

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2339

February 6, 1980

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1. APPELLATE DECISIONS - TWO GENTLEMEN OF VERONA, INC. v. VERONA.

#4319

Two Gentlemen of Verona, Inc.,
t/a Liquor Locker,

Appellant,

v.

Mayor and Council of the Borough
of Verona,

Respondent.

}
ON APPEAL
CONCLUSIONS
AND ORDER
}

Rowe, McMahon, McKeon & Curtin, Esqs., by Thomas R. Curtin, Esq.,
Attorneys for Appellant.
Robert J. Sussman, Esq., Attorney for Respondent.

Initial Determination Below

Hon. Edward D. Beslow, Administrative Law Judge, c/b - April 25, 1979
Received May 7, 1979.

BY THE DIRECTOR:

No written Exceptions to the Report of the Administrative
Law Judge were filed by the parties pursuant to N.J.A.C. 13:2-
17.14.

Having carefully considered the entire record herein,
including the transcripts of the testimony, the exhibits and the
Initial Determination, I concur in the findings and recommendations
therein and adopt them as my conclusions herein, except as to the
manner of reimposition of the license suspension. License suspen-
sions commence as of whole days and not fractions thereof. This
is standard Division policy. Thus, I shall credit one full day
to the licensee for service of the suspension.

Counsel for appellant requests that, in lieu of filing
Exceptions, the suspension commence on July 30, 1979. Good cause
appearing, I shall grant appellant's request.

Accordingly, it is, on this 16th day of July, 1979,

ORDERED that the action of the Mayor and Council of the
Borough of Verona be and the same is hereby affirmed, and the
appeal be and is hereby dismissed; and it is further

ORDERED that Plenary Retail Distribution License 0720-44-

010-002, issued by the Mayor and Council of the Borough of Verona to Two Gentlemen of Verona, Inc., t/a Liquor Locker for premises 645 Bloomfield Avenue, Verona be and the same is hereby suspended for the balance of suspension not already served, commencing 10:00 p.m. Monday, July 30, 1979 and terminating 10:00 p.m. Friday, August 10, 1979.

JOSEPH H. LERNER
DIRECTOR

APPENDIX

Initial Decision of Administrative Law Judge Beslow

TWO GENTLEMEN OF VERONA, INC.,)	
T/A LIQUOR LOCKER,)	
)	
APPELLANT,)	<u>INITIAL DECISION</u>
)	DKT. #A.B.C. 100-79
VS.)	
)	
MAYOR AND COUNCIL OF THE)	
BOROUGH OF VERONA,)	
)	
RESPONDENT.)	

APPEARANCES:

Rowe, McMahon, Mc Keon & Curtin, by
Thomas R. Curtin, Esq., Kinnelon, New Jersey,
for Appellant

Robert J. Sussman, Esq., Bloomfield, New Jersey,
for Respondent

BEFORE THE HONORABLE EDWARD D. BESLOW, ADMINISTRATIVE LAW JUDGE, c/b

Two Gentlemen of Verona, Inc., t/a Liquor Locker (appellant), is the holder of Plenary Retail Distribution License No. D-4 issued by the Borough of Verona for premises located at 645 Bloomfield Avenue, Verona, New Jersey. By resolution adopted by the Mayor and Council of the Borough of Verona (respondent), after hearing on January 27, 1979, appellant's license was suspended for twelve (12) consecutive days, to commence on Sunday, February 4, 1979 and to run through Thursday, February 15, 1979, for the sale of one case of Michelob beer to a seventeen (17) year old minor in violation of N.J.S.A. 33:1-77.

Pursuant to the provisions of N.J.S.A. 33:1-31 and N.J.A.C. 13:2-17 et. seq., appellant appealed the respondent's decision and requested a stay of the suspension pending the determination of this appeal. Said stay was granted in an order signed on February 5, 1979, by Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control of the Department of Public Law and Safety.

In accordance with N.J.S.A. 52:14F-1, et. seq., this matter was forwarded to the office of Administrative Law for hearing. After proper notice, a hearing de novo was held, as provided for in N.J.A.C. 13:2-17.6, on March 26, 1979. Appearances are noted above.

In support of its actions, respondent relied on the testimony of Officer Michael Blazier, of the Borough of Verona Police Department, and Michael Malanga, the minor to whom the beer was allegedly sold.

Officer Blazier testified that on November 24, 1978, while on duty at 7:45 pm, he observed two (2) white males, one of whom was carrying a case of beer, leaving the appellant's premises. They proceeded to walk 35 to 50 feet from the door of the licensed premises to a parked station wagon which they entered, along with some five (5) other persons who met them there. The vehicle left the parking lot and Officer Blazier further testified that he followed it, always keeping it within his sight. When the station wagon stopped, he approached its left side whereupon he recognized the driver, Michael Malanga, as the person he saw leaving the licensed premises carrying the beer. An inspection of his driver's license revealed the age of Mr. Malanga to be seventeen (17). He verified this when verbally asked by Officer Blazier along with the fact that he had purchased the beer at appellant's premises. Mr. Malanga also indicated to the witness that no one in the vehicle was eighteen (18) years of age.

Officer Blazier stated that he took Mr. Malanga and Thomas DiNapoli, the second youth he had observed, into custody, and returned to the licensed premises. Looking into the store from the police car, Malanga was unable to identify the person who sold him the beer. Thomas Palazzo, appellant's owner and manager, was asked by Officer Blazier to approach the car but stated that he did not recognize the boys.

Mr. Malanga, who was approximately 6' 3" in height and weighed about 210 pounds on the evening in question, testified that he would not reach the age of eighteen until September of 1979. The witness, who had never previously entered the licensed premises, stated that on the evening of November 24, 1978, he presented himself on the premises and purchased a case of beer from a male employee. Although he did not produce any identification, Mr. Malanga was not certain if there had been a request to do so. He also testified that he entered the licensed premises alone as Mr. DiNapoli was already in the station wagon. Mr. Malanga further stated that he had not been charged with any juvenile violation and that his only previous appearance with regard to this matter was the public hearing held by the Borough of Verona on January 27, 1979.

Mr. Palazzo testified that on the evening in question, he was the only male on duty at the licensed premises and that he did not recall Mr. Malanga entering the establishment or selling him the beer. He further stated that, as the rear of the police car was dark, he could not see its occupants clearly. The witness testified that appellant has never had a disciplinary action brought against it since its operation began in April, 1974. He added that if Mr. Malanga presented himself at the licensed premises at the present time, he would not ask the youth for identification as he appears to be over eighteen (18) years of age. Mr. Palazzo concluded his testimony by stating that the suspension ordered by respondent took effect on Sunday, February 4, 1979, and that the licensed premises was closed that day and until 2:00 pm on Monday, February 5, 1979, at which time he received Director Lerner's order staying the suspension pending determination of this appeal.

As brought out in the statement of its counsel, appellant does not question that the sale did, in fact, take place. Rather, it argues that the penalty imposed on this small business, with a previously unblemished record, is unduly harsh in light of the surrounding circumstances. Appellant contends that the sale to Mr. Malanga was made in good faith based on the physical appearance of the youth. It also points out that the minor entered the licensed premises alone and that his car and the other youngsters were situated some distance away so that appellant's staff could not reasonably ascertain that there were minors present. Appellant emphasizes that no criminal prosecution was instituted against it in this matter and further contends that there was, at most, a technical violation of the statute caused by a mistake in judgment on the part of the appellant's owner.

N.J.S.A. 33:1-31 provides, in pertinent part that:

Any license, whether issued by the Director or any issuing authority, may be suspended or revoked by the Director, or the issuing authority, may suspend or revoke any license issued by it, for any of the following causes:

- a. Violation of any of the provisions of this chapter;
- g. Any violation of rules and regulations.

The sale of alcoholic beverages to minors is prohibited by N.J.S.A. 33:1-77 and N.J.A.C. 13:2-23.1. The statute, however, does provide the basis for a defense to this charge providing that the defendant show all of the following facts:

- (a) That the minor falsely represented in writing that he or she was of age;
- (b) That the appearance of the minor was such that a prudent person would believe him or her to be of age;
- (c) That the sale was made in good faith relying on such written representation and appearance and in reasonable belief that the minor was actually of age.
(Emphasis added)

The defense provided in this criminal statute has been held to be available in disciplinary proceedings before the Division. Sportsman 300 v. Board of Commissioner of the Town of Nutley, 42 N.J. Super 488 (App. Div. 1956).

As previously mentioned, Mr. Malanga testified at the hearing de novo and appeared to be a person who could pass for eighteen (18) years of age thereby establishing defense element (b) as set out above. As there is no doubt, however, that Mr. Malanga did not falsely represent his age in writing, defense elements (a) and (c) cannot be met and appellant, therefore, cannot sustain the burden imposed on it by the statute.

The sale of liquor has never been a business of right in this state. Grant Lunch Corp. vs. Driscoll, 129 N.J.L. 554 (E & A 1943), cert. denied 88 L.Ed 484, 320 U.S. 801 (1944). There is no common, inherent natural or constitutional right to a liquor license as it is but a privilege. Eskridge v. Division of Alcoholic Beverage Control, 30 N.J. Super 472 (App. Div. 1954). And, as the liquor industry has been described as a business attended with danger to the community which may be entirely prohibited or permitted under such conditions as will limit to the utmost its evils (Crowley v Christensen, 137 U.S. 86, 34 L.Ed. 620 (1890); In re Larsen, 17 N.J. Super 564 (App. Div. 1952), it has been held that the prevention of sales of intoxicating beverages to minors necessitates the most rigid control in order to protect our youth. Sportsman 300, supra.; Essex Holding Corp. v Hock, 136 N.J.L. 28 (Sup. Ct. 1947).

While violation of the Alcoholic Beverage Law may be criminally prosecuted, proper enforcement of that law requires that disciplinary proceedings be held (N.J.S.A. 33:1-31), with the primary responsibility for enforcement resting on the municipality. N.J.S.A. 33:1-24.

The fact that appellant's agent perceived Mr. Malanga to be of age does not, standing alone, constitute a defense for a sale to a minor. N.J.S.A. 33:1-77. It has been observed that there is nothing more highly speculating or uncertain than attempting to fix the age of a person by his or her appearance.

State v Koetiges, 69 N.J.L. 678 (E & A 1916). In the absence of a written statement, in a form such as that suggested in the Special Note to Note No. 5 in the Appendix to Chapter 2 of Title 13 of N.J.A.C., the appellant cannot sustain an adequate defense despite any good faith that might have been exhibited by its agents. As stated by the court in State v Conner, 149 N.J. Super 319-325 (Princeton Mun. Ct. 1977):

While the results are sometimes harsh when it appears, as in both cases here, the defendants acted in good faith and relied upon what they felt was a reasonable means of establishing age, the intent and purpose of the alcohol beverage laws are to restrict the use of alcohol rather (than) to provide a means of increasing its consumption. With that public policy clearly in mind, an individual engaged in the sale or dispensing of alcoholic beverage must operate within the restrictions and rigors of the law, notwithstanding his good faith attempts to comply in a manner which he personally may deem reasonable.

In Conner, the court determined that the defendants had not met the requirements set out in N.J.S.A. 33:1-77 even though they relied on false identification cards presented by the minors. The court held these cards, obtained through newspaper and magazine ads, were not proper written representation as contemplated by sub-section (a) of the statute. In the now pending matter, as mentioned above, there was a complete absence of any written representation made by the minor to appellant.

As it is evident that respondent determined the guilt of appellant by a preponderance of the competent evidence, the only remaining question is whether the twelve (12) day suspension imposed on appellant was justified. It is settled

law that the extent of any penalty imposed for violation of the Alcoholic Beverage Law or the regulations promulgated thereunder rests within the sound discretion of the adjudicating authority. Benedetti v Board of Commissioners of the City of Trenton, 35 N.J. Super 30 (App. Div. 1955); Mitchell v Cavicchia, 29 N.J. Super 11 (App. Div. 1953). On appeal, the exercise of that discretion will be interfered with only in case of manifest error, clearly unreasonable action or some more untoward impropriety. Nordco, Inc. v State, 43 N.J. Super 271 (App. Div. 1953). In light of the fact that there is a major public interest in protecting minors from the evils of intoxicating beverages, as noted above, and, as the appellant's owner himself testified that the area surrounding the licensed premises is frequented by youngsters, there is nothing in the record to indicate that the twelve (12) day suspension period imposed by respondent in this matter, is arbitrary, a result of manifest error or that it is unwarranted under the existing circumstances. (See Benedetti, supra.; Traymore of Atlantic City, Inc. v Hock, 9 N.J. Super 47 (App. Div. 1950).

Therefore, after consideration of the entire record in this matter, I FIND that:

1. Appellant is the holder of Plenary Retail Distribution License NO. D-4 issued by the Borough of Verona for premises located at 645 Bloomfield Avenue, Verona, New Jersey;
2. On January 27, 1978, the respondent, after hearing, found appellant guilty of selling one case of beer to a minor in violation of N.J.S.A. 33:1-17 and ordered that appellant's license be suspended for a period of twelve (12) days, commencing on Sunday, February 4, 1979, and running through Thursday, February 15, 1979;
3. The respondent's finding of appellant's guilt in this matter was supported by a preponderance of the competent evidence;
4. There is a great public interest in the prevention of sales of intoxicating beverages to minors which necessitates the most rigid controls;
5. The penalty imposed by respondent is not arbitrary or a result of manifest error and does not represent an abuse of its discretion;
6. The licensed premises was closed on Sunday, February 4, 1979, and from 9:00 am. to 2:00 pm. on Monday, February 5, 1979, at which time it received Director Lerner's order staying the suspension until the determination of this appeal.

CONCLUSION OF LAW

In view of the foregoing, appellant has not sustained the burden, as required by N.J.A.C. 13:2-17.6, of establishing that the action of respondent was erroneous and should be reversed. Therefore, the appeal of Two Gentlemen of Verona, Inc., t/a Liquor Locker, should be DENIED. As appellant was closed

on Sunday, February 4, 1979, and from 9:00 am. to 2:00 pm. on Monday, February 5, 1979, as a direct result of the imposed penalty, the Director of the Division of Alcoholic Beverage Control should order that the suspension of appellant's license be continued at 2:00 pm. on a Monday of the Director's choosing and run for ten (10) consecutive days thereafter.

This action can not be affected prior to the effective date of this order (45 days from the date of agency receipt of this order) unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I hereby file with the Director of Alcoholic Beverage Control my Initial Decision in this matter and the record is these proceedings.

DATE

EDWARD D. BESLOW, ALJ c/b

DATE

FOR AGENCY HEAD

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

of the appeal.

The appeal de novo was heard in this Division, pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses.

By way of background, the appellant was denied renewal of its 1977-78 license. On appeal to this Division, an Order reversing the action of the Board was entered subject to a special condition that there be provided a uniformed professional security guard from 7:00 p.m. until closing.

The Order was received (and was effective) April 1, 1978. The sole stockholder, Clarence Jones, immediately obtained the services of the required guard from an agency in the business of supplying security personnel. He reported three days and then failed to return. Inquiry ascertained that this Agency no longer desired to service the account. Jones then contacted other agencies without success.

On April 10th, realizing the seriousness of the problem, he contacted his attorney (Leonard Rubin) and placed the problem in his hands. Rubin wrote the Division that day explaining the problem and requested a hearing to modify the order.

The Director responded on April 18th, stating in pertinent part:

Any request for reconsideration of my Conclusions and Order dated February 10, 1978 must be commenced by the filing of a verified petition. This petition shall set forth the basis and reasons for your request, in detail, with documentary corroboration.

The respondent shall file its answer thereto within ten days. I shall determine the application on its pleadings, unless, for good cause, I set the matter down for further hearing.

On April 14, 1978, Rubin advised Frank Blatz, the City's Corporation Counsel, that security agencies who checked with the police were advised that the guard would have to be armed. There was nothing in the Order requiring an armed guard and Rubin felt that this was why Jones was having such difficulty in obtaining a security guard.

Rubin next wrote all nineteen security agencies listed in the yellow pages, some of which were solicited unsuccessfully by Jones previously. The bulk did not respond, and those that did declined the offer to supply the required guard. One of them gave Rubin the name of an agency not listed in the yellow pages.

Ultimately, this unlisted Agency supplied a guard but not before forty-nine days had elapsed during which the tavern was operating in violation of the special condition imposed by the Director in his Conclusions and Order.

The City instituted charges and appellant pleaded non vult which resulted in the imposition of the forty-nine days suspension.

The sole issue to be determined is whether or not this penalty was unduly harsh under the circumstances.

I have had two occasions to observe the sole stockholder of corporate licensee, Clarence Jones. I find him to be a reasonable, believable businessman operating a license under very trying conditions in the more depressed (economically) section of Plainfield.

He has attempted to maintain a lawful establishment in spite of a horde of loiterers that frequented the area near his premises. In recognition of his capabilities and the nature of the problem, the Director adopted the Hearing Officer's recommendation that a uniformed, professional security guard be provided as a condition of the license being renewed.

I find Jones exercised diligent efforts in an attempt to obtain the required guard. Realizing the seriousness of operating in violation of the order, though unintended, he took the most reasonable step that could be expected of the licensee, namely, consulting his attorney when it became apparent that his efforts were fruitless.

It should be noted too, that the police may have unwittingly exacerbated the problem by advising agencies

who made inquiry that an armed guard was needed, though not stated in Director's Order.

Under the circumstances, I find as a fact that the appellant has met the burden of establishing that the Council imposed too harsh a penalty, pursuant to N.J.A.C. 13:2-17.6, and recommend that the penalty of the Council be modified to a suspension of license for ten (10) days.

- II -

In Case No. 4251, the appellant appeals the refusal of the Council to renew its Plenary Retail Consumption License for the licensing period 1978-79. In its Resolution, dated July 3, 1978, the Council recites the following reasons for denial.

1. The continued operation of the establishment would be adverse to the public interest and to the general good/welfare of the area residents.

2. The renewal will create continued annoyances and disturbances to the many residents, including children, who live in and around and pass near the said premises.

3. Many citizens in the area, as well as religious and civic leaders, have voiced objections to the granting of the renewal.

4. Use of abusive language.

5. Littering

6. Loitering

7. Accosting of innocent passerby.

8. Gambling

9. Failure to continuously have a uniformed, professional security guard as

directed by the Director of the Division of Alcoholic Beverage Control, to patrol the outside and adjacent area; even when present, said security guard fails to curb the defined anti-social behavior.

10. Other similar acts offending the public sensibility.

11. The renewal of said license will not serve the public need and convenience.

The appellant contends that the action of the Council was arbitrary and capricious, not founded upon competent evidence and, lastly, excessive and unwarranted.

The Council, in its Answer, denies the substantial allegations contained in the appellant's Petition of Appeal, and reiterates the findings as set forth in the Resolution.

Upon the filing of the appeal, by Order to Show Cause, dated July 5, 1978, the Director granted ad interim extension of appellant's license pending determination of the within appeal.

The parties waived a de novo hearing, opting instead to submit the matter on the pleadings, transcripts and oral summations.

From documents and discussion with the attorneys the following chronology emerges.

At an agenda-fixing session prior to the public meeting, instructions were forthcoming to its attorney to prepare a resolution approving the renewal of the subject license.

At the regular Council meeting of June 19th, Councilman Robert Stout introduced a motion to separate subject's license renewal application from the forty-three others. He was joined by two councilwomen.

Since four affirmative votes are required to approve, the effect was to deny renewal. Stout gave as his reason numerous complaints from various residents of the area and the recent suspension of its license for forty-nine days

for failure to have a uniformed security guard posted for forty-nine evenings, as required under a special condition imposed upon the appellant by the Director of this Division.

On July 3, the Council issued a resolution denying the renewal application, setting forth as its basis the reasons set forth hereinabove.

No notice was given to the appellant that a hearing affecting its license would be held; no police, sanitation, housing authority or other officials gave testimony or submitted documents, no local residents or spokespersons or attorneys on their behalf appeared to oppose the renewal. The action is apparently based solely upon unsupported statements uttered by Councilman Stout.

The Resolution adopted closely resembles the charges preferred against this license last year and which was the subject of a Conclusions and Order almost one year ago.

The burden of establishing that the action of the Council is erroneous and should be reversed rests entirely with appellant, N.J.A.C. 13:2-17,6.

The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion, or unwarranted finding of fact, or mistake of law by the Council. Nordco, Inc. v. State, 43 N.J. Super. 277 (Ap. Div. 1957).

It is abundantly clear that the appellant has established that the Council's action was erroneous and unreasonable. Appellant was denied elemental due process.

It is, thus, recommended that the action of the Council be reversed and an order be entered directing the renewal of appellant's license for the current licensing period, subject to the special condition imposed for the 1977-78 license term.

Conclusions and Order

No written Exceptions to the Hearer's Report were filed by the parties pursuant to N.J.A.C. 13:2-23.17.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, and the Hearer's Report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 17th day of July, 1979,

ORDERED that on Appeal No. 4251, the denial of renewal of appellant's license for the 1978-79 license term be and the same is hereby reversed, and the Common Council of the City of Plainfield be and is hereby directed to renew the subject license for the 1978-79 license term in accordance with the application filed thereto, expressly subject to the special condition imposed for the 1977-78 license term; and it is further

ORDERED that on Appeal No. 4229, the action of the Common Council in finding appellant "guilty" of violation of special condition be and the same is hereby affirmed, but the suspension imposed is modified to ten (10) days; and it is further

ORDERED that my previous Orders of June 2, 1979 and July 5, 1979 staying the suspension and extending the subject license for the 1978-79 license term be and the same are hereby vacated; and it is further

ORDERED that any renewal or extension which may be granted for the 1979-80 license term of Plenary Retail Consumption License No. 2012-33-025-001 issued by the Common Council of the City of Plainfield to Queen City Lounge, Inc., t/a Queen City Lounge for premises 400 Liberty Street, Plainfield, which is now subject to an appeal from the revocation of its license by the Common Council and a stay order issued by the Director on May 23, 1979, be and the same is hereby suspended for ten (10) days commencing 2:00 A.M. Wednesday, August 8, 1979 and terminating 2:00 A.M. Saturday, August 18, 1979.


JOSEPH H. LERNER
DIRECTOR

APPENDIX

Technically, the stay of revocation Order dated May 23, 1979 only covers that period of time remaining in the 1978-79 license term, to wit, until June 30, 1979. There is no record that the appellant filed an appeal from a denial of an application to renew its license for the 1979-80 license term. The proper procedure is for an application for renewal,

with appropriate fees therefore, to be submitted to the local issuing authority for the 1979-80 license term. Upon the action taken thereon, the appellant can file an appeal. However, given the confusion that could exist by virtue of the stay of revocation order, I shall provide the parties with ten (10) days from the date of this Order to process and determine appellant's application for renewal.

The license of appellant shall lapse unless renewed by the issuing authority or extended by my Order upon the filing of an appeal from denial of renewal or refusal of the issuing authority to act. I specifically note that the special condition annexed to the license of appellant for the previous two license terms is in full force and effect despite the stay of revocation Order and failure to process the application for renewal for the 1979-80 license term. I have established the dates of the ten day license suspension to commence after the aforesaid ten (10) day period provided herein to act on the application for the 1979-80 license term.


JOSEPH H. LERNER
DIRECTOR