer months and who patronize restaurants much more extensively during such period than during the remainder of the year.

However, there are three comparable licensed restaurants in the municipality, one of which, Risley's, is in the vicinity of appellant's premises. Although, so far as the records of this Department show, no license for the ensuing summer season has as yet been issued to Risley's, there is no competent proof in the record that such license will not be issued to such restaurant for this season. Moreover, if no application is filed by Risley's for the seasonal license, it may be that if appellant makes application therefor, respondent may, in its discretion, grant such application

despite the fact that it refused a plenary retail consumption license which carries with it the privileges of sales of alcoholic beverages all year round. Of course, I neither entertain nor express any opinion at this time as to whether such application, if made by appellant, should be granted.

The sentiment of the residents in the immediate vicinity is vehemently against giving appellant a license for her premises. Although at the appeal hearing as many or more residents appeared on behalf of appellant, by far the greater majority of those opposed lived within two blocks of Granville Avenue while the majority of those in favor resided much farther away.

My function as a judge on these appeals is to determine whether the action of the issuing authority is reasonable and within the bounds of the discretion confided in it to determine in the first instance whether the application should be granted. The burden of showing that the issuing authority was arbitrary and abused such discretion is on the appellant. Upon a consideration of all of the circumstances of this case, it cannot be said that the evidence leads to but one conclusion and that contrary to respondent's denial of the application. While appellant has made out a strong case, the evidence is not so convincing that I would be warranted in reversing the authority below.

I find that appellant has not sustained the requisite burden of proof with respect to this issue. It is, therefore, unnecessary to consider the additional reasons given by respondent in justification of its denial in this case.

The action of respondent is affirmed.

Accordingly, it is, on this 15th day of May, 1941,

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

E. W. GARRETT,
Acting Commissioner.

10. APPELLATE DECISIONS - KUHTA v. PATERSON.
IMMORAL ACTIVITIES ON LICENSED PREMISES - REVOCATION AFFIRMED.
APPEALS - NOT LIMITED TO REVIEW OF RECORD BELOW, BUT ARE HEARD DE NOVO.

JOHN KUHTA,
Appellant,
-vs-
BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF PATERSON,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Schwartz & Schwartz, Esqs., by Louis Schwartz, Esq., Attorneys for the Appellant.
George Surosky, Esq., Attorney for the Respondent.

This is an appeal from the revocation of appellant's plenary retail consumption license after respondent found him guilty of a

charge of having permitted immoral activities on his licensed premises on January 24, 1941, in violation of local ordinance and also State Regulations No. 20, Rule 5.

It was stipulated that this appeal could be decided upon the stenographic record of the proceedings before the issuing authority (see State Regulations No. 14, Rule 8) unless it was determined that the record was lacking in any pertinent respect, in which event further hearing would be scheduled.

From such record, it appeared that, more particularly, the offense involved a man, later identified as Peter, and one Mary _____, who were alleged to have had sexual intercourse at the licensed premises on the date in question. Peter gave no evidence before respondent. Mary, who had admitted the offense in a signed statement to the police, and also admitted to respondent that she had signed the statement, nevertheless denied at the hearing below the truth of the contents of such statement.

In such posture of the record, it was deemed advisable that Peter's testimony be obtained. Independent investigation was then instituted by this Department and, in accordance with the aforesaid stipulation, a hearing was scheduled for such purpose. At that hearing, Peter testified that on January 24, 1941 he entered the licensed premises in the early afternoon and found the licensee and his wife there. After having a glass of beer, Peter asked, "How about the girls?", to which Mrs. Kuhta replied, "Well, they may be here a little later, if you wait around." Some time thereafter, Mary came in and was introduced to Peter by Mrs. Kuhta. Upon Mary's request, he bought both her and Mrs. Kuhta a drink. The licensee then left the barroom and proceeded upstairs, leaving his wife in charge. Mrs. Kuhta then asked Peter if he "would like to go with Mary in the back room." He further testified:

> "She (Mrs. Kuhta) said, 'If you want to have good time with her, you can take her in the back room.' I hesitated because she was kind of old. Really I didn't like the woman. I said to her, 'She looks kind of old and pale in the face, I don't want to get no disease,' and Mrs. Kuhta said to me, in Polish, 'As far as I know, she was with many customers in back room and none of them came back and made no complaint, so I don't think she is bad.' So we went in the back room where I found three or four booths and tables, so we occupy booth table from the bar on the righthand side and Mary ask me sit down next to her, and she call Julia Kuhta."

Then he treated both females to another drink, again pursuant to Mary's request. After consuming her drink, Mrs. Kuhta left them with the remark, "Now you can do anything you want." Thereupon, he had sexual relations with Mary. When they returned to the barroom, both Mr. and Mrs. Kuhta were there. His testimony then continues:

> "Q Did Mr. Kuhta know you were in the back room?
>
> A We start conversation after Mary insisted I treat her to another drink. I remarked, 'I will; but I am kind of ashamed.' I said that in Polish, and she remarked, 'Well, my husband knows all about it anyway.'

"Q Who made that remark?

A Mrs. Kuhta -- that he know I was in back."

Mary was arrested the same day and gave the police the written statement heretofore referred to, in which she admitted having had intercourse at the licensed premises during that afternoon and also "just a couple of times in the last two months." She was charged with the crime of prostitution, to which she pleaded non vult. Her denial at the hearing before respondent of any wrongdoing at the licensed premises is, in view of the foregoing, not worthy of belief.

Appellant argues that determination of this appeal should be made solely on the basis of the record taken before respondent and that it was, therefore, improper to supplement the record with Peter's testimony. This contention has no merit. As was said in Memorial Presbyterian Church v. Newark et al., Bulletin 191, Item 8:

> "Respondent licensees further contend that the Commissioner's jurisdiction on this appeal is limited solely to a review of the record below. This contention is devoid of support either in the language of the statute or in the adjudicated cases. Section 35 expressly authorizes the Commissioner to establish appellate 'procedure and rules,' and the rules governing appeals in force since May 4, 1934, provide that all appeals shall be heard de novo. Indeed, the courts have held that general statutory language authorizing an administrative 'appeal' similar to that contained in Section 19, without more, contemplates an appeal de novo rather than on the record below. See Schwartzrock v. Board of Education of Bayonne, 90 N. J. L. 370 (Sup. Ct. 1927); City of Paterson v. Baker, 5 N. J. Misc. 1075 (Sup. Ct. 1927); McCrory Co. v. Commissioner of Corporations and Taxation, 280 Mass. 273, 182 N. E. 481 (1932); Alwen v. Fisher, 279 Fed. 164 (D. Wash. 1922). In the Schwartzrock case, supra, the New Jersey Supreme Court held that the administrative 'appeal' under the School Law, contemplated a hearing de novo; and in the Baker case, supra, the New Jersey Supreme Court likewise declared that the administrative 'appeal' under the Tax Act was a hearing de novo."

Such procedure permits either party to introduce any pertinent evidence on appeal that was not presented to the local body. For a case where such additional testimony offered on behalf of appellant resulted in a reversal of a thirty-day suspension imposed by the issuing authority, see Carnes v. Hamilton, Bulletin 390, Item 7.

I am satisfied from all of the evidence that this licensee permitted immoral activities on his licensed premises, and I therefore find him guilty as charged.

Revocation of appellant's license is wholly justified. It is the only proper penalty commensurate with the nature of the violation. In a case involving a similar issue, it was said, "The penalty of outright revocation fits the offense. Respondent has clearly indicated that it does not intend to tolerate the unholy

union of vice and liquor on licensed premises in its municipality." Procoli v. Hamilton, Bulletin 413, Item 6. Cf. Re Snyder, Bulletin 247, Item 9; Re Sengebush, Bulletin 311, Item 8.

The action of respondent is affirmed.

Accordingly, it is, on this 16th day of May, 1941,

ORDERED, that respondent's order of revocation of appellant's plenary retail consumption license C-102 for premises 28 Bridge Street, Paterson, held in abeyance pending disposition of the instant appeal, be and the same is hereby restored to full force, effective immediately.

E. W. Garrett

Acting Commissioner.