

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

BULLETIN 1731

May 18, 1967

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - MAIN DRUG CO., INC. v. CHATAHM.
2. DISQUALIFICATION REMOVAL PROCEEDINGS - CARRYING CONCEALED WEAPON WITH UNLAWFUL INTENT - ORDER REMOVING DISQUALIFICATION.
3. ADVERTISING - LOUD SPEAKER SYSTEMS DISAPPROVED.
4. SEIZURE - FORFEITURE PROCEEDINGS - SPEAKEASY IN RESTAURANT - ALCOHOLIC BEVERAGES AND COMMINGLED CASH ORDERED FORFEITED - DEPOSIT UPON STIPULATION REFLECTING REASONABLE VALUE OF FIXTURES, FURNISHINGS AND EQUIPMENT ORDERED FORFEITED - CASH IN BAG NOT COMMINGLED ORDERED RETURNED TO CLAIMANT.
5. DISCIPLINARY PROCEEDINGS (Irvington) - SALE TO INTOXICATED PERSON - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.
6. STATE LICENSES - NEW APPLICATIONS FILED.



near a Church, which has activities participated in by teenagers and that no problems or violations of the law have occurred.

"(d) The Mayor and Council of the Borough of Chatham failed to give due consideration to the fact that a licensee is in the immediate area of the proposed transfer where beer is dispensed and that no difficulties of any sort have occurred therein.

"(e) The Mayor and Council of the Borough of Chatham failed to evaluate not only the conduct of the licensee in the operation of its business and the investment contained therein, which is entitled to some measure of protection, but in assuming that the licensee would engage in activities to the detriment of the youth in the area they should have recognized the background of Mr. Sidney Barth, the president of the licensee company, who has dedicated many hours to working in cooperation with the Police Department and with the youth in the community of the Borough of Chatham for the benefit of all."

Prior to detailing to some extent the testimony of various witnesses, I might point out that in the absence of the members of the Council to appear and testify at the instant hearing, it will be necessary to refer to the reasons given by the Council for its action contained in the resolution dated October 10, 1966. The said resolution reads in pertinent part as follows:

"WHEREAS, this governing body, being the local issuing authority of the Borough of Chatham, following receipt of a written objection from the Chatham Methodist Church and a public hearing on this matter, is of the opinion that the granting of this transfer might present difficulties with regard to the youth activities at the Chatham Methodist Church or at the Chatham High School, and

"WHEREAS, the nearest entrance of the premises sought to be licensed is within 200 feet by direct line distance from the nearest entrance to the Church and even though this does not place the proposed premises within the 200 feet prohibited area as contained in R.S. 33:1-76 which provides that no municipal license may be issued within 200 feet of a church or school, measured in the normal way a pedestrian would properly walk from the nearest entrance of the proposed premises to the nearest entrance of the church or school, the governing body has considered the proximity to the Church in reaching this decision..."

The appeal herein was heard de novo pursuant to Rule 6 of State Regulation No. 15.

Robert C. Halsey (a licensed land surveyor) testified that he made various measurements, one being from the entrance of the proposed liquor store to the sidewalk on the opposite side of Main Street where it intersects with the walk leading to the Chatham Methodist Church in a manner which a person would properly walk, and found it to be 581 feet; another measurement was the distance from the entrance of appellant's present licensed premises to the walk leading to St. Paul's Episcopal Church, and found it to be 488 feet. Also he stated the present licensed premises are

located approximately 265 feet from a library. Mr. Halsey approximated the distance between the present licensed premises and the proposed premises to be one-half mile. Mr. Halsey also testified that he made a measurement which showed the distance from a point in the sidewalk opposite the entrance to the Chatham Methodist Church and on the same side of the street to a point on the sidewalk opposite the entrance to the proposed premises to be "about a hundred feet" and then crossing Main Street (not at a crosswalk) to the sidewalk on the opposite side where the entrance of the proposed premises would be is another "forty-five feet" or approximately one hundred forty-five feet.

Kenneth L. Kidd (a local police lieutenant), called as a witness by appellant, testified that for two years he has had occasion to work with Sidney Barth (president of the corporate licensee) concerning police and law enforcement problems and that from his experience he found that Barth conducted appellant's business in a lawful and proper manner. He further said that in his opinion the transfer of the license to the proposed location would create no new problems. Lieutenant Kidd further testified that at night, although policemen are on foot and traffic control in the business district in the center of town, in the area of the proposed location only radio patrol cars are used. However, when dances sponsored by the Methodist Church take place, one or two policemen are hired by the church to be present at these particular functions.

Floyd W. Carley (a retired police captain) testified that Mr. Barth has operated the business in a lawful manner and that the liquor license at the proposed location would not present any problems.

Richard E. Thomas (an officer of a bank and a resident of the Borough) testified that he has been a customer of appellant's establishment since 1954 and has found Mr. Barth to be a man of integrity. He stated that if appellant were permitted to transfer its license to the proposed site, he (Thomas) "can't visualize that any problem would run out of it if Mr. Barth, or any other law abiding citizen, had the license to sell the liquor in that particular location."

Seven other residents of the Borough, including a banker, a former high school teacher, a present high school teacher and a former member of the Board of Health and Board of Education of the Borough, testified that they were of the opinion that the transfer of the license in question should be approved. Their testimony was corroborative of the testimony of Mr. Thomas as they too were customers of appellant which operates a drug store as well as a licensed premises, and were in agreement that Mr. Barth has always operated the establishment in a law-abiding manner.

It is apropos to mention that a letter addressed to Councilman Ahlers dated September 23, 1966, was before the Council at the hearing below, wherein it was stated by the Superintendent of Schools that after conferring with the principal of the high school located in the area of the proposed premises, the school officials saw "no particular problem in the location of the Main Drugs nearer to our school property."

Reverend Walter A. Bell, Jr. (minister of St. Paul's Episcopal Church located in the area of appellant's present business establishment) testified that the members of the church engage in religious and social activities and, to his

knowledge, have never experienced any trouble resulting from the conduct of appellant's business.

Sidney Barth (president of appellant corporate licensee and a registered pharmacist) testified that since March 1950, the liquor business has been operated by appellant and that he, as president thereof, has always cooperated with the local authorities to the fullest extent. He further stated that this is especially true concerning his association with the police of the Borough to prevent persons from obtaining at his establishment any medical supplies which could be used "in ways which they were not intended to be used." Moreover, he said that he prepared a chart for the Police Department characterising the various types of drugs and "presented this to the Borough Police and they have it in police headquarters at the present time and use it rather religiously." Mr. Barth said that it was his intention to transfer the license to the proposed premises where it would be operated solely as a package goods store.

John H. Mowen (Borough Clerk) testified that the four plenary retail distribution licenses issued and outstanding in the Borough are now located in Zone B-4 whereas the proposed location to which the transfer of the license is sought is in Zone B-3. Mr. Mowen stated that the B-4 district is where the business concentration is most intense, whereas the B-3 district is less intense in so far as business establishments are concerned.

Reverend Robert D. Simpson (pastor of the Chatham Methodist Church) testified that he opposes the transfer because of "the environment in which Mr. Barth is to have his store, namely, the parking facility which surrounds it; its great adequacy and the possibility of loitering and usage of this parking area by over twenty-one-year-old young people. We feel that this would be a possible risk and influence upon the youth using the church."

Reverend Robert D. Bowers (assistant minister of the Chatham Methodist Church) testified that he opposes the transfer of the license in question to the proposed site because of the various social functions that are held at the church. These functions, he stated, consist at times of major dinners and of parties in the lounge. He also said they have a dance on Saturday nights at which function a large number of younger members of the church are in attendance.

Aubrey K. Bennett (chairman of the official board of the Chatham Methodist Church) testified that he also opposes the transfer because of the possible risk that could be involved with young people in the event of such a transfer.

H. Watson Tietze testified that he is the president of the Planning Board of the Borough and that, in his opinion, a transfer of the license to the site sought by appellant herein would constitute setting up in the area "an attractive nuisance" and thus should not be permitted.

Apparently, from the record herein, the opposition to the transfer of the license by the Council was based solely on the proposed location. All witnesses were in accord that Mr. Barth, who operates appellant's establishment, is highly respected as a business man in the community.

The Chatham Methodist Church is located diagonally across the highway from appellant's proposed premises. Measured in a direct air line, it has been established that the church is

about 145 feet distant from the proposed site. However, measured in accordance with the statute relating thereto (R.S. 33:1-76), appellant's proposed premises are located in excess of the 200 feet requirement.

Local desire to keep church vicinities free of liquor licensed places might be termed a civic sentiment which commands respect and thus should be left to the sound discretion of the local issuing authority. In case after case, refusal of a municipality to permit a liquor establishment near a church, even though, as here, beyond the statutory 200 feet distance, has been affirmed. As early as 1934, the late Commissioner Burnett said, in Staciewicz v. Trenton, Bulletin 35, Item 10:

"Section 76 expresses a legislative policy against licensing premises near churches and schools. The 200 feet provision was included in the statute as a workable minimum requirement. The Legislature did not contemplate depriving issuing authorities of the right to decline to issue licenses for premises reasonably considered by them as being too near churches or schools but, nevertheless, beyond 200 feet."

Appellant contends that the present location of the licensed premises is nearer to a church when utilizing the statutory measurement than the proposed location for which application for transfer has been made. There is no evidence that any official was a member of the Council at the time. Even though this were so, it would not necessarily follow that the Council is guilty of any unlawful discrimination.

In Biscamp v. Twp. Council of the Twp. of Teaneck, 5 N.J. Super. 172, 175 (App.Div. 1949), the court stated:

"Assuming, but not conceding, that other licenses were granted under somewhat similar circumstances, it does not follow that the governing body should further perpetuate earlier unwise action."

It is apparent by the large attendance before the Council that the application for the proposed transfer of the license in question aroused local interest (both pro and con) on the part of many residents of the Borough.

In order for appellant to be successful in the instant appeal, it must be shown that respondent abused its discretion in denying the application for transfer. Appellant's obligation to overcome this burden, especially in a matter of discretion such as this, must show manifest error or some abuse of discretion by respondent. Nordco, Inc. v. State, 43 N.J. Super. 277 (App.Div. 1957); Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955).

There is nothing in the record which indicates or even suggests that the decisions given by the respective members of respondent Council were inspired in any manner by improper motives. In Fanwood v. Rocco and Div. of Alcoholic Beverage Control, 59 N.J. Super. 306 (App.Div. 1960), aff'd 33 N.J. 404 (1960), Judge Gaulkin, among other things, stated (at p. 323):

"The Director may not compel a municipality to transfer licensed premises to an area in which the municipality does not want them, because there more

people would be able to buy liquor more easily. Such 'convenience' may in a proper case be a reason for a municipality's granting a transfer but it is rarely, if ever, a valid basis upon which the Director may compel the municipality to do so."

Moreover, it was stated in Fanwood that "No person is entitled to the transfer of a license as a matter of law", and "If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial."

I have fully considered the various grounds of appeal advanced by appellant in its petition of appeal.

After reviewing the testimony and the exhibits, I find that respondent's action was neither arbitrary, capricious, unreasonable nor did it constitute an abuse of discretion. I conclude that appellant has failed to sustain the burden of proof necessary to establish that the action of respondent was erroneous so as to warrant reversal thereof. Rule 6 of State Regulation No. 15. Under the circumstances, I find it unnecessary to consider the applicability of the existing zoning ordinance with relation to the area sought for transfer of the liquor license. Hence, it is recommended that an order be entered affirming respondent's action and dismissing the appeal herein.

#### Conclusions and Order

Pursuant to the provisions of Rule 14 of State Regulation No. 15, exceptions to the Hearer's report and argument in support thereof were filed by the attorneys for the appellant. Answer to the exceptions and written argument in support thereof were thereupon filed by the attorneys for the respondent.

In their exceptions the attorneys for the appellant state that the basis for the action of the respondent was that the "transfer might present difficulties with regard to the youth activities at the Chatham Methodist Church or at the Chatham High School." The attorneys insist that the sale of alcoholic beverages in close proximity to a church must be incompatible with their religious purposes. However, such distinction cannot be made between religious activities of a church and other activities of the membership at the said church and involving the members of the church. Thus all of the activities, both religious and other, participated in by the membership of the church must be considered.

Appellant's attorneys further contend that the testimony of the local police officers, that in their opinion no law enforcement problem would arise by reason of the transfer of the license to the proposed site, was not given adequate attention. In answer thereto, I might state that the Hearer gave due consideration to the opinion of the police officers which was favorable to the appellant. It must be borne in mind that the local issuing authority, in matters of transfer of a license, are duty bound to consider all of the evidence and then determine what, in their opinion, is for the best interest of the municipality.

Appellant's attorneys again contend that the Hearer neglected to give sufficient weight to a letter addressed to Councilman Ahlers dated September 23, 1966, wherein it was stated by the superintendent of schools and the principal of the high school, after conference, that they foresaw no particular problem to be created by the granting of the proposed transfer. I am

satisfied that the Hearer did consider said letter, as well as the other evidence presented at the within hearing, and thus the exception is without merit.

Furthermore, it is contended by the appellant's attorneys that the position of the Chatham Methodist Church was taken without consultation with the respective members of the congregation and without notice to the members thereof. I am not aware of any requirement on the part of the church officials which makes it mandatory or even necessary either to notify or discuss such a matter as now under consideration with the general membership of the church.

Another contention advanced by the attorneys for the appellant was that a series of petitions containing 1053 signatures on behalf of the appellant, obtained subsequent to the hearing before respondent issuing authority, should have been marked as an exhibit at the hearing of the instant appeal. However, under the existing circumstances, the ruling made by the Hearer to exclude them at the hearing of the instant appeal was not in any way detrimental to the appellant's case. Petitions are no substitute for the considered determination of an administrative agency in fulfilling its obligation and responsibility of its designated capacity. Dunster v. Bernards, Bulletin 99, Item 1. Moreover, the respective petitions were directed to Mayor John P. Davidson and Councilmen of the Borough of Chatham, New Jersey, as well as the Director of the Division of Alcoholic Beverage Control. Since the said petitions were circulated after the action of the respondent Council, it is apparent that they were not available to respondent when the matter was heard.

Appellant's attorneys further contend that the Hearer failed to evaluate and relate the particular facts in the instant case to the record before him. However, I am satisfied that the Hearer did take all pertinent matters into consideration and that the conclusion in his report indicated that the action of the respondent was not arbitrary, capricious, unreasonable or did it constitute an abuse of discretion.

I have examined the other exceptions advanced by appellant and find them to be without merit.

After careful consideration of the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's report, the appellant's exceptions and arguments thereto and the answers to said arguments by the respondent's attorneys, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 3d day of April 1967,

ORDERED that the action of respondent Council be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed.

JOSEPH P. LORDI  
DIRECTOR

2. DISQUALIFICATION REMOVAL PROCEEDINGS - CARRYING CONCEALED WEAPON WITH UNLAWFUL INTENT - ORDER REMOVING DISQUALIFICATION.

In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to R.S. 33:1-31.2 ) ) )

CONCLUSIONS AND ORDER

Case No. 2097

BY THE DIRECTOR:

Petitioner's criminal record discloses that on January 31, 1947, he was convicted in the Mercer County Court for carrying a concealed weapon (pistol) in violation of N.J.S. 2A:151-41 and, as a result thereof, was fined \$50 and placed on probation for two years.

It further appears that in 1943 petitioner was fined \$10 in a local magistrate's court for disorderly conduct.

The crime of carrying a concealed weapon may or may not involve moral turpitude. When the crime stands alone, unattended by other crimes or intent to commit other crimes, it does not ordinarily involve moral turpitude. Re Case No. 1698, Bulletin 1474, Item 4. In view of petitioner's testimony (herein below set forth) that he intended to use the pistol in the commission of a crime, it is my opinion that his conviction in 1947 involves the element of moral turpitude.

Petitioner's conviction in the magistrate's court is not a conviction of crime.

At the hearing held herein, petitioner (42 years old) testified that he is married and living with his wife and two minor children; that for the past eleven years, he has lived in the municipality where he presently resides; that since July 1964, he has been employed as a custodian of a library; that prior thereto, he had been employed as a construction worker for eight years by various companies; that since 1954, he has also worked as a part time bartender for three licensees and that until recently, when notified by the Division, he had no knowledge of his ineligibility for employment in licensed premises in this State.

With respect to his conviction in 1947, petitioner testified that he had an argument with a soldier; that the soldier shot him; that he ran home, got his pistol and returned to the scene intending to shoot the soldier with the same; that he was unable to find him, following which he was arrested by the police.

Petitioner further testified that he is asking for the removal of his disqualification to be free to engage in the alcoholic beverage industry in this State and that, ever since his conviction in 1947, he has not been convicted of any crime or arrested.

Petitioner produced three character witnesses (two truck drivers and a construction worker) who testified that they have known petitioner for more than five years last past and that, in their opinion, he is now an honest, law-abiding person with a good reputation.

The Police Department of the municipality wherein the petitioner resides reports that there are no complaints or investigations presently pending against petitioner.

The only hesitation I have in granting the relief sought herein is based on the fact that petitioner, although disqualified, worked in licensed premises in this State. I am, however, favorably influenced by three factors, viz., (a) the testimony of his character witnesses, (b) petitioner has not been convicted of any crime since 1947, and (c) his sworn testimony that he was unaware of his ineligibility to be employed by a licensee. Knowledge of the law, moreover, is not a prerequisite to removal of disqualification in these proceedings. Re Case No. 1738, Bulletin 1510, Item 7.

Considering all of the aforesaid facts and circumstances I am satisfied that the petitioner has conducted himself in a law-abiding manner for five years last past and that his association with the alcoholic beverage industry in this State will not be contrary to the public interest.

Accordingly, it is, on this 31st day of March, 1967,

ORDERED that petitioner's statutory disqualification, because of the convictions described herein, be and the same is hereby removed, in accordance with the provisions of R.S. 33:1-31.2.

JOSEPH P. LORDI  
DIRECTOR

3. ADVERTISING - LOUD SPEAKER SYSTEMS DISAPPROVED.

March 31, 1967

Singer Associates, Inc.  
Union City, New Jersey

Gentlemen:

It has been brought to my attention that your alcoholic beverage business is being advertised over a loud speaker system originating and audible in the supermarket abutting your licensed premises.

I have been concerned, since my assumption of office, with the above method of advertising. Although Division policy prior thereto had allowed, on a trial basis, the use of loud speakers where not audible outside of the building in which the licensed establishment was located, I suspect that nothing more was originally intended than to permit use of the loud speaker as a means of informing listeners as to the location in the building where the licensed premises are located. In any event, it may be stated with utmost certainty that previous Division lack of objection was predicated on the assumption that the content of the advertising would be proper and would violate neither the substance nor intent of the regulations dealing with improper advertising and promotion of alcoholic beverages. My experience has shown, however, that the use of loud speaker systems has been and is prone to abuse and has created problems which are not conducive to sound liquor control and to proper enforcement.

Of instances coming to my attention which have involved abuses in this mode of advertising, I am very concerned with

occurrence of the following incidents:

1. The announcements invariably purport to offer merchandise at sale or discount prices with highly persuasive, sensational and blatant references to "specials", "reduced prices", "one day sale", "Easter (or other holiday) sale", "quantities limited at this price", etc. In jointly advertising the alcoholic beverage business and other mercantile businesses conducted in the building, such announcements, whether so intended or not, create the deceptive impression to the listening public that alcoholic beverages are included in the "sales" and are available at reduced prices during the "sale period" or other limited periods of time. Not only do such announcements stress and feature a pecuniary appeal but are grossly misleading in creating the inference that alcoholic beverages are available in the liquor store on the premises at bargain prices not available in other licensed establishments, whereas, in fact, alcoholic beverages are generally available throughout the state at the same minimum consumer price during the entire prevailing quarter annual period.

2. The announcements often imply that there is a common operation of the liquor business and the supermarket or department store located in the building housing the licensed premises. For example, invitations are extended in the name of the unlicensed supermarket or department store to visit "our" liquor store or department.

3. In some instances, the loud speaker system has been utilized in advertising prices and brands of alcoholic beverages, exterior advertising of which are prohibited under Rules 4 and 5 of State Regulation No. 21.

The burdensome and difficult enforcement problem involved in the detection and effective curtailment of abuses must also be considered in determining proper policy with respect to advertising of this nature. Further, I am totally in accord with the philosophy of former Commissioner Burnett in his deprecation of loud speaker advertising. See Bulletin 203, Item 11. In my opinion, such philosophy is as sound today as it was some 30 years ago. The projection of persuasive sales talks by loud mechanical means to persons whether they wish to listen or not, including children and other minors who should not be thus subjected, can only create adverse public criticism.

Accordingly, I feel that I must, and hereby do, voice my complete disapproval of any advertising of, or reference to, any licensed establishment over a loud speaker system.

JOSEPH P. LORDI  
DIRECTOR

- 4. SEIZURE - FORFEITURE PROCEEDINGS - SPEAKEASY IN RESTAURANT - ALCOHOLIC BEVERAGES AND COMMINGLED CASH ORDERED FORFEITED - DEPOSIT UPON STIPULATION REFLECTING REASONABLE VALUE OF FIXTURES, FURNISHINGS AND EQUIPMENT ORDERED FORFEITED - CASH IN BAG NOT COMMINGLED ORDERED RETURNED TO CLAIMANT.

In the Matter of the Seizure on )  
 October 28, 1966 of a quantity ) CASE NO. 11,797  
 of alcoholic beverages, \$605.31 in )  
 cash, various fixtures, furnishings ) ON HEARING  
 and equipment in a restaurant located ) CONCLUSIONS  
 at 778 East State Street, in the City ) AND ORDER  
 of Trenton, County of Mercer and )  
 State of New Jersey.

-----  
 Leonard J. Williams, Esq., Appearing for claimant.  
 I. Edward Amada, Esq., appearing for Division of Alcoholic  
 Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This matter came on for hearing pursuant to R.S. 33:1-66 and State Regulation No. 28, and, further, pursuant to a stipulation dated December 30, 1966, signed by Mack Johnson, agent for Della Mae Johnson, to determine whether 21 containers of alcoholic beverages, \$605.31 in cash, various fixtures, furnishings and equipment, more particularly described in a schedule attached hereto, made part hereof, and marked Schedule "A", seized on October 28, 1966 in a restaurant located at 778 East State Street, Trenton, New Jersey constitute unlawful property and should be forfeited; and, further, to determine whether the sum of \$500.00, representing the retail value of the fixtures, furnishings and equipment, (exclusive of the alcoholic beverages and the said \$605.31), paid under protest by Mack Johnson, agent for Della Mae Johnson, should be forfeited or returned to him.

The seizure was made by ABC agents because of alleged unlawful sales of alcoholic beverages at a speakeasy conducted at the said premises.

At the said hearing, McKiver Johnson (being the same person who signed the above stipulation as Mack Johnson), represented by counsel, appeared and sought return of \$491.88 which was found by ABC agents in a green bank bag on the said premises.

No claim was made for the return of the cash deposit under the said stipulation, the balance of the seized cash or the alcoholic beverages.

The file of this Division, which was admitted into evidence with the consent of the claimant herein, contained the affidavit of mailing, affidavit of publication, chemist's report, copy of the cash receipt, the original stipulation, the inventory of the "marked" one-dollar bills and the recording of the same.

The said file, which included reports of ABC agents and other documents, discloses the following: At about 2:20 a.m. on Friday, October 28, 1966 ABC Agent T, in possession of "marked" money, entered the said premises and observed 35 to 40 male and female patrons consuming what appeared to be alcoholic

beverages. These premises are operated as a restaurant which contains a counter with eight stools on one side and a cigarette machine, juke box and pinball machine on the opposite side. Behind the counter near the front main window is a large refrigerator. A cash register is located on the back bar near the center of the counter. On duty behind the counter were two persons, a male later identified as David Armstrong and a female, later identified as Betty Benjamin.

Armstrong was observed serving and accepting payment from the patrons for cans and bottles of beer. Betty Benjamin was observed selling two bottles of Ballantine beer to a male patron. The agent thereupon ordered and was served by Betty Benjamin food and a bottle of beer for off-premises consumption. She placed the food and beer in a bag, and in payment thereof the agent gave her three "marked" one-dollar bills, which she deposited in the cash register, and returned 75¢ in change to him. Agent T thereupon left the premises, re-entered the same at 3:30 a.m. on the same morning, and made similar purchases of food and two bottles of beer, in payment for which he gave Miss Benjamin three "marked" one-dollar bills. She similarly deposited the bills in the cash register and gave him 75¢ in change. Agent T departed the premises and immediately returned thereto with ABC Agent H and a local police officer.

A search of the cash register revealed \$113.43, including one of the "marked" bills. On the back counter below the cash register the agents found a green bank bag containing \$491.88. The monies, together with the goods and chattels, were seized. A considerable amount of empty whiskey and beer bottles were found and destroyed. However, a large quantity of alcoholic beverages, beer and whiskey referred to in the inventory marked Schedule "A" found on the said premises were also seized.

Betty Benjamin was questioned by the agents and stated that she had been employed by Della Mae Johnson, the owner of the premises, for about 1½ years and works on a commission basis. Armstrong stated that he was employed by Della Mae Johnson for the past six months.

Betty Benjamin was thereupon arrested and charged with the sale of alcoholic beverages without a license, contrary to R.S. 33:1-2 in violation of R.S. 33:1-50(a). Della Mae Johnson was also arrested, charged with the possession of alcoholic beverages with intent to sell the same in violation of R.S. 33:1-50(b) contrary to R.S. 33:1-2.

Betty Benjamin, David Armstrong and Della Mae Johnson were also charged with violation of the applicable city ordinance.

The records of this Division do not disclose any license or permit authorizing the sale of alcoholic beverages to Della Mae Johnson, Mack (McKiver) Johnson, David Armstrong, Betty Benjamin or for the premises where the violations took place.

It further appears on the records of this Division that on Sunday, January 2, 1966 Armstrong was arrested at the said premises for selling alcoholic beverages without a license, and was fined \$50.00. Seizure Case No. 11,777.

Further, on March 26, 1966 Betty Benjamin was arrested at the said premises for selling alcoholic beverages without a license, and upon her plea of guilty to the said charge under the applicable city ordinance was fined \$100.00. Seizure Case No. 11,774.

A sample of a quart bottle containing 28 ounces of Carstairs White Seal whiskey, seized in the said unlicensed premises, was analyzed by the Division chemist, who reports it is an alcoholic beverage, fit for beverage purposes, with alcohol by volume of 39.9%.

Since there was no permit or license authorizing the sale of alcoholic beverages to any person at or for the premises in question, they are illicit because they were intended for sale without a license. Such alcoholic beverages, the personal property and the cash, as set forth in Schedule "A" herein, constitute unlawful property and are subject to forfeiture. R.S. 33:1-2; R.S. 33:1-66; Seizure Case No. 11,597, Bulletin 1679, Item 7. This applies with equal force to the cash in the register which was clearly commingled with the "marked" bills accepted from the agent in payment for his drinks. Seizure Case No. 11,182, Bulletin 1568, Item 5; Seizure Case No. 10,898, Bulletin 1500, Item 2.

Thus, we are now concerned solely with whether the cash found in the green bank bag constitutes unlawful property, or should be returned to the claimant herein.

McKiver Johnson, testifying in support of the said claim, gave the following account: He is the husband of Della Mae Johnson, the owner of the restaurant on these premises. Mrs. Johnson also operates a restaurant on Perry Street under the same trade name, where this witness is employed part-time as a cook and manager. The money in the green bag represented three or four days receipts from the operation of the Perry Street restaurant.

He states that he kept that money at home since neither he nor his wife have a bank account for that operation. On the morning of the raid, he took the money from the Perry Street restaurant, placed it in the green bank bag, brought it over to these premises and placed it under the counter.

On cross-examination, he admitted that he has no records to establish the daily receipts from the Perry Street operation but insisted that the money in the green bag represented the receipts therefrom, and had nothing to do with the operation of the premises in question.

David Armstrong, testifying on behalf of the claimant, gave the following version: He is the manager of the premises wherein the said seizure was made. These premises are known as Mack's Seafood Restaurant and is owned by Della Mae Johnson. He is employed at a salary of \$65.00 a week and has been so employed for the past two years. He denied knowing about the money bag or seeing the same on the date in question. To his knowledge none of the money in the cash register was placed in the bag which was found about three feet from the register. Although he passed this bag numerous times on the date of the said seizure while he was serving customers he did not see it until it was seized by ABC agents. He further asserted that at no time was money removed by Mrs. Johnson or himself from the register or placed in a bag.

Betty Benjamin testified that she was employed as a waitress on October 28, 1966 and estimated that the receipts for that day may have averaged "Over \$100, a little over \$100." She also denied taking any money out of the register or placing any money in the green bag, and that all the receipts of that evening were in the cash register at the time of the seizure.

Agent H, called in rebuttal by the Division, testified that the green bag was found approximately two to three feet to the right of the cash register underneath another shelf and that Armstrong was required to pass behind that location in order to obtain beer from the refrigerator. He acknowledged, however, that Johnson, under questioning, insisted that the money in the bag came from the Perry Street restaurant and did not contain any receipts from subject premises. Also the key to the bank was in the possession of Johnson and was turned over to this agent.

From my evaluation of the testimony, I note certain circumstances relating to the money found in the green bag which raise a strong suspicion that militate against the claim for the return of the said money. They are as follows: (a) a large number of patrons being served with food and drink at these premises during the entire day and evening immediately preceding the raid would gross considerably more than the amount of money (\$113.43) which was actually found in the register at the time of the seizure; (b) the location of the said bag in the immediate vicinity of the cash register; (c) the relationship of the claimant to the owner of the premises and (d) the failure to supply supporting evidence with respect to the sales at the Perry Street operation.

However, none of the "marked" bills were found in the green bag and there is no evidence that there was any actual commingling of those monies with the bills used by the agent. Also, as noted hereinabove, the claimant had the key to the bag on his person. Suspicion, no matter how great, has never been a property substitute for substantial proof. To be in doubt is to be resolved. Cf. Case No. 185, Bulletin 217, Item 4. Such doubt will be resolved in favor of the claimant. It is, therefore recommended that the claim of McKiver Johnson for the return of the sum of \$491.88 found in the green bank bag be recognized, and that an order be entered returning the said sum to him. Seizure Case No. 10,918, Bulletin 1504, Item 3; Cf. Re Silverstein, Seizure Case No. 10,450, Bulletin 1401, Item 6; R.S. 33:1-1(y).

It is further recommended that an order be entered declaring the other personal property to be unlawful property; that the sum of \$500.00 deposited under the stipulation herein be forfeited; and that the commingled cash in the sum of \$113.43 found in the cash register and the seized alcoholic beverages be forfeited. Seizure Case No. 10,009, Bulletin 1391, Item 4; R.S. 33:1-2; R.S. 33:1-66.

#### Conclusions and Order

No exceptions were taken to the Hearer's Report pursuant to Rule 4 of State Regulation No. 28.

After carefully considering the facts and circumstances recited in the Hearer's Report, I adopt the recommended conclusions as my conclusions herein.

Accordingly, it is on this 3rd day of April, 1967,

DETERMINED and ORDERED that the said sum of \$491.88 referred to in the Hearer's Report be and the same shall be returned to McKiver Johnson; and it is further

DETERMINED and ORDERED that the balance of the cash seized in the sum of \$113.43 be and the same is hereby forfeited

in accordance with the provisions of R.S. 33:1-66; and it is further

DETERMINED and ORDERED that the sum of \$500.00, representing the appraised retail value of the various fixtures, furnishings and equipment, exclusive of the alcoholic beverages and the aforementioned cash, paid under protest, by Della Mae Johnson aforesaid, pursuant to a stipulation signed on her behalf, shall be and the same is hereby forfeited, in accordance with the provisions of R.S. 33:1-66; and it is further

DETERMINED and ORDERED that the alcoholic beverages referred to in Schedule "A", attached hereto, constitutes unlawful property and the same be and is hereby forfeited in accordance with the provisions of R.S. 33:1-66, and shall be retained for the use of hospitals and State, county and municipal institutions, or destroyed, in whole or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

JOSEPH P. LORDI  
DIRECTOR

SCHEDULE "A"

- 21 - containers of alcoholic beverages;
- music, pinball and cigarette machines;
- refrigerators, cash register; television set;
- \$605.31 - cash;
- Miscellaneous equipment

5. DISCIPLINARY PROCEEDINGS - SALE TO INTOXICATED PERSON - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against )

RUTKA'S TAVERN, INC. )  
371 Nye Avenue )  
Irvington, New Jersey )

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-16, issued by the Municipal Council of the Town of Irvington. )

-----  
Braff, Litvak & Ertag, Esqs., by Frederick J. Wortmann, Esq., Attorneys for Licensee.  
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on November 10, 1966 it sold drinks of alcoholic beverages to an intoxicated person, in violation of Rule 1 of State Regulation No. 20.

Licensee has a previous record of suspension of license by the municipal issuing authority for two days effective October 21, 1963, for permitting a brawl on the licensed premises. In addition, the license then held by John Rutka (president and 98% stockholder of the licensee corporation) in partnership with Mary Rutka (vice president and 1% stockholder) for premises 249 Bruce Street, Newark, was suspended by the Director for fifteen days

effective July 13, 1950, for possession of alcoholic beverages not truly labeled (Re Rutka, Bulletin 882, Item 5) and thereafter the license held individually by John Rutka was suspended by the municipal issuing authority for five days effective September 7, 1953, for permitting gambling at cards, by the Director for twenty-five days effective May 19, 1955, for sale below minimum price, sale in violation of State Regulation No. 38 and permitting a brawl on the licensed premises (Re Rutka, Bulletin 1065, Item 1), and for ten days effective November 14, 1960, for possessing an alcoholic beverage not truly labeled (Re Rutka, Bulletin 1359, Items 5 and 6; Bulletin 1370, Item 6).

The prior record of suspensions of license for dissimilar violations in 1950 through 1960 disregarded because occurring more than five years ago but the prior record of dissimilar violation in 1963 occurring within the past five years considered, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Re Sabe, Inc., Bulletin 1706, Item 2.

Accordingly, it is, on this 6th day of April 1967,

ORDERED that Plenary Retail Consumption License C-16, issued by the Municipal Council of the Town of Irvington to Rutka's Tavern, Inc., for premises 371 Nye Avenue, Irvington, be and the same is hereby suspended for twenty (20) days, commencing at 2 a.m. Thursday, April 13, 1967, and terminating at 2 a.m. Wednesday, May 3, 1967.

JOSEPH P. LORDI  
DIRECTOR

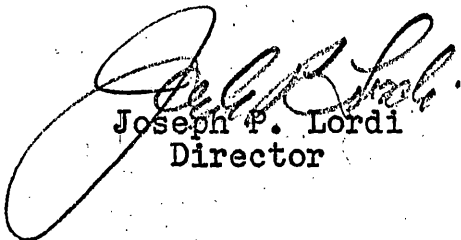
6. STATE LICENSES - NEW APPLICATIONS FILED.

Fontana-Hollywood Corp.  
468 Greenwich Street  
New York, New York

Application filed May 16, 1967 for wine wholesale license for the fiscal year 1967-68.

Michael Kostic & Mary V. Kostic  
t/a Kostic Beverage Co.  
Black Horse Pike  
Williamstown, New Jersey

Application filed May 16, 1967 for state beverage distributor's license for the fiscal year 1967-68.

  
Joseph P. Lordi  
Director