

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2474

SEPTEMBER 30, 1997

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New Jersey Department of Law & Public Safety

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2474

SEPTEMBER 30, 1997

1. NOTICE AND ORDER TO SOLICITOR PERMITTEES.

NOTICE AND ORDER TO SOLICITOR PERMITTEES
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
P.O. BOX 087, TRENTON, NEW JERSEY 08625

NOTICE AND ORDER TO SOLICITOR PERMITTEES

The Division has received an inquiry regarding situations where a solicitor or applicant for a solicitor's permit has an immediate family member who holds an interest in a retail license. For purposes of this inquiry, an "immediate family member" is a spouse, child, father, mother, brother or sister or the children of any son, daughter, brother and sister. The following Notice and Order sets forth the position of the Division in matters involving these circumstances.

BY THE DIRECTOR:

Pursuant to N.J.S.A. 33:1-43 it is unlawful for any person having any interest whatsoever in any supplier to be directly or indirectly interested in the retailing of alcoholic beverages. The related regulation provides that a solicitor should not have an interest, directly or indirectly, in any retail license or business conducted under such license. The regulation also prohibits the employment of a solicitor in any business capacity with any retail licensee N.J.A.C. 13:2-16.12. The legislative purpose behind these provisions is to prevent manufacturers or wholesalers from unfairly



New Jersey Department of Law & Public Safety

promoting consumption of their products at the retail level. This coincides with the statutory duties of the Division to foster moderation and responsibility in the use and consumption of alcoholic beverages; and to provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition; to maintain trade stability and a three-tier distribution system and; to prohibit discrimination in the sale of alcoholic beverage to retail licensees.

A review of these statutory and regulatory provisions compel the conclusion that the "immediate family member" relationship in the context set forth herein does not support and is, in fact, in contradiction to the legislative goals enunciated in the Alcoholic Beverage Control Act N.J.S.A. 33:1-1 et seq. It is incumbent upon this Division to prescribe appropriate conduct for those persons who enjoy the privileges of a solicitor's permit. To ensure compliance with the above cited provisions and to limit the potential for improper conduct, I shall herein Order that the following requirements be adhered to by all solicitors and retailers who have immediate family relationships as defined herein.

Accordingly, on this 24th day of September, 1997, it is

ORDERED that at the time of application for either issuance or renewal of a solicitor's permit, the applicant or permittee shall disclose the identities or any immediate family members who have an interest in a retail license, to the Division of ABC and his or her employer; and it is further

ORDERED that the solicitor shall disclose to the ABC and his or her employer any such relationship that arises during the permit year; and it is further

ORDERED that where any such relationship exists between a solicitor and retailer, the solicitor shall not service or call upon that account, and it is further

ORDERED that all wholesalers shall make a diligent inquiry to determine whether such relationships presently exist and accomplish the separation of solicitors from such retail accounts by January 1, 1998.

\S\ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

(Paglione & Massi, Esqs.)
Jeffrey P. Blumstein, Esq., for Appellant, Polish American Club of
Central Jersey (Szaferman, Lakind, Blumstein, Watter and
Blader, Esqs.)
Richard D. Fornaro, Esq., for respondent.

INITIAL DECISION BELOW

HONORABLE J. ROGER PERICHILLI, ADMINISTRATIVE LAW JUDGE

Decided: November 16, 1995

Received: November 27, 1995

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by counsel for Appellant, Doc Cross, Inc. and replies thereto were submitted on behalf of the Township Council of the Township of Hamilton, as permitted pursuant to N.J.A.C. 1:1-18.4(d). The time to render a final decision was extended by properly executed Orders, therefore, my Final Conclusion and Order must be issued on or before March 11, 1995.

Appeal No. 6110, OAL Dkt. No. ABC 398-94 arises from the determination by the Township of Hamilton (Hamilton) to deny the person-to-person transfer application submitted by Doc Cross, Inc. (Doc Cross) for the plenary retail consumption license held by Polish American Club of Central Jersey (Club). Upon filing of an Appeal by the proposed transferee, Doc Cross, the matter was transmitted to the Office of Administrative Law as a contested case.

Subsequent to denial of the transfer, Hamilton revoked the license held by the Club, effective November 15, 1994, based on the option granted to Doc Cross by the Club for the sum of \$25,000. Hamilton determined that the option agreement resulted in an undisclosed interest in the license under the terms and conditions of the agreement. The appeal of revocation by the Club was transmitted to the Office of Administrative Law for a hearing (OAL Dkt. No. ABC 530-95). On May 8, 1995 J. Roger Persichilli, ALJ rendered an Initial Decision finding, inter alia, that there was no undisclosed interest created by the option contract in question. I rejected this finding and concluded that the contract permitted an unlicensed entity (Doc Cross) to direct sale of the license and receive profits therefrom. I remanded the matter to the ALJ for further consideration on whether revocation or some lesser penalty was appropriate given the circumstances of the case.

The Administrative Law Judge scheduled consolidated hearings on the transfer issue and the remanded matter for August 23 and 24, 1995. The parties elected to stipulate to the documentary record and submit briefs on the issues posed.

In his initial decision, the Administrative Law Judge noted that Hamilton's refusal to grant the transfer application was based primarily on two grounds. First, he said that the transfer should be denied based on the close personal and business relationships between Kathleen Rosier, the shareholder of Doc Cross and Steven Wesna, an individual alleged to have been convicted of a crime involving moral turpitude. Second, he said that Hamilton based its denial of the transfer on alleged common business interests created by cross-contingencies protecting Wesna and Rosier in the contracts of sale for the club's premises and license.

In light of the case of Division of Alcoholic Beverage Control vs. 99 Washington Street, Inc. t/a Good and Plenty, 92 N.J.A.R. 2d 76, (ABC), the ALJ noted that the Township's denial of the transfer was proper under N.J.S.A. 33:1-26 because of Wesna's involvement as landlord of the proposed licensed premises and the interlocking conditional provisions which existed in the contracts of sale benefiting Wesna. Thus, the ALJ concluded the municipal denial of transfer was supported under the second ground for denial and he did not need to determine if denial could be based solely on the personal and business relationships issue.

With respect to the case on remand, ABC 8507-95 (remand of ABC 530-95), the Administrative Law Judge noted that Rosier, the sole shareholder of Doc Cross, is not barred from holding an alcoholic beverage license in New Jersey due to a disqualifying factor. While finding that Hamilton correctly denied transfer of the license to Doc Cross based on the intertwined business connections with Wesna, in the overall transaction the ALJ properly noted that Rosier, herself, is not necessarily disqualified from having a stake in an alcoholic beverage license. Thus, the ALJ concluded revocation of the club's license was not warranted where the undisclosed interest created by the option contract was not necessarily held by a disqualified individual. Citing mitigating factors including reliance by the parties upon the advice of legal counsel, and the fact that the individual holding the undisclosed interest is not otherwise disqualified from holding an alcoholic beverage license, the ALJ imposed a suspension of the license for

30 days based upon the schedule of penalties in ABC Bulletin No. 2453, Item 2 (substantial undisclosed interest by a person not disqualified).

As previously noted, Exceptions were submitted by Counsel for Doc Cross. The primary exception taken to the ALJ's decision was his finding that Steven Wesna was convicted of a crime involving moral turpitude. Mr. Wesna was indicted for, and convicted of, interstate travel in aid of racketeering under 18 USCA Section 1952(a)(3) and 2 as well as N.J.S.A. 2C:37-7. Counsel for Doc Cross argues that since a conviction for commercialized gambling may or may not constitute a conviction of a crime involving moral turpitude depending on the particular circumstances, Wesna's conviction cannot be said to automatically constitute a crime involving moral turpitude.

The exceptions do not refer to any point in the record below where this issue was raised. From my review of the record, I note that Mr. Wesna was present at the Hamilton Township meeting where the transfer application was considered. While members of the counsel clearly expressed their concerns with Mr. Wesna's ownership of the licensed premises and the interlocking business agreements involving sale of the license and property, in light of his criminal convictions for gambling and arrest record for other offenses, no explanation was given to the Board as to the underlying facts relating to the conviction and why it should not constitute a crime involving moral turpitude. Mr. Wesna was available to testify at the municipal hearing, and did, in fact, testify on other matters relating to the proposed purchase of the premises as well as his business and personal relationship with the shareholder of the proposed transferee (Doc Cross) of the license. Other than to clarify the statute under which he was convicted, no facts were provided to the local issuing authority that would lead them to conclude that Mr. Wesna's conviction on federal racketeering charges based on the State gambling offense did not constitute a crime of moral turpitude. No factual testimony by Mr. Wesna was previously submitted as to why his conviction under the federal racketeering law should not be considered to be a crime of moral turpitude. Having failed to raise this argument below and to thoroughly explain facts and circumstances of the conviction despite the opportunity to do so, precludes consideration of it now.

The ALJ noted in his Initial Decision that "[a]lthough Wesna's gambling conviction under State Law cannot be said to automatically constitute a crime involving moral turpitude, his conviction under the federal racketeering provision constitutes a crime that 'is of such a nature that moral turpitude... must be conclusively presumed.'" Initial Decision at p.9. The Appellate Division, in rejecting the argument that gambling is per se a crime that does not involve moral turpitude stated:

...we hold that in so far as licenses under Title 33 are involved, the ABC may, and when the convicted individual requests, it must, look at the underlying facts to determine whether there exists moral turpitude, unless the crime is of such a nature, that moral turpitude or its absence must be conclusively presumed...

[State of New Jersey, Division of Alcoholic Beverage Control vs. McNalley, 91 N.J. Super. 513 (App. Div. 1966).]

While not all gambling convictions under State law can be said to automatically constitute a crime involving moral turpitude, absent a request of the individual for a determination by the Director and disclosure of the underlying facts surrounding the conviction, Hamilton must reasonably presume the offense to be disqualifying. Furthermore, the conviction under federal racketeering provisions as well as the interstate and conspiracy aspects of Mr. Wesna's conviction clearly elevates it to the status of a crime presumptively involving moral turpitude.

Finally, I note that support for denial of the transfer by Hamilton is not solely dependent on a finding that Mr. Wesna is statutorily disqualified. At the municipal hearing, the Council had before it a police report detailing Mr. Wesna's prior arrests and convictions. Upon determining that he would hold a beneficial interest in the license, all aspects of his character and background became relevant and the scope of inquiry into qualifications is not limited to statutory requirements. "The cases are legion holding that inquiry into other aspects of an applicant's background and character is proper and, in fact, mandated, in order to properly evaluate his/their qualification," Narducci and Testa v. Bd. of Commissioners of Atlantic City, ABC Bulletin 2305, Item 3 (citation omitted).

Counsel for Doc Cross also takes exception to the ALJ's reliance on Division of Alcoholic Beverage Control vs. 99 Washington Street, Inc. t/a Good N'Plenty, 92 N.J.A.R. 2nd 76 (ABC). Counsel notes that in 99 Washington St. the disqualified individual involved made suggestions to the potential license holder concerning operations of the licensed premises and thus seeks to limit its holding to those specific circumstances. Counsel states that Mr. Wesna has made and will make no suggestions concerning operations of this particular license and that the license will be operated without any assistance or suggestion from Mr. Wesna. I do not consider 99 Washington Street to be so limited. In light of the broad discretion granted to the local issuing authority in considering a transfer application (see discussion in Initial Decision at p. 6-7) it cannot be said that Hamilton's action denying the transfer was arbitrary or capricious after consideration of the interlocking business agreements surrounding the proposed purchase of the premises and the license that involved Mr. Wesna.

Finally, counsel for Doc Cross notes that Mr. Wesna has submitted an application to remove his statutory disqualification. Counsel argues that if the statutory disqualification is removed by the Division of Alcoholic Beverage Control, the Division should make it clear to the Township of Hamilton that Doc Cross, Inc. would be permitted to "accept transfer of the license". This Exception is clearly without merit. Any transfer application must be considered initially at the local level. My review of the municipal determination is limited: absent a clear abuse or unreasonable or arbitrary exercise of its discretion the local issuing authority's decision should be granted great deference. Lyons Farm Tavern, Inc. vs. Mun. Bd. of ABC, Newark, 55 N.J. 292 (1970); See Initial Decision at p. 6-7. Whether or not a future transfer application to Doc Cross, Inc. should be permitted will be determined, in the first instance, by the Township of Hamilton in the reasonable exercise of its discretion.

Upon review of the record below, I accept the findings of fact and conclusions of law of the Administrative Law Judge. Additionally, I shall give leave for the Club to submit a monetary offer in lieu of the license suspension.

Accordingly, it is on this 11th day of March, 1996,

ORDERED, that the action of the Township Council of the Township of Hamilton which denied the person-to-person transfer of plenary retail consumption license no. 0103-33-043-002 held by the Polish American Club of Central Jersey for premises located at Route 156 and Highway 130 to Doc Cross, Inc. be and the same is hereby affirmed and the Appellant's Appeal be and is hereby dismissed; and it is further

ORDERED, that the action of the Township Council of the Township of Hamilton revoking the license held by Doc Cross, Inc. be and the same is hereby modified to a suspension for a period of thirty (30) days, the commencement date of such suspension to be established by supplemental Order at such time when the Director finds that the license is active and operating on a regular basis; and it is further

ORDERED, that leave is granted for the licensee to petition that the Director accept a monetary penalty in the amount of \$3,000 in lieu of the thirty (30) days of suspension.

\S\ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

JGH/DNB/mer

BY THE DIRECTOR:

Written exceptions dated May 31, 1995, were filed on behalf of the Respondent, Township Council of the Township of Hamilton, with regard to the above captioned Initial Decision, as is provided by N.J.A.C. 1:1-18.4. On June 6, 1995, Appellant filed responses to Respondent's exceptions. For reasons which I will state later in this opinion, I agree with the first portion of Respondent's exceptions that the "option" contract created an undisclosed interest in the license held by Appellant. As a result, I reject the conclusion of the Administrative Law Judge (ALJ) and Appellant's claim that the "option" did not create an undisclosed interest in the license held by the Polish American Club. With regard to Respondent's contention that revocation was an appropriate penalty, I will remand this matter back to the Office of Administrative Law (OAL) for further factual findings concerning the circumstances surrounding the undisclosed interest and the application of this Division's standards and penalties for the violation involving this license.

PROCEDURAL AND FACTUAL HISTORY

This matter arose from the action of the Township Council of the Township of Hamilton which, by Resolution dated November 14, 1994, revoked Plenary Retail Consumption License No. 1103-33-043-001, held by the Polish American Club of Central Jersey (Polish American Club). In the present action, the Appellant filed a Notice and Petition of Appeal from the action taken by the local issuing authority on December 7, 1994, and on January 5, 1995, that action was stayed pending final determination of the Appeal. This matter was then transmitted to the Office of Administrative Law as a contested case on January 17, 1995, pursuant to N.J.S.A. 52:14F-1 et seq.

This case is one of two rulings by Hamilton Township concerning this license which is on appeal and was transmitted to the Office of Administrative Law for a hearing. The other case, Appeal # 6110, OAL DKT. NO. ABC 398-94, is an appeal of Hamilton Township's denial of the transfer of the license to Doc Cross, Inc. (Doc Cross). That appeal is scheduled for a hearing on August 23, 1995 before ALJ J. Roger Persichilli.

The issues in this case are: (1) whether the option to purchase contract, entered into on July 27, 1994, between the Polish American Club and Doc Cross, created an undisclosed interest in violation of N.J.S.A. 33:1-26, and (2) whether the penalty of revocation of the license was appropriate under all of the facts and circumstances.

After conducting a hearing on this matter, the ALJ found that the option contract between Polish American Club and Doc Cross did not result in a transfer of interests and therefore was not a violation of N.J.S.A. 33:1-26. Additionally, the ALJ held that even if a technical violation occurred, the Township's decision to revoke the license was arbitrary and capricious.

In his analysis of N.J.S.A. 33:1-26, the ALJ notes that while the statute prohibits agreements that provide a third party with control of the license in the future, such "shadow control" did not exist in the present case. He found that the agreement did not run counter to the principle that a contract of sale of a liquor license is not subject to specific performance, citing Route 73 Bowling Ctr., Inc. v. Aristone, 192 N.J. Super. 80 (App. Div. 1988). The ALJ rejected Respondent's argument that the July 27, 1994 agreement resulted in an exchange whereby Doc Cross paid \$25,0000 to obtain "shadow control" over the license in the form of economic control and the potential for future profit. The ALJ stated that, since the agreement and any future transfer of economic interests was ultimately subject to Hamilton Township approval,

there has been no such transfer by virtue of this agreement. The law is clear. Whatever contractual arrangements the parties make are ultimately subservient to the absolute control and discretion of the licensing authority.

In support of his conclusion that the issuing authority maintains control over future transfers including option contracts, the ALJ relied on Packard-Bamberger v. Borough Council of Oakland, 87 N.J. Super. 92 (App. Div. 1965). The Judge noted that Packard-Bamberger stands for the notion that, under N.J.S.A. 33:1-26, "a contract vendee has no interest until the vendor transfers the license and the local issuing authority approves the transfer."

Packard-Bamberger was also cited by the ALJ for the proposition that N.J.S.A. 33:1-26 "does regulate the transfers of licenses but not contracts of sale or sales thereof" Id. at 97. Based on these findings the ALJ concluded that Hamilton Township's revocation action was arbitrary, unreasonable and constituted an abuse of its discretionary authority. Accordingly, the Judge ordered the revocation reversed. I disagree with the ALJ's conclusion that no indirect interest was created by the "option" contract and I am remanding the case for further factual findings to determine the proper penalty to be imposed.

EXCEPTIONS

In its exceptions, Respondent contends that Judge Persichilli was wrong in concluding that the Township was incorrect in its finding that an undisclosed interest in the license existed. According to Respondent, the written agreement between the Polish American Club and Doc Cross plainly afforded that unlicensed entity the right to sell the license and retain any profit derived from the sale. Respondent points out that this "option" contract was entered into after Doc Cross had already been rejected as a licensee and transferee of the Polish American Club license.

With regard to the penalty imposed by Respondent, revocation of the license, the exceptions filed by Respondent submit that that penalty was a reasonable exercise of judgment and discretion grounded upon settled legal standards, and therefore not subject to reversal by the Director. Respondent, relying on Black v. Mayor of Magnolia, 38 N.J. 484 (1962); Fanwood v. Rocco, 33 N.J. 404, 414 (1960); Lyons Farms Tavern v. Municipal Bd. Alc. Bev., Newark, 55 N.J. 292, 303 (1970); Pilon v. Board of Alc. Bev. Control, Paterson, 112 N.J. Super. 436 (App. Div. 1970); and Nordco Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957), contends that the Township Council, given the facts involving Appellant's relinquishment of economic control of its license, had good and sufficient grounds upon which a revocation decision could be founded.

On June 6, 1995, Appellant filed written responses to the exceptions filed by Respondent. According to Appellant's responses, the "option" agreement entered into on July 27, 1994, constituted a superseding amendment to the original contract for sale dated August 19, 1993. It argued that this July 27th contract

modified the contractual rights of Doc Cross vis-a-vis the Polish American Club's license and did not, nor could not, effect a transfer or conveyance of the license itself. Appellant contends that both before and after the July 27th contract, the "license remained the Polish American Club's."

LEGAL ANALYSIS

Initially, I note that the issuance, renewal, or transfer of a retail liquor license, in the first instance, rests within the sound discretion of the local issuing authority. Hudson-Bergen Package Stores Ass'n. vs. Municipal Bd. of Alc. Bev. Control of North Bergen, ABC Bulletin 1981, Item 1 (April 28, 1971); Paul vs. Brass Rail Lounge, Inc., 31 N.J. Super. 211 (App. Div. 1954). The local issuing authority is vested with a high degree of responsibility and wide discretion, and must have the public interest as its principal guide in licensure matters. Rajah Liquors vs. Division of Alc. Bev. Control of Newark, 33 N.J. Super. 598 (App. Div. 1955) and Black v. Mayor of Magnolia, 38 N.J. 484 (1962).

In reviewing of the propriety of the decision at the local level, the burden of establishing that the action of the local issuing authority was erroneous and should be reversed rests with Appellant. Lyons Farms Tavern vs. Municipal Board of Alc. Bev. Control of Newark, 55 N.J. 292 (1970); Pilon vs. Municipal Board of Alc. Bev. Control of Paterson, 112 N.J. Super. 436 (App. Div. 1970). Under settled authority, a municipality's grant or denial of an application will stand so long as its exercise of judgment and discretion was reasonable and founded in law. Fanwood vs. Rocco, 33 N.J. 404 (1960). The local issuing authority's exercise of discretion will be accepted absent a clear abuse of that discretion in an unreasonable or arbitrary exercise of its powers. Nordco Inc. vs. State, 43 N.J. Super. 277 (App. Div. 1957). In the absence of such an abuse of discretion, the action of the local issuing authority should not be disturbed by the Director of the Division of Alcoholic Beverage Control, and the Director may not substitute his judgment for that of the local issuing authority. Cf., Florence Methodist Church vs. Township Comm., Florence Twp., 38 N.J. Super. 85 (App. Div. 1955).

I disagree with the ALJ's determination that the July 27, 1994, agreement did not give Doc Cross an undisclosed interest in the license held by the Polish American Club. Further, I find that the ALJ erroneously relied on the Packard-Bamberger decision as that case is both factually and legally distinguishable from the case before me.

The "option" agreement called for Doc Cross to pay \$25,000.00 (non-refundable) to Appellant as consideration for the possible future transfer of the license to Doc Cross or some other party chosen by Doc Cross. If the license was transferred from Appellant to a third party chosen by Doc Cross within two (2) years, all proceeds of the sale must be given to Doc Cross. It was only if the license was not transferred within this two (2) year period of time, that Appellant regained the right to sell the license and keep the proceeds. If Doc Cross decided to obtain the license itself within this two (2) year period, then, assuming the transfer is granted, the consideration for such transfer is set at \$1.00. Notably, the original purchase price for the transfer of this license that was denied by Respondent (which is pending on appeal) was \$25,000.

To say that this contract did not create an undisclosed interest in Appellant's license is simply wrong. In the first instance, the right to sell the license is tied up and in Doc Cross's control for the next two years. Moreover, should the license be transferred within that two (2) year period, Appellant will not receive one cent of the proceeds from such transfer. Rather this "option" would allow Doc Cross, who has no disclosed interest in the license, to receive "all proceeds from said transfer." Therefore, this agreement, clearly gave Doc Cross more than "shadow control" over the license held by Appellant - it gave Doc Cross actual control for a two year period regarding to whom the license would be sold and thereafter transferred, as well as receipt of all of the proceeds for the sale of the license. While the transfer must be approved by the local issuing authority, nevertheless the selection of the transferee and receipt of proceeds directly benefits Doc Cross's interests.

Based upon the record before me, as well as the terms of the July 27, 1994 agreement, I find that clearly Respondent did not act arbitrarily or capriciously in determining that an undisclosed interest in the license was created. Respondent found, based on

the agreement, that "Doc Cross Inc. was delegated the authority to market the license and capture full benefit of the proceeds of sale of the license, through July 26, 1996, with Polish American Club relinquishing all rights to convey the license during this period." My reading of the agreement leads me to agree with the conclusion reached by Respondent. There is nothing in the record which would allow me to overturn this determination by the local issuing authority as being an arbitrary and capricious abuse of its authority in such matters.

Reliance on the decision in Packard-Bamberger is misplaced in this case. The license sale in Packard-Bamberger was a conventional bilateral agreement and it dealt with the application of the two license limitation act (N.J.S.A. 33:1-12.31) in very unique and limited circumstances. By itself, it was not an unusual contract for sale. In fact, the nature of the contract was not at issue. At issue was whether the agreement entered into conferred rights in the buyer, a "beneficial interest" for purposes of obtaining an exception to the two license limitation act, prior to approval of the transfer by the municipal issuing authority. While the court held that without municipal approval the contract did not confer a "beneficial interest" in the buyer, the ruling spoke specifically to the issue at bar in that particular case: whether a standard contract for sale of a liquor license conferred a beneficial interest on the buyer prior to municipal approval of the transfer in order to be excepted from the restrictions of the two license limitation law.

In contrast to Packard-Bamberger, the contract for sale of Appellant's liquor license was extraordinary. In effect, Appellant and Doc Cross agreed to an "option" contract whereby Doc Cross was unconstrained for a two (2) year period with the right to sell and profit from the sale of the license. Provision was made for the reversion of the right of sale back to the Appellant only if a sale was not made during that time.

The contract between the Polish American Club and Doc Cross was challenged as a transfer of an undisclosed interest whereby Doc Cross could potentially realize a profit from the sale of a license while not being the owner of record. This contractual right by an undisclosed party to profit from the sale of the license is a quintessential undisclosed interest. For these reasons, Packard-Bamberger is distinguishable from the present case.

The remaining issue to be determined is whether the decision of Respondent regarding revocation of Appellant's license was arbitrary and capricious. In assessing penalties for cases where undisclosed interests have been found, this Division looks at several variables. The first variable is whether the undisclosed interest (at times known as a "front") is held by a person who is disqualified by reason of a criminal conviction, is in violation of the "tied-house statute," or is disqualified by reason of a prohibited interest in two or more licenses. If the undisclosed interest satisfies any of these conditions, it is found to be a substantial or controlling one, and if there are no mitigating circumstances, the appropriate penalty is revocation of the license. ABC Bulletin 2442, Item 6 (September 13, 1985).

When there is an undisclosed interest violation, but the person having the undisclosed interest is not disqualified from having an interest in an alcoholic beverage license, the penalty will be suspension for an appropriate period of time. The period of suspension will depend upon the facts and circumstances of the particular case.

Where the undisclosed interest is merely technical in nature and not intentional and can be readily corrected, the penalty may be as little as a \$500 offer in lieu of disciplinary proceedings. Ibid.

This matter therefore is remanded and should be consolidated with the pending appeal from the initial denial of transfer to Doc Cross. This remand will allow the ALJ to establish a complete record of the facts and circumstances surrounding the denial of the transfer to Doc Cross, whether or not the principles in Doc Cross are disqualified for licensure, and then determine if Respondent's action in revoking Appellant's liquor license was arbitrary or capricious.

CONCLUSION & ORDER

For the reasons stated within, I reject the findings of fact as insufficient and further reject the Administrative Law Judge's conclusion of law that the "option" contract did not create an undisclosed interest. Therefore, this matter is being remanded for further fact finding and for a determination of the appropriate penalty for the transfer of the undisclosed interest.

Accordingly, it is on this 29th day of June, 1995,

ORDERED that the Initial Decision in this matter which reversed the action of Respondent, Township Council of the Township of Hamilton, with regard to its revocation of the license held by the Polish American Club for premises located at U.S. Highway 130, Yardville, New Jersey, be and the same is hereby REJECTED; and it is further

REMANDED to the Office of Administrative Law for further fact finding and for a determination of an appropriate penalty upon the finding that an undisclosed interest was created with respect to Plenary Retail Consumption License Number 1103-33-043-001.

/S/ John G. Holl
JOHN G. HOLL
DIRECTOR

JGH/LSR/JL

4. VINCENT R. MANETTA V. DIVISION OF ALCOHOLIC BEVERAGE CONTROL -
FINAL CONCLUSION AND ORDER ADOPTING THE INITIAL DECISION.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

VINCENT R. MANETTA,
APPELLANT,
V.
DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,
RESPONDENT.

FINAL CONCLUSION AND ORDER
ADOPTING THE INITIAL DECISION

OAL DKT. NO. ABC 5985-95

AGENCY DKT. NO. N-2108

Carmine J. Liotta, Esq., for Appellant,
(O'Brien, Liotta & Mandel, Attorneys)

Jennifer L. Pirrung, Deputy Attorney General, for Respondent,
(Peter Verniero, Attorney General of New Jersey, Attorney)

INITIAL DECISION BELOW

HONORABLE LINDA BAER, ADMINISTRATIVE LAW JUDGE

Decided: July 17, 1997

Received: July 23, 1997

BY THE DIRECTOR:

No written exceptions to the Initial Decision were filed by either party as permitted pursuant to N.J.A.C. 13:2-19.6. The Initial Decision was received by the Division on July 23, 1997, therefore, my Final Decision must be issued on or before September 8, 1997.

For the following stated reasons, I adopt the conclusion of law contained in the Administrative Law Judge's ("ALJ") Initial Decision, which permits Appellant to become eligible for a limited rehabilitation employment permit with the condition that Appellant is not employed on a licensed premises owned by his wife or other relative where there exists the potential for an undisclosed interest.

I. PROCEEDINGS BELOW

Appellant was convicted of conspiracy to promote gambling on or about March 13, 1992. On October 19, 1993, Appellant filed for a Rehabilitation Employment Permit with the Division of Alcoholic Beverage Control ("Division"). The Division denied Appellant's request for an unlimited employment permit, but offered Appellant an opportunity to obtain a limited employment permit. Appellant appealed that determination, and on June 9, 1995, the matter was transmitted as a contested case to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was conducted on February 13, 1997, and the record was closed after post-hearing documents were submitted.

II. FACTS

On December 17, 1990, Appellant was arrested by the Union County Prosecutor's Office for conspiracy to promote gambling at the Old Stock Inn. In her Initial Decision, the ALJ specifically noted that Appellant's arrest resulted in the largest single seizure of book-making proceeds in Union County history. Appellant pled guilty to the offense and was sentenced to two years probation, served 27 days of a 45 day jail term, and paid a \$2,000 fine. Subsequently, Appellant's application for a Rehabilitation Employment Permit was denied by the Division.

According to the record established before the ALJ, the Division did not oppose issuing a limited rehabilitation employment permit so that Appellant could seek a non-managerial position at a bar. However, the Division wanted to place a condition on the permit preventing Appellant from being employed by the Old Stock Inn. The Division's position was primarily based on three findings: 1) a crime involving moral turpitude occurred on the licensed premises of the Old Stock Inn; 2) investigative reports from the Linden Police Department dated August 21, 1993 and October 2, 1993 indicated that Appellant was working behind the bar after his conviction without first obtaining the requisite Rehabilitation Employment Permit in violation of N.J.A.C. 13:2-14.5; and 3) Appellant's wife owns one-third interest in the Old Stock Inn.

III. LAW AND ANALYSIS

N.J.A.C. 13:2-14.6 requires any person convicted of a crime involving moral turpitude to apply to the Director for a Rehabilitation Employment Permit before performing work on a licensed premises. The Division defines moral turpitude as an act that gravely violates the moral standards of the community: one which is contrary to justice, honesty, modesty, or good morals. Such crimes are deemed serious by society and are generally punishable by imprisonment for more than one year. The Division has established that book-making and gambling are crimes of moral turpitude. Moreover, Division policy has articulated that conspiracy to commit such crimes also implicate moral turpitude.

N.J.A.C. 13:2-14.6 states:

Whenever that application is made and it appears to the satisfaction of the Director that such person's employment in the alcoholic beverage industry will not be contrary to the public interest, the Director may, in the exercise of sound discretion, issue such employment permit.

Pursuant to N.J.A.C. 13:2-14.7, the Director has the authority to issue two types of Rehabilitation Employment Permits: 1) unlimited employment permit; or 2) limited employment permit. An unlimited employment permit allows the holder to be employed by any class licensee without restrictions as to type of employment. However, such permits may not be issued to persons who have been convicted of crimes which in the opinion of the Director present a special risk to the alcoholic beverage industry. The ALJ found, and I agree, that based upon Appellant's conviction in the largest single seizure of book-making proceeds in Union County, an unlimited employment permit could potentially present a special risk to the alcoholic beverage industry. Appellant thus only qualifies for a limited employment permit.

A limited employment permit allows the holder to be employed by any licensee in a non-managerial capacity and permits the holder of the permit to sell, serve, or deliver alcoholic beverages. N.J.A.C. 13:2-14.7, N.J.A.C. 13:2-14.8. However, the ALJ found that Appellant's recent involvement in the Old Stock Inn was in a managerial capacity, contrary to Division regulations.

Based on Appellant's first-hand knowledge of the various financial aspects of the business and his testimony that he does not get paid for his work on the licensed premises, the ALJ concluded that Appellant has an ownership interest sufficient to establish an undisclosed interest by a disqualified person in a licensed business. In addition, even though the disclosed interest is in his wife's name, it is significant to note that on August 31, 1993, Appellant informed two Linden Police Department detectives that he personally owned a one-third interest in the Old Stock Inn.

The Division carefully reviews situations where a disqualified individual's family or spouse holds a liquor license. Case law has held that the issuance of a Rehabilitation Employment Permit is not a matter of right, but rests in the exercise of the Director's sound discretion. Marini v. Div. of Alcoholic Beverage Control, 1 N.J.A.R. 365, 378, N.J.A.C. 13:2-14.6(a). I conclude that based upon the facts presented, the potential for an illegal act exists, especially since a family member of the Appellant owns the license.

The ALJ determined, and I agree, that due to this interest in the license, it would not be proper to issue a Rehabilitation Employment Permit to Appellant for his wife's licensed business. As such, as the ALJ concluded, a limited employment permit be

issued to Appellant, with the condition that Appellant cannot be employed at a licensed premises owned by his wife or other relative where there exists the potential for an undisclosed interest.

IV. CONCLUSION

Upon my review of the record, I shall deny Appellant's application for an unlimited employment permit. Moreover, I accept the conclusion of the ALJ that Appellant is eligible for a limited employment permit with the condition that Appellant shall not be employed by the Old Stock Inn or any other licensed premises owned by his wife or other relative.

Accordingly, it is on this 2nd day of September, 1997,

ORDERED that Appellant, Vincent R. Manetta, upon the proper filing of an application, is eligible for a limited employment permit, subject to a condition that prohibits employment by the Old Stock Inn or any other licensed entity owned by his wife or other relative pursuant to N.J.A.C. 13:2-14.6 and N.J.A.C. 13:2-14.7.

\S\ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

JGH/LRE/MDS

5. WILLIAM HANSON V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ATLANTIC CITY AND MARK SCOTT, LTD. T/A GRABEL'S LOUNGE - FINAL CONCLUSION AND ORDER ACCEPTING SUMMARY INITIAL DECISION AND AFFIRMING DISMISSAL OF APPEAL.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

APPEAL NO. 6321)	FINAL CONCLUSION AND ORDER
)	ACCEPTING SUMMARY INITIAL
WILLIAM HANSON)	DECISION AND AFFIRMING
)	DISMISSAL OF APPEAL
APPELLANT,)	
)	OAL DKT. NO. ABC 8899-95
V.)	
)	
MUNICIPAL BOARD OF)	
ALCOHOLIC BEVERAGE)	
CONTROL OF THE CITY OF)	
ATLANTIC CITY AND)	
MARK SCOTT, LTD)	
PRCL# 0102-33-001-003)	
)	
RESPONDENT.)	

Mary J. Maudsley, Esq., Attorney for Appellant
George G. Frino, Esq. Attorney for Respondent.

INITIAL DECISION

HONORABLE EDGAR R. HOLMES ADMINISTRATIVE LAW JUDGE

Decided: April 18, 1996

Received: April 24, 1996

BY THE DIRECTOR:

No written exceptions to Administrative Law Judge (ALJ)
Holmes' Summary Initial Decision were filed. The time to render a

Final Decision was entered by Order until on or before July 25, 1996.

For the following stated reasons, I accept the basic findings of fact and conclusions of law continued in ALJ Holmes' Summary Initial Decision and incorporate them by reference. I conclude that the Office of Administrative Law (OAL) and the Division of Alcoholic Beverage Control (Division) lack jurisdiction over Appellant's claims under the Fraudulent Conveyance Act and the Rules of Professional Conduct. For these reason, Appellant's appeal of Respondent Mark Scott, LTD.'s (Scott) license transfer is dismissed, and Respondent Municipal Board of Alcoholic Beverage Control of the City of Atlantic City's (Atlantic City) approval of the transfer application for the subject license is affirmed.

I. Procedural History

This matter arose from Appellant's objection to Scott's application for a person-to-person transfer of Plenary Retail Consumption License (PRCL) No. 0102-33-001-003 to 3901 Atlantic cps[/. t/a Grabel's Cocktail Lounge. Atlantic City held a hearing on August 9, 1995, and approved the transfer by Resolution. On September 11, 1995, Appellant appealed Atlantic City's grant of the transfer to the Division. On September 27, 1995, Scott filed an Answer and Affirmative Defenses. The matter was transmitted to OAL on October 5, 1995 as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

After a prehearing conference on January 23, 1996, Scott filed a brief in support of its application for a Summary Initial Decision on February 3, 1996, and Appellant subsequently filed a reply. Upon consideration of these, ALJ Holmes found that Appellant was judgment creditor of Scott. The ALJ concluded that, since no public interest was at stake here, Appellant's appeal as an "aggrieved person" pursuant to N.J.S.A. 33:1-26 could not be sustained. He further concluded that Appellant's contention that the transfer violated the Fraudulent Conveyances Act, N.J.S.A. 25L2-1 et seq. (FCA), was without merit, as a license is not "property" within the meaning of the statute, subject to attachment, lien or seizure for debt. Finally, ALJ Holmes also concluded that the OAL was not the proper forum to consider Appellant's argument that the transfer was improper due to an alleged conflict of interest in violation of the Rules of Professional Conduct by Scott's attorney. ALJ Holmes therefore dismissed Appellant's appeal. I concur

II. Analysis and Conclusion

I find ample support for ALJ Holmes' Summary Initial Decision in the record before me. I note again that no exceptions were filed in this matter.

Municipal actions which constitute an abuse of discretion, a manifest mistake, or are clearly unreasonable, are subject to reversal. The Grand Victorian Hotel v. Borough Council of the Borough of Spring Lake, 94 N.J.A.R.2d (ABC) 43 (1993) (citing Hudson-Bergen Package Stores Association v. Municipal Board of Alcoholic Beverage Control of North Bergen, A.B.C. Bulletin No. 1981 Item No. 1 (April 28, 1981)). It is the responsibility of the Appellant to establish that the local issuing authority acted in error or bad faith, and should therefore be reversed. The Grand Victorian Hotel, spur; Lyons Farm TAVERN, Inc. v. Municipal Board of Alcoholic Beverage Control of the City of Newark, 55 N.J. 292 (1970). I find Appellant has not satisfied its burden in this instance.

Only a taxpayer or an "aggrieved person", with a special grievance, may appeal a transfer approved by the local issuing authority. N.J.S.A. 33:1-26; Greenspan v. Div. of A.B.C., 23 N.J. Super. 567, 569-570 (App. Div. 1952). An aggrieved person must have either a substantial private interest at stake, or a "slight" interest, added to an harmonizing with the general public interest Hudson Bergen County Retail Liquor Stores Ass'n v. Board of Com'rs of Hoboken, 135 N.J.L., 502, 510 (E & A 1947).

As will be discussed later, a liquor license is not property. Thus, Appellant, a judgment creditor, has no private interest at stake here. It is clear that a license is not property subject to attachment, lien or judgment. N.J.S.A. 33:1-26; see The Boss Co., Inc. v. Bd. of Com'rs of Atlantic City, 40 N.J. 379, 384 (1963); B & G Corp. v. Wayne Twp., 235 N.J. Super. 90, 94 (App. Div. 1989); In re The Great Atlantic and Pacific Tea Co., Inc. A.B.C. Bulletin No. 2351 Item No. 2 (December 19, 1979). Therefore, Scott's transfer of the license does not affect Appellant's private interest. Significantly, Appellant asserts no private interest here, nor is any public interest served by denial of this transfer. As Appellant is not an "aggrieved person" within the meaning of N.J.S.A. 33:1-26, he therefore lacks the relevant indicia of standing necessary to contest Atlantic City's approval of the

transfer. I note that Appellant has not asserted that any interest in an asset was improperly affected by Scott's transfer. I further note that, were any property interest so affected, Appellant is at liberty to pursue such a claim in the proper forum.

Appellant's objection is unsupported by the Fraudulent Conveyances Act, N.J.S.A. 25:2-1 et seq. (FCA), as well. The FCA provides in pertinent part:

Conveyances of personal property in trust for use of persons making them void as to creditors. a. . . .[E]very conveyance, transfer and assignment of goods, chattels or thing in action, made in trust for the use of the person making the same, shall be void as against creditors.
(emphasis added).

The laws of the State of New Jersey clearly hold that a liquor license is not considered "personal property" but is a mere privilege to "conduct a business which is otherwise illegal". The Boss Co., Inc., supra, 235 N.J. Super, at 94. The State statute regulating the transfers of liquor licenses announces that liquor licenses are not "property":

Under no circumstances however, shall a license, or rights thereunder, be deemed property, subject to inheritance, sale, pledge, lien, levy, attachment, execution, seizure for debts, or any other transfer or disposition whatsoever, except for payment of taxes, fees, interest and penalties imposed by any State tax law for which a lien may attach pursuant to R.S. 54:49-1 or pursuant to the State Tax Uniform Procedure Law, R.S. 54:48-1 et seq. or any similar State lien of tax, except to the extent expressly provided by this chapter.

N.J.S.A. 33:1-26 (emphasis added); see also Sea Girt Restaurant, v. Borough of Sea Girt, 625 F. Supp. 1482, 1486 (D.N.J. 1986) aff'd, 802 F.2d. 448 (3d cir. 1986).

New Jersey courts have long recognized the clear legislative pronouncement that a liquor license is not property vested with inherent rights of property. See, e.g., Sea Girt Restaurant, supra, 625 F. Supp. at 1486; The Boss, supra, 192 A.2d at 588, 40 N.J. at 387; Mannion v. Greenbrook Hotel, Inc., 48 A.2d 888, 138 N.J. eq, 518, 520 91946); Voight v. Board of Excise Commr's., 36 A. 686, 59 N.J.L. 358 (E & A 1896).

The only exceptions to the concept that a New Jersey liquor license is considered a property interest are the limited holdings in The Boss, supra, wherein the New Jersey Supreme Court created a narrow exception and found that a liquor license may be considered an attachable interest under the strict confines and the interpretation of the Internal Revenue Code, 192 A2d. at 588, 40 N.J. 387-8, in Sea Girt Restaurant, supra, where the New Jersey Federal District Court found that a liquor license is an interest entitled to a Fourteenth Amendment due process protection; Sea Girt Restaurant, supra, 625 F. Supp. at 1486-88, and in the language of N.J.S.A. 33:1-26 which permits state tax liens.

Therefore, a New Jersey liquor license, by definition, cannot be considered "personal property" under the FCA. Furthermore, a liquor license by State statute cannot be subject to a judgment creditor. Rather, it is privilege that can be "transferred" from one person to another when an application to the local issuing authority is approved by that municipality. N.J.S.A. 33:1-26; N.J.A.C. 13:2-7.1. If Appellant has a claim under the FCA concerning Scott's other property interests, Appellant should raise that claim in the appropriate forum.

Further, ALJ Holmes correctly did not address the issue of whether Scott's attorney committed professional misconduct due to an alleged conflict of interest. The New Jersey Rules of Professional Conduct clearly state that such charges are to be made to the "appropriate professional authority." R.P.C. 8.3 (1996). Neither OAL nor the Division is such an entity.

Therefore, I find that ALJ Holmes properly found that Appellant's appeal is not cognizable by the Division or OAL. Appellant is not an "aggrieved person" within the meaning of N.J.S.A. 33:1-26, and to the extent that his arguments that the FCA and R.P.C. 8.3 apply, they should be raised elsewhere. Therefore, I concur with ALJ Holmes' determination to summarily dismiss Appellant's appeal of Respondent Atlantic City's approval of Respondent Scott's transfer for Plenary Retail Consumption License No. 0102-33-096-004 to 3901 Atlantic Corp., t/a Grabel's Cocktail Lounge.

Accordingly, it is on this 25th day July, 1996,

ORDERED that the decision of the Municipal Board Board of Alcoholic Beverage Control of the City of Atlantic City to approve of the person-to-person transfer of Plenary Retail Consumption License No. 0102-33-001-003 to 3901 Atlantic Corp., t/a Grabel's Cocktail Lounge is AFFIRMED, and it is further

ORDERED that the Appeal brought by William Hanson objecting to the approval of the transfer of Plenary REtail Consumption License No. 0102-33-096-004 by the Municipal Board of Alcoholic Beverage Control of the City of Atlantic City be and is hereby DISMISSED.

/S/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

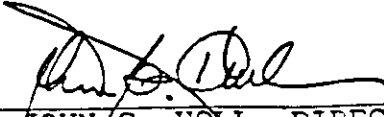
JGH/GCS/cps

6. APPELLATE DIVISION, SUPERIOR COURT DECISION AFFIRMING FINAL CONCLUSION AND ORDER IN WILLIAM HANSON V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ATLANTIC CITY AND MARK SCOTT, LTD. T/A GRABEL'S LOUNGE

APPELLATE DECISION AFFIRMING FINAL CONCLUSION AND ORDER IN WILLIAM HANSON V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ATLANTIC CITY AND MARK SCOTT, LTD. T/A GRABEL'S LOUNGE

On June 27, 1977, the Superior Court, Appellate Division affirmed the action of the Director in accepting the Summary Initial Decision and approving the transfer of the Plenary Retail Consumption License from the Respondent Mark Scott, Ltd., to 3901 Atlantic Corp. The Appellate Division ruled that the transfer of the license was supported by the record, not arbitrary, capricious or unreasonable and that the issues of law raised by the plaintiff were without merit.

Publication of Bulletin 2474 is hereby directed this
30th Day of September, 1997



JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL