

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 2400

June 2, 1981

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1. COURT DECISIONS - MR. JON'S PUB, INC. v. PASSAIC - DIRECTOR AFFIRMED IN PART AND REMANDED IN PART.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-3349-79

MR. JON'S PUB, INC.,  
t/a GIANNI'S RISTORANTE,

Appellant,

v.

MUNICIPAL BOARD OF ALCOHOLIC  
BEVERAGE CONTROL OF THE CITY OF  
PASSAIC,

Respondent.

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Submitted February 9, 1981 - Decided February 20, 1981

Before Judges Pressler and Furman

On appeal from the Division of Alcoholic Beverage Control

Domonick Giordano, attorney for the appellant

Randolph A. Newman, City Prosecutor, attorney for the respondent

John J. Degnan, Attorney General, attorney for the Division of Alcoholic Beverage Control (Erminie L. Conley, Assistant Attorney General, of counsel; Kenneth I. Nowak, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

(Appeal from the Director's decision in Re: Mr. Jon's Pub, Inc. v. Passaic, Bulletin 2399, Item 2. Director affirmed in part and remanded in part.

2. APPELLATE DECISIONS - THE INTERLUDE, INC. v. PASSAIC.

#4442

The Interlude, Inc.,	:	ON APPEAL
	:	
Appellant,	:	CONCLUSIONS
	:	
vs.	:	AND
	:	
Municipal Board of Alcoholic	:	ORDER
Beverage Control of the City	:	
of Passaic,	:	
	:	
Respondent.	:	

-----  
 Dominick Giordano, Esq., Attorney for Appellant.  
 Randolph Newman, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Joseph Rosa, Jr., Administrative Law Judge

Dated: March 24, 1980.

Received: March 26, 1980

BY THE DIRECTOR:

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

While I concur in the ultimate conclusion arrived at by the Administrative Law Judge, I do not adopt his development of a policy concerning the relationship of N.J.S.A. 33:1-12.18 and N.J.S.A. 33:1-12.19.

A liquor license must be renewed annually. Applications by a licensee to renew its license must be filed by May 1st of any given year. N.J.S.A. 33:1-25. The local issuing authority has the ability to renew a license until July 30th of any such year. N.J.S.A. 33:1-12.13 and 12.26. A limited period of sixty (60) days is provided to permit the Director to review situations where a timely renewal application has not been filed. The Director can grant relief where the failure to timely renew was due to circumstances beyond the control of the licensee. N.J.S.A. 33:1-12.18. This sixty-day period always expires on September 28th of each year.

In short, the various cited provisions reflect a well-established time framework wherein an existing license can be, in effect, renewed for the next preceding license term. Paramount therein is the licensee's obligation to file an application for renewal with payment of appropriate fees within this time frame.

The provisions of N.J.S.A. 33:1-12.39 are not interrelated in the manner as advanced by the Administrative Law Judge. The effect of the interpretation advanced in the Initial Decision would abrogate the specific language and time frame set forth in N.J.S.A. 33:1-25, i.e., renewal applications must be filed by May 1st. It would also establish a "floating" time schedule for N.J.S.A. 33:1-12.13, 12.26 and 12.18.

Words alone do not control in the construction of a statute. It is the internal sense of the law which must be gathered and recognized. Laboda v. Clark Twp., 40 N.J. 424, 425 (1963); San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 155, (1958). And, in furtherance thereof, specific statutory language may be avoided to thwart a result not intended. State v. Madewell, 117 N.J. Super. 392, 394-95 (App. Div. 1971), aff'd 63 N.J. 506 (1973).

The "pocket license" law, N.J.S.A. 33:1-12.39 provides, in essence, a bar to renewal with relief provisions available upon petition to the Director. It does not bar the filing of an application to renew, even though said statute contains therein language to the effect that the relief the Director grants is to "authorize a further application for renewal".

An unforced and natural interpretation of these statutes, with the complete achievement of the objectives of all, can be obtained without the construction advanced in the Initial Decision. The procedural act of submitting an application for renewal must follow the specific statutes referable thereto. This provides a certainty to all involved and uniformity in application. If the particular retail license is subject to N.J.S.A. 33:1-12.39, action on the application is deferred until resolution of the petition for relief thereunder, or, in the alternative, the renewal is granted (assuming no other impediments or basis for objection) expressly subject to and conditioned upon a favorable ruling by the Director on the licensee's petition.

Having carefully considered the entire record herein, including the pleadings and exhibits submitted in lieu of testimony and the Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge, except as heretofore noted, and adopt same as my conclusions herein.

Accordingly, it is, on this 1st day of May, 1980,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic be and the same is hereby affirmed and the appeal be and is hereby dismissed.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

IN RE:

INITIAL DECISION

INTERLUDE, INC. )  
v. )  
PASSAIC )  
)

OAL DKT. No. ABC 5872-79

APPEARANCES:

Dominick Giordano, Esq. for the Appellant, Interlude, Inc.  
Randolph Newman, Esq. for the Respondent, Municipal Board of Alcoholic Beverage Control of the City of Passaic

BEFORE THE HONORABLE JOSEPH ROSA, JR., A.L.J.:

This is an appeal from an action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic, (hereinafter Respondent), which refused to accept the license renewal application of Interlude, Inc., (hereinafter Appellant). Respondent based its refusal to accept on a special ruling of the Director of the Division of Alcoholic Beverage Control dated October 29, 1979. On November 27, 1979, Appellant filed a notice of appeal with the New Jersey Division of Alcoholic Beverage Control appealing the action of the Respondent. Appellant contended that the actions of the Respondent were erroneous, that the determination was against the weight of the evidence, was contrary to the decisions of the Division of Alcoholic Beverage Control, was contrary to the law, and constituted an abuse of the discretionary power of the Respondent board, was arbitrary, capricious, and unreasonable. Respondent filed an Answer to the Petition of Appeal and the matter was then transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was scheduled for February 21, 1980, before Administrative Law Judge Joseph Rosa, Jr.

Prior to the hearing, by letters of the attorneys for the Respondent and Appellant, the parties agreed to have the matter submitted on the basis of the petition and the exhibits which were previously submitted to the Office of Administrative Law.

Relevant facts in this matter are as follows:

Appellant is the holder of plenary retail consumption license No. 1607-32-166-002, heretofore issued by the Municipal Board of Alcoholic Beverage Control of the City of Passaic. Said license was last renewed for the 1978-79 license year. Petitioner acquired its license in September 1968, and operated the licensed premises until February 1977 when the building housing the licensed premises was completely destroyed by fire. The licensed location was not rebuilt by the Appellant's landlord. The Appellant made an effort to relocate the license without success, and then sought a purchaser of the license, also without success.

Pursuant to N.J.S.A. 33:1-12.39, when the time came for the renewal of the license for the 1979-80 term, the Appellant applied to the Director of the Division of Alcoholic Beverage Control for a finding of a good cause. In a special ruling, dated June 29, 1979, the Director of the Division of Alcoholic Beverage Control found good cause to renew and directed the Respondent to renew the license for the 1979-80 license term, upon the filing of the appropriate license application and payment of the fees as required by law. It should be noted, however, that the Director in this special ruling erroneously, and without basis in law, also found good cause for the renewal of the license in the 1980-81 license term. This however was later corrected in a second special ruling, dated August 9, 1979 in which the Director limited the good cause renewal for the subject license to the 1979-80 license term.

The licensee, at that point in time, was represented by a Jack Krakauer, Esq., of the City of Passaic, New Jersey. Mr. Krakauer was, at the time, under criminal indictment, and was subsequently suspended from the practice of law, effective August 13, 1979. The licensee claims that he was not aware of either of the special rulings issued by the Director until he "picked up" his file from Mr. Krakauer's office on October 9, 1979. The licensee further claims that on September 28, 1979, he inquired about the status of his license from the Respondent and was told that he was required to file his application for renewal on that same date.

The Appellant, on October 1, 1979, attempted to file his application for renewal, for the 1979-1980 term, but the application was refused by the Respondent. On October 10, 1979, the Appellant filed a letter with the Director of the Division of Alcoholic Beverage Control setting forth the reasons for his late application. On October 29, 1979, the Director of the Division of Alcoholic Beverage Control issued a letter ruling (J-1 attached hereto) stating that he had no jurisdiction in the matter, and would not direct the local issuing authority to accept the renewal application. Appellant on November 14, 1979, again attempted to file an application for renewal of his plenary retail consumption license for the 1979-80 term, but the application was again refused. A copy of the refusal of the local board of November 16th is attached hereto and marked as J-2.

The licensee filed an appeal from the action of the local issuing authority in refusing to accept the renewal application. As heretofore mentioned, the parties hereto have agreed to have the matter decided upon the basis of the documents already filed.

After a careful review of the documents submitted in this matter, I FIND:

1. Appellant is the holder of plenary retail consumption license No. 1607-32-166-002, heretofore issued by the Municipal Board of Alcoholic Beverage Control of the City of Passaic.

2. Appellant's license was last actively used in connection with the licensed premises in February, 1977.
3. Appellant applied to the Director of the Division of Alcoholic Beverage Control, and received, good cause authorization, as authorized by N.J.S.A. 33:1-12.39 for renewal of its plenary retail consumption license for the license year 1979-80, by a special ruling of the Director dated June 29, 1979.
4. The special ruling of the Director was superseded by a second special ruling dated August 9, 1979, which again found good cause for the renewal of the subject plenary retail consumption license for the license year 1979-80.
5. The licensee was never notified of these special rulings by his attorney.
6. The attorney for the licensee at the time of the special rulings was Jack Krakauer, Esq.
7. On, or about August 13, 1979, Jack Krakauer was under criminal indictment, and was subsequently suspended from the practice of law.
8. On, or about September 28, 1979, the licensee inquired of the local alcoholic beverage control board of the status of his license, was told that he was required to file his application for renewal on the same date.
9. The Appellant, on October 1, 1979, attempted to file his application for renewal of his license for the 1979-80 license term but said application was refused.
10. On October 29, 1979, by letter memorandum, the Director of the Division of Alcoholic Beverage Control refused to authorize the renewal of the Appellant's plenary retail consumption license.
11. Appellant again, on November 14, 1979, attempted to file an application for renewal of his plenary retail consumption license for the 1979-80 term, and said application was again refused by the secretary of the local issuing authority.

In view of the foregoing, I CONCLUDE that Appellant has not shown that the actions of the Respondent were without basis in law and should be overturned.

The original power to pass on the application for plenary retail distribution license resides in the local municipalities. W.C. 3, Inc. v. Twp. Committee of Washington Twp., 142 N.J. Super. 291 (1976), N.J.S.A. 33:1-19. Each municipal governing body has a wide discretion in the issuance or transference of liquor licenses. Their actions, however, are subject to the review of the Commissioner of Alcoholic Beverage Control for the control of any abuse. Passarella v. Bd. of Commissioners of Atlantic City, 1 N.J. Super. 313 (App. Div. 1949). Whether or not the license should be renewed rests in the sound discretion of the issuing authority, and the licensee has no vested right to renewal. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946). The rights of the local municipality, however, are not unlimited. Although their decisions regarding licensure will be accepted, absent a clear abuse or unreasonable or arbitrary exercise of their discretion, Lyons Farm v. Municipal Board of A.B.C. of the City of Newark, 55 N.J. 292 (1970), Fanwood v. Rocco, 33 N.J. 404 (1960) and Nordco, Inc. v. State of New Jersey, 43 N.J. Super. 277 (App. Div. 1977), it has been held that a liquor license in New Jersey once granted, "is protected against arbitrary revocation, suspension, or refusal to renew." The Boss Co., Inc. v. Board of Commissioners of Atlantic City, 40 N.J. 379, 384 (1963), see also Blanck v. Mayor and Borough Council, 38 N.J. 484, 489 (1962); N.J.S.A. 33:1-22, 33:1-31. It thus becomes incumbent in the present matter to ascertain whether or not the refusal to accept the renewal application of the licensee was arbitrary on the part of the local issuing authority.

The local issuing authority based their refusal to renew entirely on the October 29, 1979 letter of the Director of the Division of Alcoholic Beverage Control. Licenses must ordinarily be renewed prior to their expiration date or "not later than 30 days after" the expiration date. N.J.S.A. 33:1-12.13. If a licensee fails to apply for renewal within this period of time, the license may only be renewed if the licensee files an application within 60 days after the 30 day expiration period to the Director, and shows that the "applicant's failure to apply for renewal of his license was due to circumstances beyond his control." N.J.S.A. 33:1-12.18. In the present matter, the Director, in his letter of October 29, 1979, felt that any application made after September 28, 1979 was outside of the scope of the Director's authority to extend the application, and similarly outside the authority of the local authority to accept such application. This is not, however, a regular license renewal. Reference, in this matter, must be made to N.J.S.A. 33:1-12.39. N.J.S.A. 33:1-12.39 provides that a license may not be renewed if it has not been actively used in connection with the operation of a licensed premises within a period of two years prior to the commencement date of the license period for which the renewal application was filed, unless the Director has found, after a hearing, good cause, for its non-use. There is an exception for non-use, in the statute, which is non-use as a result of eminent domain, fire, or other casualty. This statute, N.J.S.A. 33:1-12.39, must be read in conjunction with the License Renewal Act, N.J.S.A. 33:1-12.13-33:1-12.22.

"The legislative enactments constituting our alcoholic beverage law are statutes in pari materia and they must be considered and interpreted together; conjunctively, they represent a unified state policy." Seip v. Mayor, etc. of French Town, 79 N.J. Super. 521, 523 (App. Div. 1963); See also Clifton v. Passaic County Board of Taxation, 28 N.J. 411, 421 (1958).

Therefore, the local issuing authority could not renew the subject liquor license unless the licensee had, prior to application, filed and received a good cause authorization from the Director pursuant to N.J.S.A. 33:1-12.39. Unless such action was taken by the licensee, any action by the local issuing authority, unless at a future date the Director were to enter a nunc pro tunc order, would be a nullity, in that it would be renewing a license that was not in existence. As such the license would be considered improvidently granted and would be subject to cancellation. Cf. Liptak v. Division of Alcoholic Beverage Control, 44 N.J. Super. 140 (App. Div. 1957).

Reading the statutes in pari materia would lead to the conclusion that the 30 and 60 day periods of time for renewal should not begin to run until such time as the Director has issued an Order stating that there was good cause for the previous non-use of the license. To do otherwise would be to render N.J.S.A. 33:1-12.39 partially nugatory.\*

In the instant matter, the Director initially issued his finding of good cause on June 29, 1979. His finding of good cause was supplemented and amended by special ruling dated August 9, 1979. The time periods of renewal therefore begin to run from this latter date since the local authority could not renew the license prior to this finding of good cause on August 9, 1979. The expiration date therefore for action by the local issuing authority would have been September 8, 1979, and the expiration date for subsequent action by Director would have been November 7, 1979. Since the licensee made application for renewal on October 1, 1979, which was beyond what would have been the 30 day period for license acceptance by the local issuing authority, he was then required to file with the Director for an extension pursuant to N.J.S.A. 33:1-12.18. On October 10, 1979, the licensee, through its then attorney, Dominick Giordano, Esq.,

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\*If, for example, a licensee were to apply for good cause authorization on June 1, 1979 and if the decision on good cause were not rendered until after September 29, 1979, the licensee would be precluded from renewal even though he complied with the statutory procedure. Similarly, any decision rendered after June 30th would result in a shortened period of time for application.

set forth, to the Director, the reasons beyond his control for non-application during the initial 30 day period. If the reasons for non-application were beyond the licensee's control, then the local board should be directed to accept the application.

In the present matter, I FIND and CONCLUDE that the reasons for non-application during initial 30 day period, August 9, 1979 to September 8, 1979, were not beyond the licensee's control.

The client and his attorney have a fiduciary relationship which is founded on the trust or confidence of the client in the integrity and ability of the attorney. The client is ordinarily bound by the mistaken procedural determination of their counsel. Alberti v. Civil Service Commission, 41 N.J. 147, 155 (1963). An attorney's failure to comply with the rules must be imputable to the client if the rules are to have any significance and are to be respected. Pagano v. Crispy Kernels, Inc., 10 N.J. Super. 588, 591 (Law Div. 1950). This general rule of procedural requirement has also been held to apply to criminal cases. For example, in State v. Newman, 36 N.J. Super. 506, 510 (App. Div. 1955), it was held that the client was bound by his attorney's failure to file a notice of appeal within the applicable statutory time frame.

In the present matter, it is clear that the licensee's difficulty emanated from his selection of Mr. Krakauer as his attorney, and was compounded by his failure to exercise due diligence in the inquiry about the renewal of his plenary retail consumption license. Although the liquor industry is a "rather sophisticated business", Cf. Barr v. Phillipsburg, Bulletin 2316 No. 1., the annual renewal of the liquor license at a specified time of year, is not such a complex and arcane matter filled with procedural difficulties, (as, for example, one encounters in a liquor license transfer), that an ordinary layman cannot realize that it must be renewed within a specified period of time. In the present matter, the licensee was obviously aware of the question of renewal as is demonstrated by his appearance at the office of the Clerk of the Respondent on September 28, 1979. This appearance, in and of itself, some 58 days after the expiration of the prior liquor license leads to the inescapable conclusion that the licensee was dilatory in regards to a valid asset which he owned. Even if he were not able to contact his attorney within this 58 day period, I FIND and CONCLUDE that he should have contacted the local issuing authority sooner than 58 days after the expiration of the prior license. To now state that his difficulties result totally from the actions of an incompetent attorney, are contrary to alcoholic beverage law. "Having selected another to manage his affairs, he cannot avoid the concomitant assumption of liability for his agent's acts." In Re Schneider, 12 N.J. Super. 449 (App. Div. 1951); and V-Bar, Inc., Bulletin 2259, No. 5. His lack of diligence in inquiring from the local board as to the status of his license resulted in the situation in which he now finds himself.

I therefore FIND and CONCLUDE that although the licensee has applied to the Director within the required extended period

of time and has complied with the statutory scheme, considering N.J.S.A. 33:1-12.13 to N.J.S.A. 13:1-12.22; he has not demonstrated that the failure to renew within the extended 30 day period of time was because of circumstances beyond his control as required by N.J.S.A. 33:1-12.18.

I further FIND and CONCLUDE that the actions of the municipal board in not accepting the license application of the Appellant were not arbitrary and capricious.

For the foregoing reasons, IT IS HEREBY ORDERED that the petition to renew the Appellant's plenary retail consumption license be and the same is hereby DENIED.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with Joseph W. Lerner, Director, my Initial Decision in this matter and the record in these proceedings.

3. APPELLATE DECISIONS - THE HAVEN CORPORATION v. CLIFFSIDE PARK.

#4448

The Haven Corporation,	:	ON APPEAL
t/a Papa Bears Pub,	:	
	:	
Appellant,	:	CONCLUSIONS
	:	
vs.	:	AND
	:	
Mayor and Council of the Borough	:	ORDER
of Cliffside Park,	:	
	:	
Respondent.	:	

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Ronald V. LoLordo, Esq., Attorney for Appellant.  
Joseph Clark, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Sybil R. Moses, Administrative Law Judge

Dated: March 28, 1980

Received: March 31, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were filed by the parties hereto pursuant to N.J.A.C. 13:2-19.6.

Having carefully considered the entire record herein including the transcript of the testimony, the exhibits and the Initial Decision below, I concur in the findings contained in the Initial Decision and adopt them as my conclusions herein.

I make the following comments, however, with respect to the Initial Decision.

The Administrative Law Judge states "the grant or denial of an alcoholic beverage license rests in the sound discretion of the Mayor and Council in the first instance. In order to prevail in this appeal, appellant must show arbitrary, capricious or unreasonable action on the part of the Council, constituting a clear abuse of such discretion." While this sets forth a fundamental principle of Administrative law, it is neither relevant nor applicable to the matter sub judice. This is an appeal from the action of the Borough Council in disciplinary proceedings. Thus, "discretion" plays no part in the determination of the issues here; it is strictly factual. "If the evidence is not there, no amount of discretion can supply the deficiency." Fanwood v. Rocco, 59 NJ Super. 306 at p. 317 (App. Div. 1960). Thus, the appellant must establish that the action of the Council was erroneous and should be reversed. N.J.A.C. 13:2-17.6. The applicable test is whether the action of the respondent is supported by substantial credible evidence, Hornauer v. Div. of Alcoholic Beverage Control, 40 NJ Super. 501. I am satisfied from the factual findings of the Administrative Law Judge that the determination was supported by substantial evidence, i.e., that a reasonable man upon consideration of the entire record could reasonably have concluded that the violations did in fact occur. Hornauer, supra at page 504. See also Atkinson V. Parsekian 37 NJ 143, 149 (1962).

One further comment: it is clear that the appellant allowed, permitted and suffered the act of violence and brawl in its licensed premises. Its employees knew well in advance of the incident on that evening of Ms. Osborne violent tantrum prior to the episode in question and it became its duty to see to it that this individual was requested to leave but should have been barred from the premises.

It is equally apparent that alcoholic beverages were served and consumed after hours in violation of the local ordinance. I am persuaded that the penalty imposed was reasonable under the facts and circumstances herein. See Pilon v. Paterson, 112 NJ Super. 436 (App. Div. 1970). Sventy and Wilson, Inc. v. Pt. Pleasant Beach, Bulletin 1930, Item 1; F & A Distr. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961).

Accordingly, it is, on this 5th day of May, 1980,

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

ORDERED that Plenary Retail Consumption License No. 0206-33-023-001 issued by the Mayor and Council of the Borough of Cliffside Park to The Haven Corporation, t/a Papa Bears Pub for premises 512 Anderson Avenue, Cliffside Park be and the same is hereby suspended for twenty (20) days effective 3:00 a.m. on Friday, May 16, 1980 and terminating 3:00 a.m. on Thursday, June 5, 1980.

JOSEPH H. LERNER  
DIRECTOR

INITIAL DECISION

THE HAVEN CORPORATION,  
T/A PAPA BEAR'S PUB

vs.

BOROUGH OF CLIFFSIDE PARK

OAL DKT. NO. A.B.C. 0190-80

AGENCY DKT. NO. APPEAL # 4448 -  
MUN. REV. # 7481

APPEARANCES:

Ronald Vincent LoLordo, Esq.  
for Appellant, The Haven Corp.  
t/a Papa Bear's Pub

Joseph Clark, Esq.  
LEIBOWITZ, LEIBOWITZ & CLARK  
for Respondent, Mayor and Council  
of the Borough of Cliffside Park

BEFORE THE HONORABLE SYBIL R. MOSES, A.L.J.:

This is an appeal from an action of the Mayor and Council of the Borough of Cliffside Park which, by Resolution and Order dated December 19, 1979, suspended Appellant's plenary retail consumption license, #0206-33-023-001, for a period of twenty (20) days, effective January 1, 1980 at 5:00 a.m. That license is issued to The Haven Corp., t/a Papa Bear's Pub, 512 Anderson Avenue, Cliffside Park, New Jersey. Upon the filing of the petition of appeal on December 27, 1979, the Director of the Division of Alcoholic Beverage Control granted a stay of the order of suspension pending determination of this appeal.

Appellant contends that the action of the Council was arbitrary, capricious and unreasonable and deprived Appellant of due process of law. The Council denied that the action of the Mayor and Council was erroneous and contends that there is more than enough sufficient and competent evidence in the record to support its Resolution and Order. It therefore asks that the license suspension be affirmed.

The suspension was voted after a hearing before the Mayor and Council of the Borough of Cliffside Park on December 17, 1980. At that hearing, the Mayor and Council heard testimony and made findings of guilty in regard to the charge of allowing the premises to be open after the 3:00 a.m. closing time on December 18, 1978, in violation of section 5-4.1 of the General Ordinances of the Borough

of Cliffside Park and in regard to the charge that the licensee allowed, permitted or suffered in or upon the licensed premises an act of violence, a brawl or disturbance on October 12, 1979, in violation of N.J.A.C. 13:2-23.6.

The appeal from that determination was heard, de novo, on Tuesday, February 26, 1980, Bergen County Courthouse, Hackensack, New Jersey. This Judge determined that evidence would be taken separately in regard to each of the charges set forth above. The Borough presented all of the testimony at the de novo hearing.

The Borough presented four witnesses in the matter of the violation of Municipal Ordinance 5-4.1, which prohibits sale, delivery, service or consumption of alcoholic beverages in any licensed premises between 3:00 a.m. and 6:00 a.m. The first witness was Patrolman Thomas Reuther, Cliffside Park Police Department, who testified, that on December 18, 1978, at 3:50 a.m., he passed Papa Bear's Pub. Patrolman Reuther saw, through the front window, three people, two sitting on stools and one behind the bar. His partner, Patrolman Aurelio, knocked on the door. As he knocked, Patrolman Reuther saw the two people sitting at the bar leave. The bartender opened the door after approximately five minutes and when asked where the people were responded, "What people?" (T-6, L-6). Patrolman Reuther testified that one of the parties, Mr. Spivey, was found in the ladies room. He also testified that the other party, Mr. Marcum, was found in the basement hiding under the desk. This person said he was told to hide in the basement by the bartender (T-6, L-11 and 12).

Cross examination of Patrolman Reuther revealed that the bar had the window drapes open and the lights on after closing so the police could look in. Both Mr. Spivey and Mr. Marcum are bartenders in the Borough of Cliffside Park. Patrolman Reuther's testimony was unequivocal during cross examination, that he saw the bartender, a Mr. Brett, take two drinks from the people who were sitting at the bar.

Patrolman Harold Aurelio also testified on behalf of the Borough of Cliffside Park. He corroborated the testimony of Officer Reuther in every respect. Patrolman Aurelio testified that Mr. Brett insisted there was nobody in the bar until he was told that the policemen had seen two men in the bar. It was only at that time that the bartender revealed that Mr. Spivey was in the bathroom (T-13, L-23). Patrolman Aurelio testified that the bartender continued to say there was no one else in the place (T-14, L-2). Despite that a Mr. Marcum was found in the basement, who told Patrolman Aurelio that Mr. Brett told him to go into the cellar and hide (T-14, L-17-20).

Eugene Brett, the bartender on the night in question, testified that he was employed on December 18, 1978 and that there were two people in the bar after 3:00 a.m., a Mr. Spivey and Mr. Marcum, who are also bartenders in Cliffside Park. Brett said he was aware that 3:00 a.m. is closing time and served no drinks after that time. He testified that the two men were in the bar because Mr. Marcum had come to give him a ride and Mr. Spivey was helping him clean up. Mr. Brett testified he was the one that told the police that Spivey was in the bathroom and Mr. Marcum was downstairs.

Cross examination by the Licensee's attorney revealed that the bartender opened the windows, turned on the inside lights and locked the door after the last call at 2:40 a.m. The purpose of opening the window curtains was to allow the police to look in. Mr. Brett said there was no money in the register when the police entered and that he was doing nothing but cleaning up after 3:00 a.m. He asserted it is not unusual for an employee to be in the bar as late as ten to four. In Mr. Brett's opinion the 3:00 a.m. closing time means no sales and no one on the premises.

James Spivey testified he was in Papa Bear's Pub at 3:50 a.m. on December 18, 1978, having arrived at 2:15 a.m. and had a few drinks until 2:45 a.m. He then helped Mr. Brett clean up and fill the beer boxes. Mr. Spivey testified when he saw the police looking in, he went to the ladies room, which he was planning to do anyway. He said Mr. Marcum went downstairs to get aspirin. It was Mr. Spivey's contention no drinks were had after 3:00 a.m.

The Borough then rested in regard to this charge. The licensee did not present any testimony concerning the charge of serving alcoholic beverages after 3:00 a.m. There was legal argument as to the meaning of a 3:00 a.m. closing time and as to the allegation that the licensee was denied due process because the hearing was held one year after the incident occurred.

Testimony was then heard on the charge of a brawl on the premises on October 12, 1979. The Borough of Cliffside Park presented five witnesses with relevant testimony. Patrolman Gerard Winters, a Cliffside Park Policeman for ten years, testified he was on routine patrol at 3:00 a.m. on October 12, 1979 when he investigated a group of five men arguing in loud voices in front of Papa Bear's Pub. He went into the bar and saw the barmaid, one Irene Bruno. When he returned outside three men were still there; Mr. Goodwin, Mr. Spivey and Mr. Brett. Patrolman Winters learned that Mr. Brett had an argument in the tavern with a woman, later identified as Susan Osborne, where the two of them were rolling on the floor. The woman then ran out and took off in her car. Patrolman Winters testified he saw Mr. Brett swaying and holding his stomach. When he looked, he saw a puncture wound in his stomach from a knife. Brett refused medical attention at a local hospital and was brought to headquarters. He was then released in the care of his brother and the owner of Papa Bear's, who took him to another hospital.

Cross examination only revealed that the officer did not actually see the fight, but arrived simultaneously with the shouting.

Patrolman Carl Lupica was also on duty on the evening of October 12, 1979, 12:00 to 8:00 a.m. shift. He testified he went to Papa Bear's Pub as a backup because of the loud noise of the group that was heard by Patrolman Winters. He observed Winters talking to five men on the sidewalk and saw Mr. Brett holding his side with blood on his shirt. Patrolman Lupica said he took Mr. Brett in the police car to a nearby hospital where Brett refused medical attention. At headquarters Brett refused to sign a complaint as well. Cross examination revealed that the police signed a complaint against Susan Osborne for negligent assault, in violation of N.J.S.A. 2C:12-1.

Mr. Brett testified in regard to this charge that he went to Papa Bear's to have a few drinks until 2:45 a.m., not to work. Mr. Spivey was tending bar that night. Mr. Brett said he was on his way to the men's room when he was nudged by another man, then bumped into Susan Osborne and then said "Excuse me." It was Brett's testimony that the woman swore and grabbed his arm. He felt a sharp punch in the stomach and saw her hand came up with a knife. Mr. Brett grabbed the knife and began rolling on the floor with her. The incident happened very, very quickly and she immediately ran out of the bar, got in her car and drove away while running over Mr. Spivey's foot. (See T-50, L-14-25, T-51, L-1-10) Mr. Brett testified the wound didn't look so bad which is why he refused treatment at Palisades General Hospital. However, when he went to Holy Name Hospital he learned that surgery was required because the knife penetrated five and one half to six inches. He stayed in the hospital ten days. Mr. Brett also testified that Irene Bruno was not employed by Papa Bear's, but dates Mr. Spivey and is a regular patron there. He testified that Mr. Spivey tried to break up the fight while Mr. Hill, another patron, grabbed the knife.

On cross examination by the licensee's attorney, Mr. Brett said the incident happened spontaneously and that if one were at the other end of the bar, one could not hear or know what was happening. Susan Osborne was found guilty in Cliffside Park Municipal Court of negligent assault and was sentenced to one year probation and a \$500 fine, which was suspended.

Irene Bruno testified that she was in Papa Bear's at 3:00 a.m. on October 12, 1979 when she saw and heard a crash. She saw Mr. Brett and a girl fall to the floor. She had previously seen him bump into the girl. Mr. Spivey, the bartender, ran over and broke up the fight. Ms. Bruno saw blood on the side of Mr. Brett's face and saw the girl run out and take off in her car, running over Mr. Spivey's foot. Ms. Bruno stayed in the bar to clean up while Mr. Spivey went out and got the police.

Ms. Bruno testified that she had noticed the girl, Susan Osborne, earlier that evening because she had caused some trouble. The witness said that at about 10:30 p.m., Susan Osborne spilled a drink on a girlfriend and that words were exchanged between the two women. Ms. Osborne did not seem intoxicated to Ms. Bruno. Mr. Spivey did not investigate the incident. Mr. Brett was stabbed at 3:00 a.m. at which time, Ms. Bruno said, Susan Osborne had been there four to five hours. Cross examination was brief and only revealed that the spilled drink incident calmed down very quickly.

The final witness presented by the Borough was Mr. Spivey. In his opinion it was 1:30 a.m. when Susan Osborne came into the bar with a Barbara Nelson. They sat by themselves and had one drink apiece. About 2:15 a.m. Susan asked for another drink. The two women were arguing and Ms. Osborne proceeded to dump her drink over the head of Barbara Nelson. Mr. Spivey testified he asked them both to leave and that Ms. Nelson left but Ms. Osborne continued to sit at the bar and use bad language. Mr. Spivey threatened to call the police if she didn't leave. The stabbing of Mr. Brett by Ms. Osborne occurred almost instantly after he threatened to call the police if she did not leave. Mr. Spivey said he broke up the fight and ran after Susan Osborne to hold her, and thus did not immediately call the police.

The list of evidence introduced at the hearing is appended to this decision.

The Borough of Cliffside Park rested at the conclusion of all the testimony. The Appellant/Licensee also rested without presenting any witnesses.

Legal argument was then held wherein the licensee asked the court to reverse the finding of the Cliffside Park Mayor and Council because Ms. Osborne was convicted in the Municipal Court of negligent assault while a violation of N.J.A.C. 13:2-23.6 requires a showing of intent by the licensee. Counsel argued there was no intentional sufferance here of a brawl but that a quick incident had occurred almost immediately after a threat of the bartender to call the police. Counsel argued the bartender could not have foreseen the spontaneous incident and could not foresee the negligence of Ms. Osborne.

The attorney for Cliffside Park argued that this unseemly act took place after the licensee's bartender has received sufficient notice of Ms. Osborne's actions in order for him to call the police and to remove Ms. Osborne, and by not doing so he suffered an act of violence in and upon the premises.

All the witnesses were presented by the Borough of Cliffside Park. This court found the police officers credible, sincere and honest, striving to be fair in their testimony and endeavoring to recollect to their best ability what occurred

on the two nights in question. The other witnesses who testified were the principals in the events in question and were either patrons or employees, or both, of Papa Bear's Pub. After having observed all of the witnesses and having considered the entire record, including the testimony and exhibits submitted into evidence, and having read the transcript, together with the arguments of counsel, the court makes the following findings of fact:

1. The Haven Corporation, t/a Papa Bear's Pub, is the holder of a plenary retail consumption license #0206-33-023-001 in the Borough of Cliffside Park, New Jersey.
2. On December 18, 1978 three persons were in Papa Bear's Pub at 3:50 a.m.
3. Patrolmen Reuther and Aurelio saw these persons through the front window which had its curtains open. Two of them were sitting on stools and one was behind the bar.
4. As Patrolman Aurelio knocked on the door both persons sitting left the bar. It took the bartender a long time to open the bar and he refused to tell the policemen where the people were.
5. One party, Mr. Spivey, was in the ladies room and the other party, Mr. Marcum, was in the basement hiding under the desk where he had been told to go by the bartender.
6. There were drinks in front of the people who were sitting at the bar at 3:50 a.m.
7. Alcoholic beverages were being served and consumed on the premises of Papa Bear's Pub between 3:00 a.m. and 6:00 a.m. on December 18, 1978, contrary to the General Ordinance, Section 5-4.1, Borough of Cliffside Park.
8. On October 12, 1979 Ms. Susan Osborne was in Papa Bear's Pub with a friend, Ms. Nelson, for several hours.
9. During that period of time Ms. Osborne engaged in an argument with her friend, where she spilled a drink on her head and words were exchanged. The bartender, Mr. Spivey, did not investigate the incident.
10. Mr. Eugene Brett was drinking at Papa Bear's Pub on October 12, 1979 during the early hours of the morning.
11. At about 2:45 a.m., on his way to the men's room, he bumped into Susan Osborne and said, "Excuse me".
12. Ms. Osborne swore, grabbed his arm and stuck a knife in his stomach.
13. Mr. Brett fought with Ms. Osborne on the floor and grabbed the knife away from her.

14. The knife penetrated Mr. Brett's stomach for five to six inches and surgery was required.
15. Immediately after the incident Ms. Osborne drove away from the bar.
16. Mr. Spivey did not threaten to call the police after the incident where Ms. Osborne spilled the drink because it had calmed down quickly.
17. The bartender had received sufficient notice of Ms. Osborne's violent tendencies prior to the knifing episode in question in order for him to ask her to leave and thus not allow an act of violence upon the premises.
18. The licensee allowed and/or suffered an act of violence, a knifing, on its premises on October 12, 1979.

The grant or denial of an Alcoholic Beverage License rests in the sound discretion of the Mayor and Council in the first instance. In order to prevail in this appeal, Appellant must show arbitrary, capricious or unreasonable action on the part of the Council, constituting a clear abuse of such discretion. Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Mayor and Council of Magnolia, 33 N.J. 484 (1962). The burden of proof in establishing that the action of the Mayor and Council of the Borough of Cliffside Park was erroneous rests entirely with the appellant, N.J.A.C. 13:2-17.6, Downey v. Summerdale, 44 N.J. Super. 84 (App. Div. 1957), Nordco Inc. v. State, 43 N.J. 277 (App. Div. 1957). The decision of the Mayor and Council should not be reversed unless the court finds as a fact that there was a clear abuse of discretion, or unwarranted finding of fact or mistake of law by the Council (see Nordco, supra.).

It is clear that the responsibility of a licensee to maintain its premises in an orderly and lawful fashion includes the duty to take affirmative action to prevent violence, brawls or other types of action which would be contrary to the administrative regulations, and also to conform to the local ordinances. See Lions Farm Tavern v. The Municipal Board of Alcoholic Beverage Control, Newark, 55 N.J. 292 (1970). The licensee is responsible for conditions inside and outside his premises that are caused by the patrons or by his employees.

The Licensee was entitled to present new evidence during the de novo hearing, as stated in N.J.A.C. 13:2-17.6. He chose not to present any witnesses and the evidence which the Borough of Cliffside Park presented is uncontroverted. I therefore CONCLUDE that there is more than enough substantial evidence in the record before me to support and justify the decision of the Mayor and Council of the Borough of Cliffside Park, acting in a reasonable exercise of their discretion, to suspend the plenary retail consumption license of The Haven Corporation, t/a Papa Bear's Pub, 512 Anderson Avenue, Cliffside Park, New Jersey, for 20 days.

Accordingly, it is HEREBY ORDERED that the suspension of the license of Papa Bear's Pub by the Mayor and Council of the Borough of Cliffside Park for a period of 20 days be AFFIRMED.

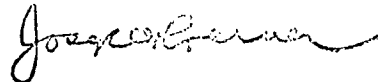
This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

JOSEPH H. LERNER  
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Parfam Enterprises Inc.  
t/a Union Beverage  
1025 John Street at Union Ave.  
Linden, New Jersey  
Application filed May 27, 1981  
for person-to-person transfer  
of a state beverage distributor's  
license from Union Beverages Inc.

  
Joseph H. Lerner  
Director