STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N. J. 07102

BULLETIN 1637 September 28, 1965

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STATE OF NEW JERSEY
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BULLETIN 1637 September 28, 1965

1. DISCIPLINARY PROCEEDINGS - NUISANCE (APPARENT HOMOSEXUALS) - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 120 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
CHARMAC, INC. 7-9 N. Straight Street Paterson, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-47, issued by the Board of Alcoholic Beverage Control for the City of Paterson.	)	

Harry Castelbaum, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge as follows:

"On June 9 and 23, 1965, you allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered persons who appeared to be homosexuals, e.g. males impersonating females, in and upon your licensed premises; allowed, permitted and suffered such persons to frequent and congregate in and upon your licensed premises and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

Reports of investigation disclose that agents visited the licensed premises on June 9 and 23, 1965. On the first visit they observed thirteen male patrons, four of whom appeared to be homosexuals. Two of these apparent homosexuals were dancing with each other. On the second visit the agents observed a total of twenty-five male patrons, all of whom appeared to be homosexuals in their mannerisms and appearance. On this occasion they also observed two apparent homosexuals dancing with each other, throwing their arms in the air and rotating the lower portions of their bodies in a feminine manner.

Licensee has a previous record of suspension of license by the Director for fifty-five days effective June 24, 1965, for similar violation, said suspension being presently in effect, terminating at 3 a.m. Wednesday, August 18, 1965, Re Charmac, Inc., Bulletin 1630, Item 2.

The prior record of suspension for similar violation within the past five years considered, the usual penalty of suspension for sixty days for a first offense of this kind (Re Charmac, Inc., supra) will be doubled and the license will be

suspended for one hundred twenty days, with remission of five days for the plea entered, leaving a net suspension of one hundred fifteen days, to take effect at the expiration of the present suspension period. Cf. Re Markowitz, Bulletin 1538, Item 1; Re Club Tequila, Inc., Bulletin 1557, Item 1.

In addition, the licensee is pointedly warned that a future similar violation may well result in outright revocation of the license.

Accordingly, it is, on this 11th day of August 1965,

ORDERED that Plenary Retail Consumption License C-47, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Charmac, Inc., for premises 7-9 N. Straight Street, Paterson, be and the same is hereby suspended for one hundred fifteen (115) days, commencing at 3 a.m. Wednesday, August 18, 1965, and terminating at 3 a.m. Saturday, December 11, 1965.

JOSEPH P. LORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - FRONT - FALSE STATEMENT IN LICENSE APPLICATION - CRIMINALLY DISQUALIFIED EMPLOYEES - REFUSAL TO SUBMIT TO FINGERPRINTING - LICENSE SUSPENDED FOR 75 DAYS.

CANCELLATION PROCEEDINGS - STOCKHOLDER CONVICTED OF CRIME INVOLVING MORAL TURPITUDE - ORDER DISCHARGING ORDER TO SHOW CAUSE ON PROOF OF CORRECTION.

In the Matter of Disciplinary Proceedings against	)	
FANTACO, INC. t/a DIAMOND SHO BAR 35-37 N. Arkansas Avenue Atlantic City, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-143 for the 1964-65 licensing period and C-97 for the 1965-66 licensing period, issued by the Board of Commissioners of the City of Atlantic City.	)	

Mathews & Sitzler, Esqs., by John O. Sitzler, Jr., Esq., Attorneys for Licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges as folows:

"1. In your application dated June 11, 1964, filed with the Board of Commissioners of the City of Atlantic City, upon which you obtained your current plenary retail consumption license, in answer to Question No. 22 you falsely listed Americo Bucalo, Charles Mason and Josephine Pestritto as the holders of all of your issued and outstanding stock and, in answer to Question No. 23, you falsely stated that no one other than said stockholders had any beneficial interest, directly or indirectly, in said stock, whereas in truth and fact Frank Fantasia

was the true and beneficial owner of all of your said stock; in violation of R.S. 33:1-25.

"2. In your aforesaid license application, you falsely stated 'No' in answer to Question No. 31, which asks: 'Have you agreed to pay (by way of rent, salary or otherwise) to any employee or other person, any portion or percentage of the gross or net profits or income derived from the business to be conducted under the license applied?', whereas in truth and fact you had agreed to permit Frank Fantasia to retain all of the profits and income derived from your licensed business; in violation of R.S. 33:1-25.

"3. From June 27, 1963 to date, you aided and abetted Frank Fantasia to exercise, contrary to R.S. 33:1-26, the rights and privileges of your plenary retail consumption license; in violation of R.S. 33:1-52.

"4. In your aforesaid license application, in answer to Question No. 33, you falsely denied that any person mentioned in the application had ever been convicted of any crime, whereas in truth and fact Americo Bucalo, mentioned in said application, had been convicted in the Court of Quarter Sessions of the Peace, of the County of Philadelphia, Pennsylvania, on October 24, 1963, of the crime of setting up and maintaining an illegal lottery; in violation of R.S. 33:1-25.

"5. On April 13, 1965, and on divers occasions prior thereto extending to on or about June 27, 1963, you employed and had connected with you in a business capacity Americo Bucalo, a person who had been convicted of a crime involving moral turpitude, viz., setting up and maintaining an illegal lottery as hereinabove stated, and Ralph Pirillo, a person who had been convicted in the Court of Quarter Sessions of the Peace, of the County of Philadelphia, Pennsylvania, on August 24, 1960 of setting up and maintaining an illegal lottery and on April 27, 1961 of poolselling and bookmaking, crimes involving moral turpitude; in violation of Rule 1 of State Regulation No. 13.

"6. From March 16, 1965, to date, you employed and had connected with you in a business capacity Americo Bucalo, Charles Mason and Josephine Pestritto, persons who refused to submit themselves for fingerprinting after having been required to do so by the Director of the Division of Alcoholic Beverage Control; in violation of Rule 31 of State Regulation No. 20.

"7. On the night of June 18, and the early morning of June 19, 1965, you employed and had connected with you in a business capacity Ralph Pirillo, a person who had been convicted in the Court of Quarter Sessions of the Peace, of the County of Philadelphia, Pennsylvania, on August 24, 1960 of setting up and maintaining an illegal lottery and on April 27, 1961 of poolselling and bookmaking, crimes involving moral turpitude; in violation of Rule 1 of State Regulation No. 13."

In addition, licensee does not contest an order to show cause why the license should not be cancelled on a charge as follows:

"The license was issued in violation of R.S. 33:1-25 in that Americo Bucalo, an owner of more than ten percentum of your stock, failed to qualify in all respects as an individual applicant for your retail license since he had been convicted of a crime involving moral turpitude, and in that Charles Mason, an owner of more than ten percentum of your stock, failed to qualify in all respects as an individual applicant for your retail license since he was not a resident of the State of New Jersey."

The facts are sufficiently set forth in the quoted charges.

Subsequent to the institution of these proceedings, the existing unlawful situation, as alleged in Charges 1, 2, 3, and 4 and in the order to show cause, has been corrected by transfer of the corporate stock to Frank Fantasia, who is now disclosed in the current application for license as president and 98% stockholder of the licensee corporation.

Although the licensee has no previous record of suspension of license, the license of Frankie's Nomad Club, Inc., t/a Zodiac Room, 1211 Bacharach Boulevard, Atlantic City, of which corporation Frank Fantasia was president and 50% stockholder, was suspended by the Director for forty-five days effective October 2, 1962, for permitting hostess activity, re-bottling and hindering investigation. Re Frankie's Nomad Club, Inc., Bulletin 1481, Item 4.

The previous record of Frankie's Nomad Club, Inc. considered (cf. Re Fun Fair Bowl, Bulletin 1625, Item 6; Re White Poodle, Inc., Bulletin 1530, Item 4) as well as the confessive plea entered, the license will be suspended on Charges 1, 2 and 3 for twenty-five days (Re Causeway Inn. Inc., Bulletin 1618, Item 5), on Charge 4 for twenty days (Re Sajdik, Bulletin 1589, Item 6), on Charges 5 and 7 for twenty days (Re Peppermint Twist, Bulletin 1558, Item 4) and on Charge 6 for ten days (cf. Re Edward J. Power, Inc., Bulletin 1487, Item 5; Re Frankie's Nomad Club, Inc., supra), or a total of seventy-five days.

In view of the correction of the unlawful situation, the order to show cause will be discharged. Cf. Re Sajdik, supra.

Accordingly, it is, on this 9th day of August, 1965,

ORDERED that Plenary Retail Consumption License C-97, issued by the Board of Commissioners of the City of Atlantic City to Fantaco, Inc., t/a Diamond Sho Bar, for premises 35-37 N. Arkansas Avenue, Atlantic City, be and the same is hereby suspended for seventy-five (75) days, commencing at 7:00 a.m. Wednesday, August 11, 1965, and terminating at 7:00 a.m. Monday, October 25, 1965.

JOSEPH P. LORDI
DIRECTOR

3. APPELLATE DECISIONS - C & S TAVERN CORP. v. NEWARK.

C & S TAVERN CORP., t/a JACK'S STAR BAR, Appellant, v. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

Louis R. Cerefice, Esq., Attorney for Appellant.
Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

The appellant C & S Tavern Corp., t/a Jack's Star Bar, the holder of Plenary Retail Consumption License C-143 for premises 24 Tichenor Street, Newark, was found guilty by the respondent (hereinafter Board) in disciplinary proceedings of charges alleging that it allowed, permitted and suffered a brawl, act of violence and disturbance on its licensed premises and conducted its place of business as a nuisance, in violation of Rule 5 of State Regulation No. 20, and its license was suspended for a period of thirty days effective February 22, 1965,

It filed this appeal challenging such action, and an order was entered on February 17, 1965 staying respondent's order of suspension until the further order of the Director. R.S. 33:1-31.

In its petition of appeal appellant alleges that the Board's action was erroneous for reasons which may be summarized as follows: (1) the verdict was contrary to the clear weight of the evidence; it was based on "meager, unclear, contradictory and weak" evidence; (2) it was unreasonable and unlawful; (3) appellant exercised "every possible precaution and did everything possible to prevent the violation charged;" (4) The Board refused to grant a motion for dismissal based upon the ground that the Board had failed to prove a prima facie case; (5) the penalty imposed was "harsh; excessive and unduly severe."

The Board filed an answer generally denying the substance of allegations in the petition. It further asserts that the decision was based upon the factual testimony from which it "in its sound discretion, concluded that such action and the penalty imposed were substantiated."

The hearing on appeal was de novo pursuant to Rule 6 of State Regulation No. 15. The stenographic transcript of the hearing below was submitted in accordance with notice prescribed by Rule 8 of State Regulation No. 15, and was supplemented at this

hearing by testimony of witnesses produced on behalf of both the appellant and the Board.

In support of the Board's case it produced Charles Person, Jr., who gave the following account: On the evening of Sunday, August 2, 1964, he visited several taverns and consumed alcoholic beverages. Around midnight he entered the licensed premises of the corporate appellant accompanied by his girl friend Miss Brenda Parham. As soon as she was seated at the bar he left the premises and visited a nearby tavern where he consumed several beers.

Within a short time thereafter he returned to the appellant's premises and stood at the bar behind his friend. This bar contained about forty seats and there were at that time somewhere between seventy-five and eighty patrons present. His girl friend was drinking beer, but Person did not order any drinks. While he was standing there a man, whom he described as a Puerto Rican, came up behind his girl friend and put his arms around her waist. She then told him, "Go leave me off, don't bother me." Person told this man to leave her alone; that she was his girl friend, whereupon this man immediately turned and punched him in the eye with his fist. He fell to the floor and he noted that one of the bartenders jumped over the bar; the next thing he knew, he had been dragged outside on the sidewalk. He further admitted that there was no argument or shouting or quarrel between the assailant and himself, and that in fact, after he was struck, the man came to his side and told him, "I'm sorry, in fact, I done that." The police arrived shortly thereafter and he was taken by police car to the hospital.

Brenda Parham testified as follows: She accompanied Person to the tavern on the night in question and seated herself at the bar. Person immediately thereafter left the tavern and returned within fifteen or twenty minutes. Upon re-entering the tavern he stood behind her because the bar was crowded and no seats were available. He did not order nor was he served any drinks at that time.

A Puerto Rican man came up to her and put his arms around her, and Person said, "why you put your hands on the lady ... and then, all of a sudden, he struck Charlie [Person] ...." She denied that there was any arguing or quarreling and that the whole thing happened spontaneously, "very fast."

It seems that, after Person was hit, she grabbed the shirt of the assailant and tore part of it. The aggressor ran out of the Tavern immediately after this assault. She noted that a bartender, whom she describes as a Spanish bartender, jumped over the bar immediately and, with the assistance of several other patrons, dragged Person out of the premises and placed him on the sidewalk. She immediately left the premises; saw that he was bleeding; returned to the premises and asked Bernard Rausch (an officer of the corporate appellant, who was also working as a bartender at that time) for a wet towel. He immediately gave her a wet towel and ice, and she returned to Person. She then sought to make a telephone call to the police, but saw that the telephone booth in the tavern was then occupied, whereupon she went to a nearby telephone and summoned the police.

On cross examination she recalled that Person, upon observing that his assailant had placed his arms around her waist, said, "Lay off, that's my girl friend .... So they said two or three words in Spanish, and then he hit Charlie and thats all."

She added that, when police took Person to the medical center, they told him he was drunk.

Detective Anthony Bongiovanni, of the Newark Police Department, testified at the hearing before the Board to the following effect: He undertook an investigation of this incident and questioned Rausch. Rausch stated that he did not call the police, nor did he have any knowledge of any incident that occurred on the premises. He insisted that, if there was any incident or disturbance that occurred, it was outside of the tavern. However, he admitted that Person had been in the tavern that evening; that he ordered his bartenders not to serve him because he was intoxicated; that in fact he was not served any beverages at that time.

It should be noted that, at this plenary hearing before me, Person and Miss Parham were both called by the attorney for the appellant in its behalf, and their testimony was substantially the same as that proffered at the hearing before the Board.

In addition the appellant called as its witnesses Bernard Rausch (the president of the corporate appellant) and Peter Toriello (who was on duty as a bartender on the night in question).

Rausch testified that, on Person's second re-entry to the bar, he walked to the rear to his girl friend and sought to be served. However, Rausch ordered the bartender Toriello not to serve him because "he looked as if he had too much to drink." Accordingly Person was not served nor did he consume any drinks at these premises on the night in question. The witness went on to state that the bar was unusually crowded on this evening; there were approximately seventy to eighty people in the premises. He heard no loud noises or quarrels, nor did anyone complain to him about being annoyed or disturbed. So far as he was concerned, nothing occurred at the premises. The first thing he knew about any assault was when Miss Parham came to him and told him that a man was lying outside and requested a wet towel with some ice. He continued to wait on customers and then, shortly thereafter, went outside and saw Person sitting on the ground propped against the wall in a sitting position. Miss Parham said to him, "You ought to get him to a hospital, get him to a doctor." He then went to a telephone which was located behind the bar and called the Martland Medical Center. He phoned police headquarters and the line was busy. Before he had a chance to try again, a police officer entered the premises and advised him that he was going to take Person to a doctor or a hospital. On cross examination he was asked why he didn't tell Person to leave the premises when he observed that he had too much to drink. His answer: "He came in and I figured he would walk out when we refused." He admitted that he did not see him leave because he was busy serving other patrons at the other end of the bar.

Peter Toriello, called on behalf of the appellant, stated that he was directed by Rausch not to serve Person because he appeared to have too much to drink; that, accordingly, this man was not served on that evening. He denied that he heard any loud noises or arguments, nor did anyone complain to him about being annoyed or bothered. He did not see any assault take place, nor did he hear anything unusual take place on that evening. The first thing he knew about any person being assaulted was when Miss Parham returned to the premises and Rausch handed her a towel and some ice cubes. Finally, he added that he did not know who Person's

assailant was, nor did he witness any incident with Person or Miss Parham.

We are dealing here with a purely disciplinary measure and its alleged infraction. Such measure is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App.Div. 1951). Thus the proof must be supported by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). In order for the Board to sustain this charge it must establish, by the preponderance of the credible evidence, (1) that there was in fact a brawl or disturbance or act of violence on its licensed premises, and (2) that the licensee allowed, permitted and suffered the same to take place and conducted its place of business as a nuisance.

Upon evaluation and examination of the entire record, it cannot be seriously argued that there was not an act of violence which occurred inside the licensed premises. There is no doubt in my mind that Person was struck by an unnamed aggressor and that he received a severe blow to his eye. The severity of the blow was such that he was required to receive medical attention, and was confined in the hospital for several weeks.

It is equally clear, however, that this blow was a spontaneous action on the part of this assailant, and both witnesses for the Board agreed that it happened within a minute or so. It seemed quite understandable that Person would object to this individual placing his arms around the waist of his girl friend and, when he objected, the attacker struck him without warning. The evidence further reflects the fact that there was just one blow struck; Person then slumped to the floor and was rendered semi-conscious, if not unconscious.

The almost involuntary action of Miss Parham in grabbing the shirt of the assailant also happened within a few seconds, and she was unable to restrain this individual from leaving the premises. Miss Parham gave conflicting versions of how the assailant left the premises. At the plenary de novo hearing before me she stated that the assailant was told by the bartender to leave the premises immediately. In her earlier testimony before the Board she stated that, as soon as Person was struck, this unnamed aggressor immediately ran out of the tavern. Regardless, however, which version is the true one, it is readily apparent that this incident was immediately concluded after the single blow; then Person was promptly dragged out of the premises and placed on the sidewalk.

The next issue which must be resolved is whether or not the licensee, its agents or employees permitted and suffered such act of violence to occur. In Conner v. Fogg, 75 N.J.L. 245, 247 (Sup.Ct. 1907), the court stated:

> "To permit is defined as meaning to authorize or to give leave (McHenry v. Winston, 49 S.W. Rep. 4), but the term 'permit' has been often used synonymously with 'suffer,' so that it may be said that one who suffers the doing of a thing which he might have prevented permits it."

The key to the sustenance of this charge is whether the appellant might have prevented the incident. There is a heavy responsibility imposed upon licensees to prevent disturbances or brawls from occurring on licensed premises and to take immediate action when they arise. Nevertheless it would be manifestly

unfair to hold a licensee liable where a disturbance occurs without warning or even without his knowledge. This principle of responsibility has often been enunciated by this Division in "brawl" cases starting in 1935. See Caso v. Belleville, Bulletin 101, Item 8. Thus, in Woodland Rod and Gun Club v. Belleville, Bulletin 569, Item 3, a finding of guilt on a brawl charge was reversed where the facts reflected an assault by one person on another. In that case the Commissioner found that there was nothing in the record that anyone on the licensed premises on that occasion was drunk or had been drinking to excess. In Zicherman v. Newark, Bulletin 613, Item 5, the finding of guilt on a brawl charge was reversed where the testimony indicated that there was a sudden assault by one patron upon another, the court saying that there is nothing in the record to show that the licensee "had any knowledge of bad blood existing between the two girls .... Nor does the evidence in the case indicate that the licensee or her agents participated in any of the events leading up to the fatal blow."

In Re Lojko, Bulletin 655, Item 6, a charge of permitting a brawl was dismissed. In that case the record shows that there was no disturbance prior to a fight between two patrons. The evidence failed "to involve the licensee or her employees with the disturbance, brawl or resulting fatality." In Re Club Washington, Inc., Bulletin 683, Item 9, a charge of permitting a brawl was dismissed and the Director stated, "I fail to find in the record any circumstances which would attribute any responsibility for the incident to the defendant or any of its employees." In Engel v. Belleville, Bulletin 694, Item 5, a finding of guilt on a brawl charge was reversed because, as the Director stated, "The record fails to demonstrate any responsibility for the fracas by the licensee .... Although a fight did occur ... there is nothing in the testimony to show that the licensee had any reason to anticipate the trouble which occurred...."

Both Rausch and Toriello denied having any knowledge of this incident, and Rausch says that the first he knew that Person was assaulted was when Miss Parham came into the premises and requested a wet towel and ice. It seems improbable that both of these men who were on duty as bartenders at that time were not made aware of this assault upon Person in view of the fact that one of the bartenders immediately jumped over the bar and helped to drag Person out of the premises. I am not convinced that their testimony was entirely credible in this point. I believe that their testimony was motivated by a fear of the possible consequences of the occurrence of this incident in the premises. It would have been much better had they given an honest and accurate account without fear of inculpation.

Counsel for the Board maintains that Rausch knew that Person was intoxicated during his stay at the premises because he admittedly directed the other bartenders not to serve him. He reasons that his failure to immediately evict him from the premises constituted a "suffering" within the contemplation of this charge. The evidence, however, fails affirmatively to show that this man was the aggressor or assailant, but in fact was the victim of the sudden blow. In any event, the record shows that this was a sudden flare-up. The assailant immediately left the premises and the bartender helped to evict Person from the premises. Cf. Ka Zam Bar, Inc. v. Newark, Bulletin 1595, Item 1.

There is a peripheral aspect to this case which requires comment. Miss Parham testified that she went to a telephone booth

located nearby and summoned the police. Rausch states that he first called the Martland Medical Center and was advised that he was required to notify the police before any medical assistance could be given. He then states that he called police headquarters but received a "busy signal." The fact is, however, that he did not contact the Police Department. The duty to notify the police is not an absolute one, and depends on the particular circumstances. See Jackson v. Newark, Bulletin 1608, Item 4. However, in most situations the more responsible course is to take prompt action in contacting the police authorities.

The Director has recently had occasion to admonish licensees with respect to their responsibility in this regard. In Jackson v. Newark, Bulletin 1600, Item 2, the Director stated:

> "Indeed, where a licensee or his employee becomes aware of the apparent commission of any crime in connection with the licensed business, they should notify the police. I am taking this opportunity to impress this point upon licensees in order that they, as citizens with a strong stake in proper law enforcement, may assume a leading position in cooperating with law enforcement agencies."

That case differs from the case sub judice in that a knife was wielded by a participant in a fight on the licensed premises, whereas here no weapon other than the man's fist was used in the commission of this act of violence. It is my conviction that there was inadequate policing of these premises on the date in question. Recognition of this fact by the appellant is manifest by its disclosure to the Board, at the original hearing before it, that arrangements have been made since that date to employ a special police officer, and such officer has been so employed at the premises since that time.

Under the totality of the circumstances present herein, I am satisfied that the Board has failed to establish by a fair preponderance of the believable evidence that the appellant allowed, permitted or suffered a brawl or act of violence in or upon its licensed premises, within the contemplation of the applicable rule thereto.

I therefore recommend that the action of the Board in finding appellant guilty of the charge should be reversed, and that an appropriate order be entered accordingly.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony and the oral argument of counsel for the respective parties, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 3d day of August, 1965,

ORDERED that the action of the respondent be and the same is hereby reversed.

JOSEPH P. LORDI
DIRECTOR

4. APPELLATE DECISIONS - FARRELLY v. NEWARK.

THOMAS M. FARRELLY, t/a P. J. FARRELLY, Appellant, v. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

John J. Smyth, Esq., Attorney for Appellant.
Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney For Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is an appeal from the action of respondent whereby on April 14, 1965 it suspended appellant's plenary retail consumption license for twenty-five days effective May 3, 1965. The suspension resulted after finding appellant guilty of sale, service and delivery of alcoholic beverages to three minors on January 1, 1965, and allowing, permitting and suffering the consumption thereof by said minors on appellant's licensed premises, in violation of Rule 1 of State Regulation No. 20. Appellant's premises are located at 91-93 Fleming Avenue, Newark.

Upon filing of the appeal an order dated April 29, 1965, was entered by the Director staying the effect of respondent's order of suspension pending the determination of said appeal. R.S. 33:1-31.

Appellant alleges in his petition of appeal that the action of respondent was erroneous in that "inadmissible evidence was received by the Board (Respondent) and the finding of the Board (Respondent) was contrary to the weight of the evidence."

Respondent's answer denies the said allegation and contends that "The grounds upon which the issuing authority made its decision were based upon the factual testimony before the Board from which it, in its sound discretion, concluded that the penalty imposed substantiated such action."

In lieu of additional testimony being presented, the hearing on appeal is based upon the transcript of the proceedings held before respondent pursuant to Rule 8 of State Regulation No. 15. However, the attorneys for the parties appeared herein and presented oral argument in behalf of their respective clients.

It appears from the charges preferred, upon which the hearing below was based, that Thomas ---, Dennis --- and Patrick ---, all eighteen years of age, were allowed to purchase and permitted to consume alcoholic beverages on January 1, 1965, at the appellant's licensed premises. In support of the charges the said three minors were called as witnesses before respondent.

Each minor categorically denied that he purchased, was served with or consumed beer at appellant's premises on the date in question.

The attorney for respondent pleaded surprise, confronted each minor with a statement signed by him at police headquarters where each minor in his respective statement admitted obtaining beer at appellant's licensed premises.

Detective Albert Goldberg testified that on January 5, 1965, he summoned Thomas to Police Headquarters to question him concerning a disturbance which allegedly occurred on New Year's eve; that during the course of the questioning Thomas stated that he had purchased beer in appellant's premises on New Year's eve.

Appellant testified that he was present in the licensed premises on the evening of December 31, 1964, and the early morning of January 1, 1965 and, although he saw the minors in question, none of them was served or permitted to consume alcoholic beverages.

Norman H. Whipple testified that he was acting as bartender on New Year's eve and also on the early morning of New Year's day and, although he saw the minors in the licensed premises, he did not serve or sell any alcoholic beverages to them.

The main question to be resolved in this matter is whether, under the circumstances appearing herein, there is sufficient evidence in the case to sustain the finding of guilt by respondent of the charges preferred against appellant.

Where, as here, a contradictory prior written statement is offered after pleading "surprise" to adverse testimony given by a witness called by a party, cross examination of said witness is permitted for the sole purpose of neutralizing or of wiping the slate clean of the unexpected adverse testimony given by the witness and is to be clearly distinguished from impeachment of a witness. State v. Hogan, 137 N.J.L. 497 (Sup. Ct. 1948), aff'd 1 N.J. 375 (1949). See also State v. D'Adame, 84 N.J.L. 386 (E. & A. 1912); State v. Cooper, 12 N.J. 532 (1952); State v. Baechlor, 52 N.J. Super. 378 (App.Div. 1958).

In the latter case Judge Haneman (now Justice Haneman), speaking for the court, stated:

> "In order to warrant the admission of neutralizing testimony it is essential that three conditions exist: (1) a witness must make an adverse statement contradictory of a prior statement made by him; (2) the statement must be unexpected by the party against whom it was made, i.e., he must be surprised thereby; and (3) the statement must be harmful to the party against whom it was made."

The legal effect of neutralization is to completely disregard the testimony of a witness. State v. Caccavale, 58 N.J. Super. 560 (App.Div. 1959); Re Newman & Gitter, Bulletin 1575, Item 3.

All the elements to warrant the neutralization of the testimony of the minors in the instant case were present.

The attorney for respondent contends that the said rules of evidence do not apply to "administrative type" hearings because in such hearings the said "rules are somewhat relaxed."

Although his contention may have some merit, the finding of guilt of a licensee must be based upon and supported by competent and legal evidence. Cino v. Driscoll, 130 N.J.L. 535 (Sup.Ct. 1943).

The policemen who took the statement did not witness the sale or service or consumption of alcoholic beverages by the minors in appellant's licensed premises. Appellant, as well as Whipple the bartender, denied serving alcoholic beverages to Thomas, Patrick and Dennis on appellant's licensed premises at the time in question.

I find that, since the minors' testimony had been neutralized, the evidence in support of the charge relative to the three minors has no probative value, and that the respondent had not established the guilt of the appellant licensee. Santhouse v. Totowa, Bulletin 907, Item 2.

Under the circumstances appearing herein, it is recommended that the action of respondent be reversed.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony and the oral argument of counsel, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 17th day of August, 1965,

ORDERED that the action of the respondent be and the same is hereby reversed.

JOSEPH P. LORDI
DIRECTOR

5. APPELLATE DECISIONS - HEINTZ v. HAMILTON TOWNSHIP (MERCER COUNTY).

EMMA HEINTZ & AUGUST HEINTZ, JR., t/a GUS HEINTZ,
Appellants
v.
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HAMILTON (Mercer County),
Respondent.

ON APPEAL
ORDER

Henry F. Gill, Esq., Attorney for Appellants.
William A. Dietrich, Esq., Attorney for Respondent

BY THE DIRECTOR:

Appellants appeal from denial by respondent on June 3, 1965 of their application for transfer of plenary retail consumption license for the licensing year 1964-65 from premises 1108-1110-1112 Chambers Street to premises 1971 State Highway Route 33, Hamilton Township.

Appellants also appeal, as from denial, from respondent's refusal to take any action on appellants' application for renewal of plenary retail consumption license for the licensing year 1965-66 for premises 1971 State Highway Route 33, Hamilton Township.

Prior to the hearing of the appeals, by letter of August 17, 1965 the attorney for the appellants advised me that the appeals were withdrawn.

No reason appearing to the contrary,

It is, on this 18th day of August 1965,

ORDERED that the appeals herein be and the same are hereby dismissed.

JOSEPH P. LORDI
DIRECTOR

6. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALERS - ORDER DENYING AD INTERIM RELIEF.

REITMAN INDUSTRIES; GALSWORTHY, INC., and CREST WINE & SPIRITS, LTD.,

Petitioners,

v.

PAUL MASSON VINEYARDS,

Respondent.

ON PETITION ORDER

Fox, Yanoff and Fox, Esqs., by Leo Yanoff, Esq., Attorneys for Petitioners.
Harrison and Jacobs, Esqs., by Jack B. Kirsten, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

This matter came on to be heard upon the return of an order to show cause, under the authority of R.S. 33:1-93.5 and Rule 6 of State Regulation No. 15A, why an order should not be entered directing the respondent to cease and desist from discriminating against petitioners in the sale of alcoholic liquors; directing respondent to refrain, cease and desist from refusing to sell to the petitioners such alcoholic liquors upon petitioners' compliance with terms of payment, and granting an ad interim order directing the respondent to comply with such order until the final hearing on the petition herein, presently scheduled for September 16, 1965, and the further order of the Director.

At the hearing on the order to show cause, it appeared that the petitioners factually grounded their petition upon two purchase orders which were placed with the respondent and which they alleged respondent failed and refused to honor, viz., one dated May 11, 1965, requesting shipment of various wines and in addition five quarts of brandy, and one dated July 6,1965, for the purchase of wines only.

Ad interim relief may be granted pending final hearing where the petitioner can show that it will probably suffer substantial and irreparable injury before final determination of the proceedings. Rule 6 of State Regulation No. 15A. Generally, to warrant such relief, petitioner must exhibit a right, free from doubt or reasonable dispute either as to the law or facts supporting the right. Allman v. United Brotherhood of Carpenters, 79 N.J.Eq. 641; Hoffman Hardware Company v. Naame, 18 N.J.Super. 234.

A substantial legal question was raised as to the construction of Sections 33:1-93.1 through 93.5 in their applicability to wines, particularly in view of the language in R.S. 33:1-93.1 (followed in the other paragraphs) that there "shall be no discrimination in the sale of alcoholic liquors [to wholesalers in this State] by distillers, importers, and rectifiers of nationally advertised brands of alcoholic liquors..." (emphasis supplied).

Counsel for both petitioners and respondent have indicated that they desired further opportunity to explore the legal question, and have agreed that a determination thereof should not be made on this application for interlocutory relief.

In addition, from the present posture of the proofs, the evidence is impersuasive that the petitioners will probably suffer irreparable injury and damage unless respondent sells its brandy to them.

Accordingly, it is, on this 13th day of August, 1965,

ORDERED that the application of the petitioners for ad interim relief herein be and the same is hereby denied.

JOSEPH P. LORDI
DIRECTOR

7. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Robert E. Lee Inn, Inc.
t/a Robert E. Lee Inn
Route 35, Morgan,
Sayreville, PO South Amboy,
New Jersey,

Holder of Plenary Retail Consumption License C-16, issued by the Mayor and Council of the Borough of Sayreville.

CONCLUSIONS and ORDER

Licensee, by R. E. Newbould, President, Pro se
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensee pleads guilty to a charge alleging that on August 18, 1965 it sold drinks and four containers of beer to two minors, ages 17 and 18, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty days (Re Club "16" Corporation, Bulletin 1472, Item 10), with remission of five days for the plea entered, leaving a net suspension of fifteen days.

Accordingly, it is, on this 7th day of September 1965,

ORDERED that Plenary Retail Consumption License C-16, issued by the Mayor and Council of the Borough of Sayreville to Robert E. Lee Inn, Inc., t/a Robert E. Lee Inn, for premises Route 35, Morgan, Sayreville, be and the same is hereby suspended for fifteen (15) days, commencing at 3 a.m. Tuesday, September 14, 1965, and terminating at 3 a.m. Wednesday, September 29, 1965.

Joseph P. Lordi
Director

New Jersey State Library