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 2312 February 21, 1979

TABLE OF CONTENTS

ITEM

1. COURT DECISIONS - JODAL CORP. v. STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

2. DISCIPLINARY PROCEEDINGS (South Amboy) - SUPPLEMENTAL ORDER.

3. APPELLATE DECISIONS - CROWN INN, INCORPORATED v. VINELAND.

4. APPELLATE DECISIONS - JUDGE'S FOUR O'CLOCK CLUB, INC. v. PATERSON.

5. OBJECTIONS TO TRANSFER STATE BEVERAGE DISTRIBUTION LICENSE - APPLICATION DENIED.

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1. COURT DECISIONS - JODAL CORP. v. STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-582-78

JODAL CORP., a New Jersey Corporation,
t/a MY WIFE'S PLACE,

Defendant-Appellant,

v.

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

Plaintiff-Respondent.

Submitted November 27, 1978 - Decided December 14, 1978.

Before Judges Allcorn and Seidman.

On appeal from New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control.

Norman A. Cohen, attorney for the appellant.

John J. Degnan, Attorney General, attorney for the respondent (Mart Vaarsi, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

(Appeal from the Director's decision in Re Jodal Corp., Bulletin 2311, Item 6. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

2. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL ORDER.

In the Matter of Disciplinary Proceedings against

Jodal Corporation
t/a My Wife's Place
Route No. 35
South Amboy, New Jersey

Holder of Plenary Retail Consumption License 1220-33-017-001 issued by the Common Council of the City of South Amboy.

SUPPLEMENTAL ORDER

Norman A. Cohen, Esq., Attorney for Licensee.

BY THE DIRECTOR:

On October 13, 1978 Conclusions and Order were entered herein suspending the subject license for forty-eight (48) days, upon licensee's plea of non vult to a charge alleging that it permitted lewd and indecent conduct on its licensed premises, in violation of N.J.A.C. 13:2-23.6.

An Appeal was filed by the licensee to the Appellate Division of the Superior Court, and, although a stay was ultimately ordered, I have been advised that the licensee served the full suspension in accordance with my original order.

On December 14, 1978 the Appellate Division affirmed the action of the Director. Jodal, Inc. v. Division of Alcoholic Beverage Control (App. Div. Docket No. A-582-78), not approved for publication, reported in Bulletin 2312, Item 1. Thus, the within Order is entered for record purposes only.

Accordingly, it is, on this 25th day of January, 1979,

ORDERED that, for record purposes only, it is herein noted that the action of the Director in his Conclusion and Order of October 13, 1978 suspending the said license for forty-eight (48) days was thereby affirmed on appeal to the Appellate Division of the Superior Court.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - CROWN INN, INCORPORATED v. VINELAND.

Crown Inn, Incorporated t/a Crown Inn,	:	
Appellant,	:	ON APPEAL
vs.	:	CONCLUSIONS
City Council of the City of Vineland,	:	AND
Respondent.	:	ORDER
	:	

Michael R. Mazzoni, Esq., Attorney for Appellant.
Robert F. Butler, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

These are consolidated appeals from determinations by the City Council of the City of Vineland (Council) which, by resolutions dated March 14, 1978, found the appellant guilty of charges alleging that: (a) On August 19, 1977, it sold alcoholic beverages to a minor, below the age of eighteen years, to wit, seventeen years; in violation of N.J.A.C. 13:2-23.1 (formerly Rule 1 of State Regulation No. 20), and imposed a twenty-one days suspension of license effective April 14, 1978, and; (b) On September 7, 1977, it again sold alcoholic beverages to another minor below the age of eighteen years, to wit, seventeen years; in violation of N.J.A.C. 13:2-23.1 (formerly Rule 1 of State Regulation No. 20), and imposed a thirty-five days suspension of license, effective May 5, 1978.

Upon the filing of the within appeals, the Director, by Orders dated April 12 and 13, 1978 stayed the suspensions pending final determination of the appeals.

- I -

Appellant concedes that there was sufficient evidence to support a finding of guilty relative to the August 19, 1977 occurrance, but maintains that the suspension imposed (twenty-one days) was excessive.

The precedent penalty imposed by this Division under similar circumstances is a minimum suspension of fifteen days. Any discussion of precedent penalties is always subject to increases for aggravating circumstances, and, same is not binding on the local issuing authority. I do not find the suspension of license for twenty-one days to be excessive or an abuse of discretion. I further recommend that the decision of the Council, suspending appellant's license for twenty-one days for selling alcoholic beverages to a minor, aged seventeen, on August 19, 1977, be affirmed, and the effective dates thereof be reimposed by the Director.

- II -

Appellant, in its Petition of Appeal relative to the September 7, 1977 charge, alleges that:

(a) Council failed to establish that the alleged person served was under the age of eighteen years.

(b) Council failed to prove the alleged sale on the date charged; and

(c) The decision was solely based upon hearsay evidence and information which never was admitted into evidence before the Council at the time of hearing.

The Council, in its Answer, admits that members may have had the benefit of certain reports that were not submitted into evidence, but asserts that the determination was based upon the evidence and testimony submitted at the hearing. It denies the other substantive allegations contained in appellant's Petition of Appeal.

The matter was submitted for determination in this Division upon the pleadings, summations and transcript of hearing held before the Council on February 16, 1978, pursuant to N.J.A.C. 13:2-17.8 (formerly Rule 8 of State Regulation No. 15).

The facts attendant to this charge include a fatal motor vehicle accident that occurred some distance from the licensed premises. The investigating officer interviewed the driver, a minor, Patricia B ---, at the hospital where she was in the intensive care unit, under the effects of drugs administered to deaden pain resulting from serious injuries sustained - among them, two broken legs. Further, it is conceded, she was in shock at the time of the interrogation.

The transcript of the local hearing reveals that Patricia B ---, the minor involved in the subject charge, testified for

the Council in support of the charge. She admits meeting two friends and stopping at several other taverns on September 7, 1977. Her recollections are vague. She remembers being in the parking lot at the Crown Inn, but has no recollection as to whether or not she was inside or was served an alcoholic beverage there. She does not recall leaving the parking lot, nor the interrogation by the investigating police officers later that evening at the hospital. She admits being seventeen years of age at the time of the occurrance.

Donald Haines testified on behalf of the Council that he was with Patricia B--- that night, and that they had been drinking together at other establishments. He states that she did not enter the barroom with him at the Crown Inn, remaining outside the entire time he was a patron. He estimates being inside for about five minutes and consuming one drink with a friend.

Thereafter, one of the Councilmen attempted to question Haines about possible conflicting statements contained in a police report which was distributed to each member, prior to the hearing.

A spirited exchange then took place between appellant's attorney and the lawyer representing the respondent. Respondent's counsel was surprised that the members had that information and stated: "(last) time I sat as special solicitor, I asked that Council not be provided with the police reports . . . (it) catches me by surpise." Further discussion was had relative to the propriety of supplying members with information, not admitted into evidence.

Sergeant Charles Adams of the Vineland Police Department next testified that he was one of the policemen who investigated at the scene of the accident. He sated that Donald Haines informed him that Patricia B--- was in the bar, but that he did not buy her a drink. Haines was questioned at the scene because he was the least seriously injured of the vehicle's occupants. Adams stated that " . . . he (Haines) was in a state of trauma, so to speak."

Adams then proceeded to the hospital and interviewed Patricia. She admitted that she bought her own drink at the Crown Inn on that evening.

The only testimony before the Council placing Patricia B--- in the tavern that evening is that of Officer Adams who related, from memory, his conversation with her at which time she admitted purchasing her own drink.

The Council argues that her utterances at the hospital were spontaneous with the incident and, therefore, an exception to the hearsay rule. Assuming for the sake of argument that the statement is an exception to the hearsay rule, what weight and credibility can be accorded to a statement by a person in shock and

pain, having just sustained two broken legs and under medication in a hospital intensive care unit? Could a person sufficiently comprehend what is happening around her and respond to questions in a competent, relevant fashion under such circumstances? I think not.

The only competent credible testimony on this issue was that of Donald Haines who stated that Patricia B--- remained on the outside and was not served an alcoholic beverage at the Crown Inn. Patricia B's denial was based upon an almost total lack of memory of that part of the evening in question, and is of little credible weight.

Hearsay may be employed to corroborate competent proof, and competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis, to sustain an administrative decision, which affects the substantive rights of a party, there must be a residuum of legal and competent evidence in the record to support same. See Weston v. State, 60 N.J. 36,51 (1972).

I conclude that the charge was not established by the preponderance of the believable evidence, and that the appellant has sustained the burden of proof that the determination was erroneous, pursuant to N.J.A.C. 13:2-17.8 (formerly Rule 8 fo State Regulation No. 16).

Therefore, I recommend that the Council's decision adjudging appellant guilty of the sale of an alcoholic beverage to a minor on September 7, 1977, be reversed.

CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-17.14.

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

Accordingly, it is, on this 1st day of December, 1978,

ORDERED that the action of the City Council of the City of Vineland, in finding the appellant guilty of a charge alleging a sale of alcoholic beverages to a minor on August 19, 1977, be and the same is hereby affirmed, and the suspension of license for twenty-one (21) days be reimposed; and it is further

ORDERED that the action of the City Council, in finding the appellant guilty of a charge alleging a sale of alcoholic beverages to a minor on September 7, 1977, be and the same is hereby reversed, and the charge therein be and is hereby dismissed; and it is further

ORDERED that my Orders of April 12 and 13, 1978 staying the suspensions pending determination of the appeals, be and the same are hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0614-33-007-001 issued by the City Council of the City of Vineland to Crown Inn. Inc., t/a Crown Inn, for premises 3513 South Delsea Drive, Vineland be and the same is hereby suspended for twenty-one (21) days commencing 2:00 a.m., Tuesday, December 12, 1978 and terminating 2:00 a.m., Tuesday, January 2, 1979.

JOSEPH H. LERNER
DIRECTOR

4. APPELLATE DECISIONS - JUDGE'S FOUR O'CLOCK CLUB, INC. v. PATERSON.

Judge's Four O'Clock Club, Inc. Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Paterson, Respondent.	ON APPEAL CONCLUSIONS AND ORDER

Tanis & Sternick, Esqs., by Philip Tanis, Esq., Attorneys for Appellant,.
Joseph A. LaCava, Esq., by Ralph L. DeLuccia, Jr., Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Paterson (hereafter Board) which by Resolution dated December 28, 1977, suspended appellant's Plenary Retail Consumption License, 1608-33-162-001, for premises 14 Clark Street, Paterson, for five days, upon a finding of guilt to a charge alleging that, on July 8, 1977 and divers dates subsequent thereto, appellant permitted patrons to create disturbances and otherwise conducted its licensed premises in a manner offensive to common decency and public morals, in violation of Rule 5 of State Regulation No. 20 (now N.J.A.C. 13:2-23.6).

Appellant contends it its Petition of Appeal that the evidence adduced before the Board was insufficient upon which to base its findings and "the conviction by the Board is tantamount to the taking of property and property rights . . . without due process." The Board denies these contentions in its Answer.

Upon the filing of the said appeal, the Director of this Division, by Order dated January 6, 1978, stayed the effective dates of suspension of license pending the determination of the appeal.

An appeal de novo was heard in this Division pursuant to N.J. A.C. 13:2-17.6 (formerly Rule 6 of State Regulation No. 15), with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. Additionally the parties agreed to rely

upon a transcript of the proceedings before the Board, submitted in accordance with N.J.A.C. 13:2-17.8 (formerly Rule 8 of Regulation No. 15), augumented solely by oral argument at the hearing.

The record of the hearing held by the Board reveals the testimony of five witnesses in support of the charges. Four were police officers who related the consequence of investigations they made in response to police calls. The remaining witness, Richard Smith, testified that, on the evening of July 8, 1977, when he was about to leave the appellant's premises, he was struck on the head by glass thrown at him by a woman patron. Police Officer Cifaldi confirmed that he found Smith bleeding and learned from him that he had been struck in the head by a glass thrown at him by a woman patron.

Police Officer Amoresano related that he had visited a local hospital and there learned from one Olin Chandler that he had been hit on the head by an axe while in appellant's premises. Chandler's explanation was not confirmed by any other evidence.

Police Officer Torrone next testified that he interviewed an individual who alleged he was robbed by a prostitute, he had solicited. The officer "assumed" the man made the arrangements at or near appellant's premises by the description given.

A report by a patron who informed Police Officer Jankowski that he was missing his wallet after a visit at appellant's premises on October 20, 1977, was also testified to before the Board.

In sum, the testimony offered to the Board was, with the exception of that of Smith, entirely hearsay. The Commissioner of the Board, speaking for it said "(After) going over the testimony that we heard, we found there was testimony to support at least one incident. I am referring to the glass-throwing incident in which an individual was injured."

In oral argument, Board's counsel urged that the action of the Board should be affirmed despite the hearsay character of the evidence presented before it, in that, the Board is an administrative agency to which N.J.S.A. 52:14B-10 applies. This statute permits the inclusion of hearsay or other evidence, and is not bound by Rule 63 et seq. of the Evidence Act (N.J.S.A. 2A:84A-1 et seq.), which excludes hearsay evidence unless such evidence comes within the named exceptions (not applicable here).

However, our Supreme Court in Weston v. State, 60 N.J. 36, 51 (1972) stated the appropriate rule in administrative determinations:

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or

> given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

See also, In re Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976).

Thus, it is clear that, although the Board has full right to hear the testimony of the officers and permit the inclusion of their hearsay testimony, its decision could not be based upon such testimony alone.

In respect to the testimony of Smith, it is likewise clear that, although such testimony is uncontroverted, it is probative only that Smith was struck. No proof was offered that the appellant or its agents were aware of any acts or events leading to this assault which it might have prevented by the exercise of due diligence. Hence, there was a total absence of proof indicating that the assault had been allowed or permitted by the appellant, in violation of N.J.A.C. 13:2-23.6.

Appellant's arguments referred to sociological problems facing owners of liquor establishments in that area of the city, and the difficulties resulting from changes in the area. The appellant apparently had been previously noticed by the Board of its concerns, and had urged a more vigorous effort to control the patronage. Continued difficulties led the Board to impose a minimum five-day suspension herein, merely to alert appellant to its commitment to enforce the law and resolve the attendant difficulties at the licensed premises.

Despite the laudable goal of the Board, its action is based entirely upon insufficient competent evidence. However, the appellant should take little solace in the recommended reversal, for there are obviously repeated instances where acts of patrons, constituting nuisances, take place. These might be sufficient, if the situation is not quickly controlled by appellant, upon which the Board may deny renewal of license application, or institute further disciplinary proceedings.

In any event, I find that the appellant has sustained its burden of establishing that the action of the Board is erroneous and should be reversed as required by N.J.A.C. 13:2-17.6 (formerly Rule 6 of State Regulation No. 15).

It is, therefore, recommended that the action of the Board,

in suspending appellant's plenary retail consumption license for a period of five days be reversed.

CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-17.14.

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

Accordingly, it is, on this 7th day of December, 1978,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Paterson be and the same is hereby reversed, and the charge therein be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

5. OBJECTIONS TO TRANSFER STATE BEVERAGE DISTRIBUTION LICENSE - APPLICATION DENIED.

In the Matter of Objections to the Transfer of State Beverage Distribution License SBD-1 from:

W.H. Crowley Company
Roycefield Road
Hillsborough Township

to:

Raritan Beverages, Inc.
424 Route 206 - South
Hillsborough Township
P.O. Somerville, N.J.

CONCLUSIONS AND ORDER

Fleischer, Fleischer & Lainer, Esqs., by Richard E. Fleischer, Esq. Attorneys for Raritan Beverages, Inc.
Fuerst & Singer, Esqs., by William S. Singer, Esq., Attorneys for Somerset County Tavern Association, Objector.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

On June 15, 1978, Raritan Beverages, Inc., filed an application for a person-to-person and place-to-place transfer of State Beverage Distribution License SBD-1, issued by the Director, from W.H. Crowley Company to Raritan Beverages, Inc., and from premises Roycefield Road, Hillsborough to 424 Route 206 - South, Hillsborough, New Jersey. Said license has been inactive since 1976.

Written objections to the granting of the application for transfer were filed and a hearing duly held thereon. The objections may be summarized as follows:

1. There are sufficient retail alcoholic beverage outlets in the area to serve the public's needs;

2. The zoning at the proposed location prohibits this type of operation;

3. It is, in essence, a retail outlet

currently having no wholesale lines to distribute;

4. The grant of the transfer would create additional traffic hazards upon an already overburdened and hazardous highway; and

5. The grant of the transfer would be contrary to the public interest.

At the hearing held herein, Richard E. Fleischer, Esq. appeared on behalf of the corporate applicant. An officer and fifty percent stockholder he stated that the applicant leases a store in a small shopping center from which it proposes to sell, at retail, soda and warm beer. It anticipates that it would be successful in obtaining distribution (wholesale) franchises for one or more brands of beer and, at that time, would establish warehousing facilities elsewhere. Applicant states that it is currently negotiating with a midwest brewer to distribute its product in the Somerset County area, where it is not presently available.

The local Tavern Owners Association, as well as some of its members individually, entered objections of the application. It is their position, as related by James Pellicane, the Association's President, that there are seventy-eight retail outlets within a five mile radius of the proposed site which adequately serve the retail requirements of the area's inhabitants. Additionally, the retail licensee's (wholesale) needs are adequately fulfilled by the various wholesalers currently servicing the area.

William Tepper, a local retail licensee, testified in opposition to the granting of the application. He expressed his concern that the proposed location was "near" schools, but admitted that the distance exceeded two hundred feet.

Robert Pras, Deputy Mayor of Hillsborough Township expressed the Township's opposition. It is grounded upon the fear that an already overburdened and dangerous highway (Route 206) would be subjected to an even greater traffic load if this transfer were approved. Additionally, the location presented zoning problems, and it was their opinion that the intended use was prohibited in that zone. He further stated that there are sufficient outlets for the citizens to obtain beer in the immediate area, and no need exists for an additional one.

The transfer of a liquor license, whether state or municipal, from person-to-person or place-to-place, is not a privilege inherent in the license. Re Maccia, Bulletin 1401, Item 5. The

test in the transfer of licenses is whether there is a need and necessity for such transfer and whether such transfer would serve the public interest. Lyons Farms Tavern v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292 (1970); Lubliner v. Bd. of Alcoholic Bev. Cont., Paterson, 33 N.J. 428 (1960); Tp. Committee of Lakewood v. Brandt, 38 N.J. Super 462 (App. Div. 1955).

The principal purpose of the license would be to operate a retail sales outlet at the premises. No state-wide program of distribution of any specific brands of beer was delineated.

The objectors emphasized the adaquacy of the present service to the public in the area and the lack of need or necessity for an additional license to serve the public interest.

In applying the appropriate standards to such applications, the Director noted in Re Calabrese, Bulletin 2196, Item 5:

> The transfer sought herein would be of no demonstrable value to the applicant, nor would it serve the public interest, because the applicant admittedly has not obtained any distribution franchises with which to engage in operations.

The present applicant presented no evidence of any franchise or distribution arrangements with any malt alcoholic beverage brewing companies.

It is well settled that the Director has the discretionary authority to grant or deny the issuance, renewal or transfer of SBD licenses based upon the public need and necessity, and the good faith of the applicant. Re Mystic, Bulletin 1833, Item 3.

In sum, it is apparent that, (1) the applicant plans only a limited wholesale use of the license at this time; (2) has no viable source of malt alcoholic beverage products available for distribution; (3) the area is adequately served by existing retail licensees; and (4) the public need or necessity does not require the license transferred to the proposed location.

Accordingly, I recommend that the application be denied.

CONCLUSIONS AND ORDER

No written Exceptions were filed to the recommended denial

of the application of Raritan Beverages, Inc. for a person-to-person and place-to-place transfer of State Beverage Distribution License No. 1 currently issued to W.H. Crowley Company for premises Roycefield Road, Hillsborough Township.

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

Accordingly, it is, on this 1st day of December, 1978,

ORDERED that the application of Raritan Beverages, Inc., for transfer of State Beverage Distribution License No. 1 issued by the Director of the Division of Alcoholic Beverage Control, from W.C. Crowley Company and to premises 424 Route 206 South, Hillsborough Township, be and the same is hereby denied.

JOSEPH H. LERNER
DIRECTOR