

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

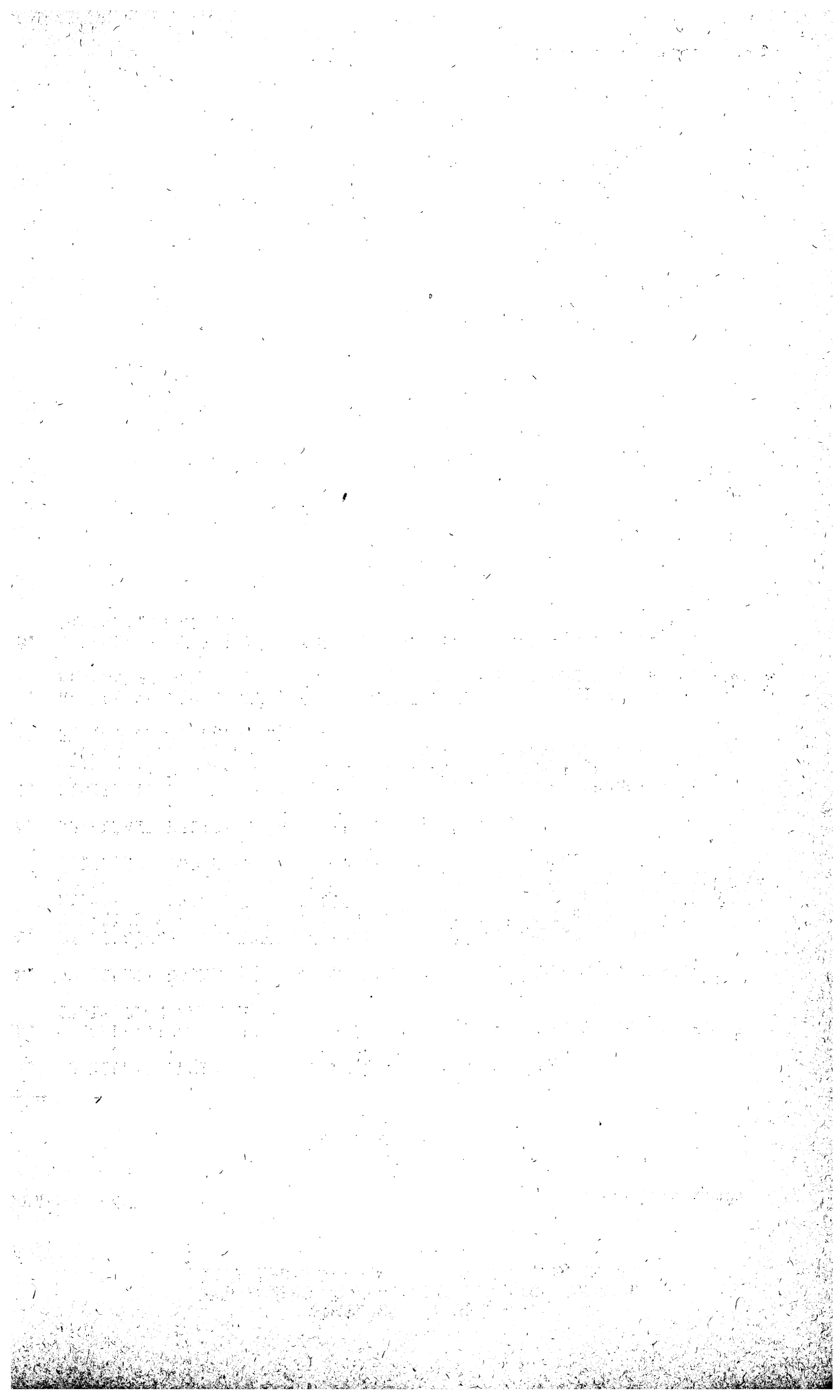
BULLETIN 647

JANUARY 19, 1945.

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STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 647

JANUARY 19, 1945.

1. APPELLATE DECISIONS - MARRONE v. MOUNTAINSIDE.

John Marrone, Trading as
The Chatterbox,
Appellant,

On Appeal

v.

CONCLUSIONS AND ORDER

Mayor and Council of the
Borough of Mountainside,
Respondent.

Anthony A. Calandra, Esq., Attorney for Appellant.
Augustus S. Dreier, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the revocation of a plenary retail consumption license held by appellant for premises on Highway #29, Borough of Mountainside. Respondent revoked the license on December 1, 1944, effective December 5, 1944, after it had found appellant guilty of possessing a slot machine, or device in the nature of a slot machine, on his licensed premises, in violation of Rule 8 of State Regulations No. 20.

On the filing of this appeal an order was entered staying the revocation until further order of the Commissioner.

The charge herein alleged that the appellant possessed a slot machine on his licensed premises on October 12, 1943, more than a year before the charge was preferred. On October 12, 1943, a corporation known as Chatterbox, Inc., of which the appellant herein was the president, was the holder of a plenary retail consumption license C-7 issued for said premises. Chatterbox, Inc. did not renew its license for the present fiscal year but, on July 11, 1944, respondent issued plenary retail consumption license C-10 to John Marrone, individually, for the same premises. The charge herein erroneously alleged that John Marrone was the holder of License C-7, but, if that were the only issue, this evident error could be corrected by me upon the appeal under the broad powers conferred upon me by R. S. 33:1-38.

The license presently held by the appellant may be suspended or revoked for proper cause notwithstanding that such cause arose during the term of a prior license held by a predecessor in interest. Rule 2, State Regulations No. 15. Hence, the preliminary motion made by the appellant to dismiss the proceedings upon the grounds heretofore considered is denied.

As to the merits: Officer Boyton of the Mountainside Police testified at the hearing herein that on October 13, 1943, he entered the rear door of the licensed premises with Officer Fritz of the Mountainside Police and a County Detective. He testified that they walked through the barroom into an adjoining room and then left the licensed premises. He stated that, while passing through the barroom,

he saw a machine about two feet high, with glass half way up, which he said "appeared to me to be one of these slot machines." He admitted that he did not play the machine and that he did not see anyone else playing the machine, and that he was about twenty feet away from the machine as he and the others walked through the barroom. He also said that he saw no handle upon the machine.

Officer Fritz testified that he also was about twenty feet from the machine as he and the other officers passed through the barroom. He described it as follows:

"It was about two feet high, about eighteen inches wide, aluminum in color, and it had a slot on top and a handle on the side."

He stated that in his opinion it was a type of slot machine. He admitted that he did not play the machine; that he did not see anyone else play the machine, and that he did not see any rotating devices. For some unexplained reason, the police did not seize the machine and did not make any criminal complaint against the licensee.

Officer Boyton and Chief of Police Honecker testified that they visited the licensed premises on the afternoon of the same day and searched the licensed premises but (mirabile dictu) were unable to find the machine observed on the first visit.

On behalf of appellant, Anthony Caprio testified that he was manager and bartender of the licensed premises on October 13, 1943. He testified that he was present when the police officers made their first visit to the licensed premises, and stated that there was no coin-operated device for the purpose of gambling in any part of the licensed premises. He stated that there were then only three machines in the barroom - one vending cigarettes, another vending peanuts, and, third, a juke-box.

A study of the testimony given by the police officers leads me to conclude that there is not sufficient evidence to establish that the machine was in fact a slot machine, or a device in the nature thereof, which may be used for the purpose of playing for money or other valuable thing. The evidence is too vague and, I might add, its antiquity further detracts from its value. Neither of the police officers was at any time nearer than twenty feet to the machine, and neither of them operated it or saw it in operation. One stated that he saw no handle, and the other stated that he saw no rotating devices. Under these circumstances, their conclusion that it appeared to be a type of slot machine is entitled to little weight. It is a little difficult to understand why, if in the opinion of the respondent this was a case warranting revocation, it waited for over a year before bringing disciplinary proceedings.

On the evidence presented, I am forced to reverse the action of respondent.

Accordingly, it is, on this 12th day of January, 1945,

ORDERED that the action of respondent, revoking appellant's license, be and the same is hereby reversed.

ALFRED E. DRISCOLL
Commissioner

2. CANCELLATION PROCEEDINGS - LICENSE ISSUED IN VIOLATION OF LOCAL LIMITATION CANCELLED.

In the Matter of Cancellation)
 Proceedings against)
 JACOB SHER,)
 2 Smith Street,)
 Perth Amboy, N. J.,)
 Holder of Plenary Retail Consump-)
 tion License C-73, issued by the)
 Board of Commissioners of the)
 City of Perth Amboy.)
 -----)

CONCLUSIONS

AND

ORDER

Henry K. Golenbock, Esq., Attorney for Defendant-licensee.
 Harry Castelbaum, Esq., Appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

An order was served upon Jacob Sher to show cause why License C-73, issued to him for premises 2 Smith Street, Perth Amboy, by the Board of Commissioners of the City of Perth Amboy, should not be cancelled and declared null and void because said license was issued in violation of Section 2 of a local ordinance, as amended on June 19, 1940. The ordinance in question, inter alia, provides as follows:

Section 2. "No plenary retail consumption license or plenary retail distribution license shall be hereafter issued or transferred from place to place for the sale of alcoholic beverages within seven hundred and fifty feet of any premises licensed for the sale of alcoholic beverages by any licensee holding a plenary retail consumption license or a plenary retail distribution license. The said distance shall be measured from the nearest entrance of the nearest licensed premises to the nearest entrance of the premises sought to be licensed, in the normal way that a pedestrian would properly walk, and in accordance with the procedure established pursuant to R. S. 33:1-76. Nothing in this section shall prevent the renewal for the same premises of licenses outstanding upon the adoption of this amendment."

It clearly appears that the licensed premises in question are within 750 feet of other licensed premises. The sole matter to be decided, therefore, is whether the license issued herein by the local authority is a renewal of a former license or the issuance of a new one.

It appears from the facts herein that the licensee, Jacob Sher, formerly held a license for the premises aforementioned. This license was revoked by order dated June 18, 1942, by the State Commissioner of Alcoholic Beverage Control. See Re Sher, Bulletin 518, Item 1. After the expiration of two years from the time of revocation of Jacob Sher's license, he applied to and received from the local issuing authority the license which he now holds and which is the subject of this proceeding. Sher's contention is that the municipal Board issued the license to him as a renewal and, therefore, he did not come within the 750-foot provision in the ordinance.

R. S. 33:1-96, approved and effective April 20, 1944, provides as follows:

33:1-96. Licenses for new license terms deemed renewals.

"Any license for a new license term, which is issued to replace a license which expired on the last day of the license term which immediately preceded the commencement of said new license term or which is issued to replace a license which will expire on the last day of the license term which immediately precedes the commencement of said new license term shall be deemed to be a renewal of the expired or expiring license; provided, that said license is of the same class and type as the expired or expiring license, covers the same licensed premises, is issued to the holder of the expired or expiring license and is issued pursuant to an application therefor which shall have been filed with the proper issuing authority prior to the commencement of said new license term or not later than thirty days after the commencement thereof. Licenses issued otherwise than as above herein provided shall be deemed to be new licenses. As amended L. 1944, C. 187, p. ___, l."

It is apparent that the license in the instant case could not be considered a renewal within the legislative intent as expressed in R. S. 33:1-96 and, therefore, the license issued to Jacob Sher must be deemed to be a new license. Since the license now held by defendant is not a renewal of a license outstanding on June 19, 1940, the license was issued contrary to the terms of the ordinance and must be set aside as void. Bachman v. Phillipsburg, 68 N. J. L. 552; Re Loeb, Bulletin 206, Item 14.

Accordingly, it is, on this 12th day of January, 1945,

ORDERED that the Order to Show Cause why Plenary Retail Consumption License C-73, issued to Jacob Sher by the Board of Commissioners of Perth Amboy for premises 2 Smith Street, Perth Amboy, New Jersey, should not be cancelled and declared null and void, be and the same is hereby made absolute; and it is further

ORDERED that operation under the aforementioned license must cease forthwith and the license certificate itself must be surrendered to the Board of Commissioners of the City of Perth Amboy for cancellation.

ALFRED E. DRISCOLL
Commissioner

3. APPELLATE DECISIONS - JOSEPH F. WEBER ASSOCIATION v. IRVINGTON

JOSEPH F. WEBER ASSOCIATION,)	
Appellant,)	On Appeal
v.)	
BOARD of COMMISSIONERS of)	CONCLUSIONS AND ORDER
the TOWN of IRVINGTON,)	
Respondent.)	

Durand A. Metrione, Esq., Attorney for Appellant.
Benjamin C. Gurnik, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from respondent's action revoking appellant's

club license for the fiscal year ending June 30, 1945.

The grounds of appeal relied upon by the appellant may be briefly summarized as follows: (1) the penalty is excessive, (2) the penalty was the result of passion, bias, and prejudice.

On August 8, 1944, appellant entered a plea of guilty to charges of selling alcoholic beverages on May 27, 1944, and June 22, 1944, to persons who were not bona fide members or guests of bona fide members of the appellant, in violation of Rule 5 of State Regulations, No. 20 and R. S. 33:1-12(5).

Appellant's license was revoked at a regular meeting of the respondent on August 22, 1944. Three of the Commissioners voted in favor of the resolution ordering the revocation, one Commissioner voted in opposition to the resolution, and one Commissioner was reported as not voting. A careful scrutiny of the entire record, as it was developed on the appeal, does not disclose any evidence supporting the claim that the penalty was the result of passion, bias and prejudice. Neither the apparent failure of the Commissioners of the Town of Irvington collectively to discuss the case subsequent to August 8 and prior to the meeting on August 22, 1944, nor the lack of unanimity in the decision reached constitutes evidence of prejudice, bias or even passion. Men of good conscience frequently disagree!

Appellant's effort to bolster its second ground of appeal with testimony that, in the heat of a political campaign in 1942, it had been suggested that its license would be in jeopardy if it did not support certain candidates falls flat in face of the fact that appellant's license was thereafter renewed for the fiscal years 1942-43, 1943-44 and again for the 1944-45 license year. For the completeness of the record, it is noted that appellant's testimony on this point was emphatically denied.

The second ground of appeal will, therefore, be dismissed.

This leaves for consideration the first ground of appeal - that the revocation of the appellant's license was unduly severe. In the Town of Irvington a plenary retail consumption licensee pays \$500. for a license. The appellant paid the \$100. fee for its club license. It is apparent that it was operating without regard to the limited character of its license and in competition with the lawful holders of the more costly plenary retail consumption license.

On a number of occasions I have stressed the point that the holders of club licenses who are either unable or unwilling to confine the sale and service of alcoholic beverages to bona fide club members and their guests as required by their license and the law should not be permitted to continue in business. Re Tenth Ward Organization Republican Club, Bulletin 501, Item 6; Re Sixth Ward Democratic Club, Bulletin 523, Item 3; Re Democratic Club of the 11th Ward, Bulletin 539, Item 10.

The penalty to be imposed after a plea or finding of guilt rests in the first instance within the discretion of the authority hearing the disciplinary proceedings. I hesitate to moderate any penalty inflicted by an issuing authority and will do so only in those cases where it clearly appears that the penalty is so unreasonable as to constitute an abuse of respondent's discretionary authority.

Allowing, as I must, reasonable latitude for differences of opinion, I am satisfied that the revocation of appellant's license was a proper exercise of respondent's discretionary authority. Accordingly, the determination of the respondent will not be disturbed. I have little sympathy for club licensees who deliberately disobey the law.

The first ground of appeal will be dismissed.

Accordingly, it is, on this 15th day of January, 1945,

ORDERED that the revocation by respondent of appellant's club license CB-1, for premises 1156 Springfield Avenue, Irvington, be and the same is hereby affirmed and restored to full force, effective immediately; and that the order entered herein on August 28, 1944, staying the effect of respondent's order of revocation pending determination of this appeal be and the same is hereby vacated, effective immediately.

ALFRED E. DRISCOLL
Commissioner

- 4. DISCIPLINARY PROCEEDINGS - FRONT - AIDING AND ABETTING NON-LICENSEES TO EXERCISE THE RIGHTS AND PRIVILEGES OF THE LICENSE - "FARMING OUT" LICENSE - LICENSE SUSPENDED FOR BALANCE OF TERM WITH LEAVE TO PETITION TO LIFT UPON CORRECTION OF ILLEGAL SITUATION AND EXPIRATION OF 20 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against)

ANNA M. LANNING, Administratrix,)
Estate of Charles M. Lanning,)
Route 25, West State Highway,)
Burlington (City), N. J.,)

CONCLUSIONS
AND
ORDER

Holder of Plenary Retail Consumption License C-10, issued by the Common Council of the City of Burlington.)

Anna M. Lanning, Administratrix, Pro Se.
Harry Castelbaum, Esq., Appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Licensee pleads non vult to the following charges;

- "1. From on or about February 1, 1944 and until June 24, 1944, you knowingly aided and abetted James Sholl to exercise, contrary to R. S. 33:1-26, the rights and privileges of your plenary retail consumption license, thereby yourself violating R. S. 33:1-52.
- "2. From on or about June 26, 1944 and until the present time, you knowingly aided and abetted Lottie Ryba and Stanley Ryba to exercise, contrary to R. S. 33:1-26, the rights and privileges of your plenary retail consumption license, thereby yourself violating R. S. 33:1-52."

After the death of her husband, defendant had the license transferred to her as administratrix of her husband's estate and endeavored to operate the premises herself. Not being successful, she arranged to sell the licensed premises to one James Sholl and, pending the consummation of the sale, permitted Sholl to enter into and operate the licensed premises. This was in direct violation of R. S. 33:1-26 and R. S. 33:1-52.

Sholl remained in the premises for about four months and during that time made no effort to obtain a transfer of the license to him or to consummate the proposed sale. At the end of that period he turned back the licensed premises to the defendant, who a few days later agreed with the Rybas to dispose of the premises (presumably to Lottie Ryba) and permitted Lottie Ryba and Stanley Ryba to enter into and operate the licensed premises pending consummation of this proposed sale and the transfer of the license. This was in further violation of R. S. 33:1-26 and R. S. 33:1-52.

At the present time, there is some question as to whether the Rybas, or either of them, will carry out their proposed purchase, and the possibility of the sale to a third party now enters into the picture. Naturally, this situation cannot be permitted to continue. The license, must, therefore, be suspended for the balance of its term, to wit, until June 30, 1945. When the proposed sale, whoever may be the purchaser, has been consummated and the license properly transferred subject to the suspension herein, the transferee may then apply to me for the lifting of the suspension. However, in no event will the order lifting suspension become effective until at least twenty days have elapsed from the effective date of the suspension herein imposed.

Accordingly, it is, on this 12th day of January, 1945,

ORDERED that Plenary Retail Consumption License C-10, issued by the Common Council of the City of Burlington to Anna M. Lanning, Administratrix of the Estate of Charles M. Lanning, for premises on Route 25, West State Highway, Burlington, be and the same is hereby suspended for the balance of its term, effective at 2:00 A. M. January 19, 1945; and it is further

ORDERED that, in the event a correction of the "front" is effected, leave be given as aforesaid to make application to the Commissioner of Alcoholic Beverage Control to lift the suspension.

ALFRED E. DRISCOLL
Commissioner

5. APPELLATE DECISIONS - ZICHERMAN v. NEWARK.

BERTHA ZICHERMAN,)	
Appellant,)	On Appeal
vs.)	CONCLUSIONS AND ORDER
MUNICIPAL BOARD of ALCOHOLIC BEVERAGE CONTROL of the CITY of NEWARK,)	
Respondent)	

Kristeller & Zucker, Esqs., by Lionel P. Kristeller, Esq.,
Attorneys for Appellant
Philip J. Schotland, Esq., by George B. Astley, Esq., Attorney
for Respondent.

BY THE COMMISSIONER:

This is an appeal from respondent's refusal to renew appellant's plenary retail consumption license for 174 W. Kinney Street, Newark, for the license year terminating June 30, 1945.

The grounds of appeal advanced by appellant may be summarized as follows: (a) there was no evidence to establish that appellant was not entitled to a renewal of her said license; (b) the respondent Board acted upon incompetent, immaterial and hearsay evidence; (c) the action of respondent Board was unlawful, unreasonable, arbitrary and capricious; (d) the respondent Board did not grant or afford appellant a hearing in accordance with the Alcoholic Beverage Law of the State of New Jersey or the regulations and decisions of the Commissioner of Alcoholic Beverage Control of the State of New Jersey (subsequently abandoned by appellant); (e) the determination not to renew appellant's license was not founded upon valid and substantial grounds in accordance with said Act or the regulations and decisions of the Commissioner of Alcoholic Beverage Control of the State of New Jersey; and (f) respondent Board discriminated against appellant in failing to renew her said license and acted upon prejudice, hate and bias and not upon any competent evidence and such denial is an abuse of discretion imposed upon respondent by law.

Appellant has held a license continuously from July 1, 1934 to July 1, 1944.

On January 21, 1944, following disciplinary proceedings, respondent revoked appellant's license for the year ending June 30, 1944. On appeal to the Commissioner and after full hearing, respondent's determination that appellant had sold alcoholic beverages to a minor in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20, and had hindered and failed to facilitate an investigation in violation of R. S. 33:1-35 was affirmed. Respondent's determination that the appellant had permitted a brawl on her premises on April 10, 1943, in violation of Rule 5 of State Regulations No. 20 and that she had sold alcoholic beverages to persons actually or apparently intoxicated in violation of Rule 1 of State Regulations No. 20 was reversed. Accordingly, on April 14, 1944, the Commissioner ordered that the revocation of appellant's

license by the Municipal Board of Alcoholic Beverage Control of the City of Newark be modified to a suspension of the license for the balance of its term. Zicherman v. Newark, Bulletin 613, Item 5.

In my opinion in the above cited appeal, I stated - "there is a serious question as to whether or not the (appellant's) license should be hereafter renewed, but that is not the issue in this case." That issue is now squarely raised by the present appeal.

There is a clear difference between the issues raised in disciplinary proceedings and those that may be raised on an application to renew a license. Those who charge (in disciplinary proceedings) must support their charges with competent proof. The burden, in the first instance, is upon the person or authority pressing the charges. A person applying for the renewal of a privilege should be prepared to demonstrate that he is worthy of the privilege. The Burden of going forward is upon the applicant for a renewal of a license.

It is now well established in New Jersey that "no one has a right to demand a license. A license is a special privilege granted to the few, denied to the many." Paul v. Gloucester, 50 N.J.L. 585; Meehan v. Jersey City, 70 N.J.L. 382; Bunball v. Burnett, 115 N.J.L. 254.

Nor is the appellant entitled to renewal of her license as a matter of right. Malone v. Bordentown, Bulletin 129, Item 8. Whether a renewal should be granted or not is, like the original issuance of a license, to be determined in the light of the best interest of the public at large.

In stressing the paramount public interest that must be considered on an application to renew, I have not lost sight of the fact that the licensee is entitled to fair play. A license once given should not be arbitrarily or unreasonably withheld. If the scales are balanced in favor of public welfare, the reasons therefor should be clear and convincing. "In renewal cases, private justice is weighed as against the public interest of the community." Lavelle v. Way, Bulletin 140, Item 1.

I have, however, consistently held that improper conduct under a previous license should be seriously considered by an issuing authority before reaching a decision on an application to renew. In a goodly number of cases it has been held that improper conduct under a prior license warrants the denial of a renewal. Schelf v. Weehawken, Bulletin 138, Item 10; Kaplan v. Newark, Bulletin 269, Item 6; Lipman v. Newark, Bulletin 356, Item 6. The misconduct of the appellant during the previous license year is not to be denied. Zicherman v. Newark, supra.

It is noted that in 1935 appellant's license was suspended by the local issuing authority for a period of ten days after she had been found guilty of possessing illicit alcoholic beverages in violation of R. S. 33:1-50.

In view of the foregoing, it is not necessary to consider in detail all of the testimony presented in the present appeal. Eight police detectives and an acting police captain, all of whom have been assigned for duty at various times in the Third Ward, wherein appellant's premises are located, testified that appellant cooperated with them at all times. A captain of the county detectives testified that he considered appellant's tavern to be "overcrowded or a possible fire trap or unsafe in emergencies requiring immediate vacating of the premises."

The Chairman of the respondent Board testified that the decision of the Board was unanimous and that it was his opinion, based upon the past conduct of appellant, that the latter was not a fit person to be permitted to continue as a licensee.

In view of appellant's previous record, with particular reference to the suspension in 1944, I cannot say that respondent's refusal to renew appellant's license was arbitrary or unreasonable.

It is only necessary to consider briefly three further points raised by the appellant.

Appellant urges, as a ground of appeal, that respondent did not afford her a hearing in accordance with the Alcoholic Beverage Law. The record does not support this charge. See also Rule 3 of State Regulations No. 2. It is not necessary, however, to belabor this point since appellant has had her full day in court on this appeal. The same statement may be made with respect to the ground of appeal that respondent's action was based upon incompetent evidence, the result of prejudice, etc.

The appellant contends that respondent failed to give her proper notice of its refusal to renew the license as required by R.S. 33:1-22. The obvious purpose of the cited section is, inter alia, to establish the time within which an appeal may be taken. In the instant case, respondent's failure to give the notice in the manner required by Section 22 is not, in itself, such a fatal error as to require a reversal of the decision below in the light of all of the circumstances, including appellant's prosecution of the present appeal. Cf. Wyckoff v. Monmouth County, 127 N. J. L. 268, 271.

Since respondent's refusal to renew does not appear to be unreasonable and is, in fact, supported by appellant's previous misconduct, its action will be affirmed.

Accordingly, it is, on this 15th day of January, 1945,

ORDERED that the petition of appeal filed herein be and the same is hereby dismissed.

ALFRED E. DRISCOLL
Commissioner.

3. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO A MINOR, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - PREVIOUS RECORD - LICENSE SUSPENDED FOR A PERIOD OF 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

JOHN J. SOMOGYI, JR.)
T/a SOMERSET CAFE)
132 Somerset Street)
New Brunswick, N. J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-80, issued by the Board of Commissioners of the City of New Brunswick.)

Charles M. Morris, Esq., Attorney for Defendant-Licensee.
Nathan Davis, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant-licensee pleads non vult to a charge which alleges, in substance, that on December 29, 1944 he sold alcoholic beverages to a minor, in violation of R. S. 33:1-77 and rule 1 of State Regulations No. 20.

The departmental file in this case discloses that one J. B. ----, eighteen years of age and a member of the armed forces, purchased, on the morning in question, two glasses of whiskey at the defendant's licensed premises. One of these drinks was consumed by the minor whereas the second glass of whiskey was seized by an investigator of the Department of Alcoholic Beverage Control.

A violation of this character where no aggravating circumstances are present and where the licensee has no previous adjudicated record warrants a ten-day suspension of the license. See Re Abrams, Bulletin 562, Item 8. In the present case, however, the Department records indicate that the within defendant was, on a prior occasion, adjudged guilty of sales of alcoholic beverages to minors, as a result of which his license was suspended by the State Commissioner of Alcoholic Beverage Control on August 2, 1943 for a period of five days. Re Somogyi, Bulletin 578, Item 9.

Under the circumstances, I shall suspend the license for the violation in the instant case for a period of twenty days, with a remission of five days for the plea entered herein or a net suspension of fifteen days.

Accordingly, it is, on this 16th day of January, 1945,

ORDERED, that Plenary Retail Consumption License C-80, issued by the Board of Commissioners of the City of New Brunswick to John J. Somogyi, Jr., t/a Somerset Cafe, for premises 132 Somerset Street, New Brunswick, be and the same is hereby suspended for a period of fifteen (15) days, commencing at 2:00 a.m. January 22, 1945, and terminating at 2:00 a.m. February 6, 1945.

ALFRED E. DRISCOLL
Commissioner.

7. APPELLATE DECISIONS - FIRST BAPTIST CHURCH OF BRIDGETON v. BRIDGETON AND SCHRANK ET AL., T/A CUMBERLAND HOTEL (CASES 1 AND 2).

Case #1.
FIRST BAPTIST CHURCH OF BRIDGETON,
NEW JERSEY,

Appellant,

-vs-

CITY COUNCIL OF THE CITY OF
BRIDGETON, and MAX C. SCHRANK,
CLARENCE B. McCORMICK, ALBERT S.
SCHRANK and JOHN B. SIECK,
t/a CUMBERLAND HOTEL,

Respondents)

ON APPEAL

Case #2.
FIRST BAPTIST CHURCH OF BRIDGETON,
NEW JERSEY,

Appellant,

-vs-

CITY COUNCIL OF THE CITY OF
BRIDGETON, and MAX C. SCHRANK,
CLARENCE B. McCORMICK, ALBERT S.
SCHRANK and JOHN B. SIECK,
t/a CUMBERLAND HOTEL,

Respondents.)

CONCLUSIONS AND ORDER

Russell S. Henderson, Esq., Attorney for Appellants.
John A. Casarow, Esq., Attorney for Respondent, City Council of the
City of Bridgeton.
Stanger & Howell, Esqs., by Robert G. Howell, Esq.,
Attorneys for Respondent,
Cumberland Hotel.

BY THE COMMISSIONER:

The above entitled cases come before me on appeal from the respondent City Council's issuance of a plenary-retail consumption license to the respondent, Cumberland Hotel, on May 16, 1944, and from the issuance, on June 23, 1944, of a license renewal for the license year 1944-1945. The issue in both cases is the same and my disposition herein of the first appeal will therefore be dispositive of the second.*

*The City of Bridgeton has a population, according to the 1940 Federal census, of 15,992. It is the center of one of New Jersey's important agricultural areas.

On June 14, 1944, the date of the present appeal, there were issued and outstanding in the City of Bridgeton 12 plenary retail consumption licenses, including the one issued for premises occupied by the Cumberland Hotel. On the same date there were outstanding two plenary retail distribution licenses and eight club licenses.

The sale of alcoholic beverages for consumption on the premises is prohibited in Bridgeton throughout Sunday and between midnight and 8:00 A.M. on weekdays. The sale of alcoholic beverages by the package for off-premises consumption is prohibited in Bridgeton by State Regulations No. 38 and by local ordinance throughout Sunday and by Regulations No. 38 on weekdays between 10:00 P.M. and 8:00 A.M. the following morning.

8:00
9:00

The First Baptist Church of Bridgeton, located on the south side of East Commerce Street, now consists of a large church auditorium, a smaller Sunday School room and lesser junior Sunday School rooms, has been in existence at its present location for approximately seventy-five years. The Cumberland Hotel Building, located on the southeast corner of South Pearl and East Commerce Streets (adjacent to the church), consists of one hundred guest rooms with all the usual accompanying hotel public rooms and facilities. The hotel was completed on or about April 16, 1924, and since that time has been continuously operated as a hotel. At the time of the passage of the Alcoholic Beverage Control Act, the hotel was owned by trustees for the Cumberland National Bank and the Bridgeton National Bank, and was operated by them down to and including May 1, 1944. The hotel is now owned and operated by a partnership consisting of Max C. Schrank, Clarence B. McCormick, John B. Sieck and Albert S. Schrank, who became the owners of the hotel property on or about May 1, 1944 and entered into possession thereof immediately upon becoming owners. On May 16, 1944 a plenary retail consumption license was issued to the Cumberland Hotel by the Bridgeton City Council, which license was renewed for the present license year on June 23, 1944. No license for the sale of alcoholic beverages on the hotel premises had been issued prior to May 16, 1944. The distance between the main entrance of the church and the main entrance of the hotel is slightly less than one hundred and nine feet. The distance from the main entrance of the church to the basement entrance of the hotel is eighty-one feet. In the instant proceedings all of these facts were stipulated and agreed to by and between the respective counsel.

Section 33:1-76 of the Revised Statutes provides, in pertinent part, as follows:

"Anything to the contrary hereinbefore notwithstanding, and for the benefit not of property but of persons attendant therein, no license shall be issued for the sale of alcoholic beverages within two hundred feet of any church or public schoolhouse or private schoolhouse not conducted for pecuniary profit, except to *** hotels *** which owned or were actually in possession of the licensed premises on December sixth, one thousand nine hundred and thirty-three. The protection of this section may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church or school, such waiver to be effective until the date of the next renewal of the license. Said two hundred feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises sought to be licensed." (Underscoring ours).

The protection of the section, if any in this case, was not waived by the appellant. Nor is any question raised in these proceedings with respect to the bona fides of the Cumberland Hotel.

The single question to be decided here is the meaning and effect to be given to the above underscored provisions of R. S. 33:1-76. The issue is whether or not the statutory exception permits the issuance of an alcoholic beverage license for the Cumberland Hotel (the nearest entrance of which is eighty-one feet from the entrance of the First Baptist Church) to persons who were not the owners, or in possession, of the hotel premises on December 6, 1933.

Briefs filed by counsel discuss the "200 feet" rule contained in the now repealed Bishops' Act (P.L. 1889, sec. 11, p. 83, as amended by P.L. 1906, p. 203; 3 Comp. Stat., p. 2908, par. 84), and the interpretation placed upon the language of that rule by our courts. Counsel's briefs cite and discuss, also, four rulings by the former State Commissioner regarding the interpretation of the "hotel" exception in R. S. 33:1-76 -- Re Ogilvie, Bulletin 59, Item 2; Re Cluesmann, Bulletin 65, Item 5; Re Bryan, Bulletin 143, Item 15; and Goldberg v. Little Falls, Bulletin 177, Item 4.

The language contained in the "200 feet" rule of the Bishops' Act was substantially dissimilar to that employed in R. S. 33:1-76, and it is clear that the interpretations placed by our courts upon the provisions of the Bishops' Act are not applicable to the present statutory language here in question. For the purpose of these proceedings I have not considered the former Commissioner's rulings (cited above) to be necessarily dispositive of this appeal. I have considered anew the question raised herein and shall determine the issue entirely upon the merits.

As already pointed out, the sole question to be determined concerns the interpretation of the language of R. S. 33:1-76, which prohibits (in absence of a waiver) issuance of an alcoholic beverage license within two hundred feet of a church "except to *** hotels *** which owned or were actually in possession of the licensed premises on December sixth, one thousand nine hundred and thirty-three."

The statutory exception is perhaps inartistically worded -- "hotels", as such, cannot own or be in possession of premises. But the statute's use of the word "hotels" is significant of the legislature's intent. Licenses are not issued to hotels, which are not legal entities, but to individuals or corporations operating them. Thus the use of the term "hotels", instead of other words apt to describe hotel owners or operators, strongly indicates that the exception applies to the hotel as an institution.

In any event, the exception can be interpreted in but one of two ways: (1) as contended by the respondents, that it applies to hotels which were owned or actually possessed as hotels on December 6, 1933, i.e., to hotels which were in existence and operation as hotels on that date; or (2) as argued by the appellant, that the exception permits issuance of a license for hotel premises only to those who owned or were in actual possession of the premises on December 6, 1933.

I am thoroughly convinced that the first interpretation of the language used by the Legislature in Section 76 is the correct one. While, as already remarked, I do not consider myself bound by the former Commissioner's rulings and opinions on this subject, I agree with his opinion that:

"It is the 'hotel' as a peculiar class of quasi-public building which is excepted from the prohibition of Section 76. Accordingly, any applicant for a license in connection with an hotel is entitled to the benefit of the exception contained in Section 76 with respect to hotels and if the hotel sought to be licensed was in existence on December 6, 1933, a license may be issued therefor, regardless of the fact that the applicant himself was not the owner or in actual possession of the premises at the time the Control Act became effective." Re Cluesmann, supra.

In my judgment, the exception, if interpreted otherwise, in accordance with the appellant's contention, would effect a clearly arbitrary and unreasonable discrimination. In selecting for favored treatment certain hotel owners and operators as against all subsequent owners and operators of these hotels, it would discriminate without any apparent rational basis for the distinction and without perceivably proper reason therefor within the broad general purpose of R. S. 33:1-76. While excluding from its protection all subsequent owners and operators of hotels, it would permit issuance of a license for a hotel at any future time to one who happened to own or operate the hotel on December 6, 1933, even though the ownership and operation had been in others over a long intervening period and had been reacquired just before the date of application filed.

There is another and perhaps stronger reason why the interpretation sought by the appellant appears unsound. The Alcoholic Beverage Law does not provide for a "hotel" license. The license commonly suited to hotel purposes is that suited to restaurants and taverns (the plenary retail consumption license -- R.S. 33:1-12(1)), and the legislature must be taken to have had that fact in mind when it selected "hotels" for special treatment by excepting them from the operation of Section 76. But under the appellant's interpretation the exception would not run in favor of hotels upon the basis of their special and peculiar characteristics, reasonably distinguishable from non-hotel premises. It would, instead, be dominantly based upon ownership or possession of hotels as of December 6, 1933, and upon that basis would exclude those who owned or possessed non-hotel property on that date and who might wish to secure a retail license of the same license class. The exception, if based upon such "date of ownership" of hotels, would appear arbitrary, unreasonable and unlawfully discriminatory, and would seem no less unreasonable and discriminatory by reason of the relatively larger investment in hotel property as compared with restaurant, tavern and other non-hotel property.

It is my conclusion that the legislature intended to, and did, except hotels as quasi-public institutions from the operation of the "200 feet" rule and, therefore, that R. S. 33:1-76 permits the issuance of a license for hotels which were in existence and operation on December 6, 1933, regardless of the fact that the applicant did not own or possess the hotel premises on that date. This conclusion disposes of the only issue raised in these appeals.

It is not within my province to rewrite the Alcoholic Beverage Law. Nor am I permitted to construe the law in a manner that appears to be clearly contrary to the legislative intent. My duty as a judge on these appeal cases is not to inflict or substitute my opinion upon or for the license issuing authority, but rather to determine if reasonable cause exists for theirs and, if so, to affirm, irrespective of my personal opinion on the subject.

The sole issue raised in the present appeal having been decided, the action of respondent City Council is affirmed.

Accordingly, it is, on this 16th day of January, 1945,

ORDERED, that the petitions of appeal herein be and the same are hereby dismissed.

ALFRED E. DRISCOLL
Commissioner.

8. APPELLATE DECISIONS - KUBERSKI v. CLARK TOWNSHIP - ORDER OF DISCONTINUANCE.

FRANK J. KUBERSKI,)
)
 Appellant,)
)
 -vs-)
)
 BOARD OF COMMISSIONERS OF THE)
 TOWNSHIP OF CLARK,)
)
 Respondent)
 -----)

ON APPEAL
ORDER OF DISCONTINUANCE

Edmond J. Dwyer, Esq., Attorney for Appellant.
David Armstrong, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial of appellant's application for a plenary retail consumption license for premises 1062 Gibson Boulevard, Clark Township, N. J.

The attorney for the appellant has requested that the appeal be discontinued and has submitted a formal stipulation of discontinuance duly consented to by the attorney for the respondent.

Since no reason appears to the contrary,

It is, on this 19th day of January, 1945,

ORDERED, that the within appeal be and the same is hereby discontinued.

Alfred E. Griswold
Commissioner.