

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

JANUARY 28, 1958

BULLETIN 1205

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1. DISTILLERS, IMPORTERS AND RECTIFIERS - DISCRIMINATION IN
SALE TO WHOLESALERS - PETITION BY WHOLESALERS PURSUANT TO
R. S. 33:1-93.1 TO .5 - RELIEF GRANTED.

F & A DISTRIBUTING CO.)
235-241 West First Street)
Bayonne, N. J.,)

GILLHAUS BEVERAGE CO., INC.)
Meta Lane)
Lodi, N. J.,)

and)

MERCHANTS WINE & LIQUOR CO.)
4415 Marlton Pike)
Pennsauken, N. J.,)

Petitioners,)

-vs-)

CANADA DRY GINGER ALE, INC.)
100 Park Avenue)
New York 17, N. Y.,)

Respondent.)

CONCLUSIONS

AND

ORDER

Green and Yanoff, Esqs., by H. Kermit Green, Esq., and
Shanley & Fisher, Esqs., by Harold H. Fisher, Esq.,
Attorneys for Petitioners.

John W. Reilly, Esq.; Clancy & Hayden, Esqs., by John J.
Clancy, Esq., and Mayer & Mayer, Esqs., by Abraham I.
Mayer, Esq., Attorneys for Respondent.

Frederick J. Lind, Esq., and White & Case, Esqs., by William
Conwell, Esq., Attorneys for Joseph E. Seagram & Sons,
Inc., Intervenor.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Each petitioner is the holder of a plenary wholesale license. Respondent is engaged in the manufacture, distilling and importing of nationally advertised brands of alcoholic beverages and also holds a plenary wholesale license. Petitioners have filed separate petitions wherein each alleges that respondent discriminated against it in the sale of alcoholic beverages and wherein each requests relief under the provisions of R. S. 33:1-93.1 to R. S. 33:1-93.5 inclusive. Since the issues in each case are the same, the matters may be disposed of in a single opinion.

"On April 26, 1957, the Director entered a preliminary restraining order herein which remains in effect, and on July 11, 1957, a hearing was held to determine whether respondent's action in refusing to sell to petitioners is arbitrary or not. See R. S. 33:1-93.2.

"The evidence herein discloses the following facts:
In the Spring of 1956 Paul J. Burnside was advanced by respondent corporation to the position of National Sales Manager. At a division level meeting he advised Alfred P. LaPorte, Eastern Division Sales Manager, that the company was displeased

with the overall operation in New Jersey and that he wanted him to survey the market in detail and submit plans to improve the situation. Accordingly, Mr. LaPorte made a survey, during which he made at least three visits to each of the eleven wholesalers who were then handling Canada Dry products in New Jersey and told each that the company had increased sales throughout the country and would like to increase sales in New Jersey. Thereafter Mr. LaPorte verbally recommended to his superior (Mr. Burnside) that five named wholesalers be retained and six named wholesaler (including petitioners) be dropped. Referring to conferences with Mr. LaPorte concerning this recommendation, Mr. Burnside said:

'Well, we considered several factors. One was our relationship with the five jobbers we proposed to retain; we also considered their sales executives, their sales personnel and feeling of these people towards our organization; the other competitive brands which they carry.'

"Mr. Burnside stated that he believed the remaining five would take a greater interest in respondent's brands; that 'we picked the wholesalers that we thought we could work best with,' and that he approved the recommendation made to him. The matter was then presented to Mr. John W. Red, Vice President of respondent corporation, who also approved the recommendation.

"On or about March 14, 1957, Mr. LaPorte advised Maurice Altschuler (Secretary and Treasurer of F & A and a director of Merchants) and Myron Feldman (Secretary of Gillhaus) that they were cutting down the number of their distributors throughout the country and that effective May 1, 1957, the three petitioners would no longer be their distributors in New Jersey for Canada Dry products. The above representatives of petitioners asked for and were granted lengthy interviews with Mr. Burnside and later with Mr. Red, and were advised in each instance that there would be no change in the decision of the policy of Canada Dry. By letters subsequently sent by respondent to petitioners, the termination, as of May 1, was confirmed and petitioners were advised that 'a study of market conditions in New Jersey has made it clear to us that we must reduce the number of wholesalers handling our line.' Thereafter the petitions considered herein were filed with the Director.

"The evidence further shows that complete lines of Canada Dry products have been carried by F & A since Repeal, by Gillhaus since at least 1955 and by Merchants since 1953. No written contracts have been entered into between petitioners and respondent and, so far as appears, there have been no restrictions as to the sections of the State in which Canada Dry products might be sold by any of the original eleven wholesalers. During 1956 the total amount of products purchased from respondent by F & A was \$360,238.93; by Gillhaus, \$39,279.49 and by Merchants, \$34,062.09. The purchases by F & A totaled 3% of its entire business. During cross-examination of Mr. LaPorte, he admitted that respondent was selling all the scotch it was able to allocate in New Jersey and was then asked:

'Would you say that any company showed an increase in purchases from your company of the non-scotch items in a greater amount than F & A?'

to which he replied:

'I would not say that, no.'

"There are only two previous decisions concerning petitions filed under R. S. 33:1-93.1 to R. S. 33:1-93.5 inclusive. In Re Boller Beverages, Inc., Bulletin 838, Item 2, the then Director decided that petitioner had not established that the refusal to sell was arbitrary where it appeared that petitioner sought the right to sell only one of the distiller's products and had been offered the right to sell two similar items, and it further appeared that petitioner had not sold any of the distiller's products for more than five years last past. In Re Hoffman, Bulletin 924, Item 1, the then Director decided that petitioner had not established that the refusal to sell was arbitrary where it appeared that the distiller had decided to resume its former practice of selling directly to retailers in the northerly counties of the State and had terminated the right of distribution of its products by all wholesalers who formerly sold its products in said counties. On appeal the Supreme Court affirmed the action of the Director. Hoffman v. Hock, 8 N. J. 397 (Sup. Ct. 1952). In the latter case the Court said:

'The apparent scope of the statute in question is to be found in section 1 thereof which bars "discrimination in the sale of alcoholic liquors by distillers, *** of nationally advertised brands" thereof "to duly licensed wholesalers of alcoholic liquors ***". Thus it is still open to the distiller to sell directly to retail dealers if licensed so to do. It may, of course, sell indirectly through the medium of duly licensed wholesalers, if it so chooses, but in the latter event it may not discriminate between such wholesalers.'

"In the briefs filed on behalf of respondent and intervenor numerous cases are cited in which the word 'arbitrary' was held to have a meaning similar to the words 'capricious' or 'despotic.' However, the word 'arbitrary' may have various meanings, depending upon the context in which it is used. 6 C.J.S. Arbitrary; State v. Then, 114 N.J.L. 413 (Sup. Ct. 1935). In construing the term as used in R. S. 33:1-93.2, it must be borne in mind that the purpose of the legislation being considered is to prohibit discrimination in the sale of alcoholic beverages by distillers to wholesalers. Thus construed, the contention that respondent's action was not arbitrary because it appears that it resulted from a policy adopted in the interest of good business and as a result of good business judgment cannot be accepted. If that contention were accepted, the sections of the statute being considered herein would become meaningless. So far as appears from the record, there was no adequate reason why respondent should discontinue selling to petitioners while at the same time it continued to sell to other wholesalers similarly situated. Under the facts of this case it appears that petitioners have established that the action of respondent was arbitrary and discriminatory.

"There is evidence in the case that petitioners have the sole and exclusive right to sell certain other brands of alcoholic beverages in New Jersey and that they have lost other lines without instituting proceedings similar to the proceedings herein. This opinion is not concerned with the wisdom or fairness of the legislation in question, and the aforesaid facts are not a sufficient reason for denying relief requested by the petitioners in this proceeding.

"Under all the circumstances, it is recommended that an order be entered herein determining that the action of respondent is arbitrary and discriminatory, and directing respondent to sell to each of the petitioners alcoholic beverages on terms usually and normally required by respondent and that, in the event respondent refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R. S. 33:1-93.4."

Written exceptions to the Hearer's Report and argument in substantiation thereof have been filed with me by the attorneys for the respondent and the intervenor. The substance of these exceptions is that the Hearer has misconstrued and misapplied the meaning of "arbitrary" and "discrimination" as contained in Sections R. S. 33:1-93.1-5, and that these Sections are void as violative of both the United States and New Jersey Constitutions in that their effect upon respondent is to deprive it of its property without due process of law, to deny it the equal protection of the laws and to amount to an unlawful delegation of discretionary legislative power to an administrative agency.

With regard to the latter point, it has consistently been held that the determination of the constitutionality of an act of the Legislature rests exclusively with the courts. See Schwartz v. Essex County Board of Taxation, 129 N. J. L. 129 (Sup. Ct. 1942), aff'd. 130 N.J.L. 177 (E. & A. 1943), which declared that a state administrative agency (the former Board of Tax Appeals) had no authority to decide the constitutionality of a statute under the New Jersey and United States Constitutions and that it was a duty of the administrative agency to accept the statute as constitutional until such time as it has been declared otherwise by a qualified judicial body. See also Alton v. Atlantic City, Bulletin 812, Item 13; Erie Railroad System v. Walsh, 25 N. J. Misc. 269 (Div. Tax App. 1947); Jamouneau v. Newark, 25 N. J. Misc. 345 (Div. Tax App. 1947); Baldwin Const. Co. v. Essex County Board of Taxation, 24 N. J. Super. 252 (Sup. Ct. 1952). Accordingly, I must accept the validity of the statute.

On the question of construction of the statutory language, respondent contends that "arbitrary discrimination" does not result from a refusal to sell its products to petitioners if such refusal is based upon a bona fide policy decision that its best business interests are served by such refusal. In this instance the policy decision was asserted to rest upon the judgment of respondent that it could improve its position in the New Jersey market by a reduction of the number of New Jersey wholesalers distributing its products.

I am in accord with the Hearer that this view cannot be sustained. A reading of the statutory sections in question, together with the above mentioned Hoffman decision, gives rise to only one reasonable construction of the crucial phrase "arbitrary and discriminatory," namely, the different treatment of similarly situated wholesalers, without reasonable and adequate cause. See the definition of "arbitrary" contained in State v. Then, 114 N.J.L. 413 (Sup. Ct. 1935) as "'Without fair, solid and substantial cause and without reason given; without any reasonable cause; in an arbitrary manner;' or, 'not governed by any fixed rule;' 'bound by no law;' 'harsh and unforbearing;' 'exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power.'" To adopt the respondent's theory would require that the wholesaler prove bad faith or intent to harm on the part of the

distiller and would thereby render the sections ineffectual. It is not difficult to conceive that, if good faith of the distiller concerning his business interest were the only criterion to be considered, the interests of wholesale licensees would be completely subservient to the will of the distillers, thereby placing the power of wholesale market control in the hands of the very persons against whom the statute intended that the wholesalers were to be protected.

From the above I do not wish to imply that wholesale licensees are given by the statute a vested right to be continued in a line of nationally advertised products merely because, as in the instant case, they have handled such products over a long period of time and in large, substantial quantities. However, these facts may be taken into consideration in determining whether or not the distiller's refusal to continue to sell to the wholesaler is arbitrary. Nor do I wish to imply that each and every wholesaler has an absolute right to take on every line of nationally advertised products being sold by a fellow wholesaler within his territory. Each case (including the case in question) must be decided upon its own particular facts.

In support of its position respondent relies upon the language of the Hoffman case that the defendant therein "made a policy decision to resume its former practice of selling its product directly to retailers and eliminating entirely the use of distributors or wholesalers in the northern part of the State." However, the distinguishing fact of the Hoffman case is that the distiller there used the defense of bona fide policy decision to justify its pre-emption of the wholesale market in a clearly defined geographical area of the state. There was no arbitrary discrimination between wholesalers since all wholesalers in that geographical area were treated alike. The import of the Hoffman decision is that in such case the distiller need not justify its action with respect to each individual wholesaler in the area as long as it acts in good faith.

But the facts in the instant case are not analogous to the facts in the Hoffman case; the petitioners have been shown to be in a position in no way different from the wholesalers retained by the respondent. On this point respondent argues that the cases are similar since there was permissible distinction of treatment of similarly situated wholesalers in the Hoffman case in that the distiller did, in fact, sell to a wholesale licensee in the pre-empted area, namely, its corporate subsidiary, and that, in any event, there was permissible distinction of treatment between wholesalers of the pre-empted area and the wholesalers of the rest of the state. These contentions are fully answered by the observation that, at the time of the Hoffman decision, the distiller and its corporate subsidiary (a wholesale licensee) had merged into one corporation, thereby eliminating any question of separate identity, while the geographical distinction was based upon the greater density of wholesale licensees in the pre-empted area, as stated in the Hoffman case.

I have carefully examined the entire record herein and I am unable to find any justification for respondent's action concerning the three petitioners. If respondent's action was based upon reasonable and adequate cause, it is not reflected in the record. Throughout the proceedings respondent has taken the position that it may rely upon its sound discretion honestly exercised. Its only attempt to differentiate between the petitioners and the retained wholesalers has been its assertion

that it considered several subjective factors of nebulous quality in arriving at its decision. There was no attempt to deal in specifics or to document objective criteria. Even applying respondent's standard of good faith policy decision, the record in this case does not warrant or justify an affirmative finding thereof, as evidenced by the following sample of the testimony of two of respondent's officials:

"Q. Do I understand, Mr. Burnside, then, that you used no standard in determining which of these wholesalers were going to be continued and which were going to be dropped?

"A. We don't have any chart or (sic) there is no particular standard that you can set for determining which distributor you may retain in a given market." (pp. 86-87)

"Q. Now, in reaching this conclusion, Mr. Burnside, were there any requirements that you set up which the wholesalers were to meet in order to be retained?

"A. No." (p. 87)

"Q. But you (Mr. Red) did not discuss any of the six (wholesalers) that were dropped, is that correct?

"A. No, sir. Only by implication that these were the five that we wanted to go with and those were the five we did." (p. 118)

Consequently, I find that respondent's refusal to continue to sell its nationally advertised products to the petitioners, while continuing to sell such products to other wholesalers similarly situated, was without reasonable or adequate cause and constituted arbitrary discrimination within the meaning of the statute. (It is to be noted that the ability of the petitioners to pay for these products has not been contested.)

The question therefore remains as to the relief to grant. In this respect respondent has argued that any order that may be entered by me cannot deviate from the statutory authorization to order the distiller merely "to complete said sale of alcoholic liquor to the wholesaler;" that the order can act only upon past particular refusals by the distiller to complete specific sales and not on future sales; and that, in any event, there was no evidence in this case that respondent had refused any order of alcoholic beverages by the petitioners.

However, since it is undisputed that respondent, on its own initiative, advised petitioners that it would no longer sell to them any products, it would serve no useful purpose to compel petitioners to perform the futile gesture of ordering alcoholic beverages from the respondent. As to the alleged limitation in the statute concerning the scope of relief to be granted, I cannot believe that, in the case where a distiller has refused to sell to a wholesaler not one order but any order, the Legislature intended to require that a wholesaler entitled to an order under the statute must apply repetitively for such an order so long as it desired to continue to handle the distiller's products. To do so would constitute an unreasonable burden upon all the parties and this Division.

Furthermore, R. S. 33:1-93.5 contains express authorization that I may "adopt and promulgate such rules and regulations as may be necessary to carry out and insure compliance with the provisions of this act," while R. S. 33:1-93.4 impliedly negates any construction that my power is restricted to ordering merely the completion of one particular sale when it refers to "complete the sale or comply with the terms of the order of the Commissioner (now Director)." Also, I am enjoined by the Legislature "to do, perform, take and adopt all other acts, procedures and methods designed to insure the fair, impartial, stringent and comprehensive administration of this chapter" (R. S. 33:1-23) and to "make such general rules and regulations and such special rulings and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of this chapter, in addition thereto, and not inconsistent therewith." R. S. 33:1-39. That the absence of the actual promulgation of any rules, regulations or findings concerning final relief that may be granted, in cases such as these, does not indicate want of authority to so act, see Liptak v. Division of Alcoholic Beverage Control, 44 N. J. Super. 140 (App. Div. 1957).

Accordingly, it is, on this 3rd day of January, 1958,

ORDERED that the respondent sell and continue to sell to each of the three petitioners alcoholic beverages on terms usually and normally required by respondent.

WILLIAM HOWE DAVIS
Director.

2. APPELLATE DECISIONS - BUYER v. WEST ORANGE.

THEODORE BUYER,)	
)	
Appellant,)	
)	
-vs-)	ON APPEAL
)	CONCLUSIONS AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC)	
BEVERAGE CONTROL OF THE TOWN)	
OF WEST ORANGE,)	
)	
Respondent.)	

Theodore Buyer, Appellant, Pro se.
William E. Kennedy, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Board on October 1, 1957; whereby it denied an application to transfer Plenary Retail Distribution License D-2 issued to appellant for the 1957-58 licensing year for premises 16 Main Street to premises 640C Eagle Rock Avenue, West Orange.

"The petition of appeal alleges, in substance, that the application was denied without affording applicant an opportunity to be heard; that no objection was made by the public against such transfer; that the area does not have a distribution license; and that the action of respondent was arbitrary, prejudicial and had been predetermined by the members of the Board.

"The respondent's answer alleges that the evidence presented at the hearing on the application failed to disclose the need for an additional distribution license in the area to which transfer was sought, and denies that its action was arbitrary, prejudicial or predetermined.

"A copy of the minutes of the meeting of respondent on October 1, 1957, presented in evidence, disclose that appellant's application was the first matter considered; that one of the members of the Board stated that the Board was very familiar with the application and decision was reserved; that thereupon applicant asked if the Board could reach a decision soon, since he desired to notify his present landlord if the transfer is approved and sign a lease with the owner of the new premises; that the Board then proceeded to consider two other matters and then rendered decision on appellant's application in the following language:

'the Board unanimously denied the application on the grounds that no need was disclosed for an additional license in the neighborhood to which the applicant seeks the transfer, and such neighborhood is adequately served by establishments presently holding licenses.'

"At the appeal hearing, the appellant testified as follows:

"His present licensed premises are located in an area where there are four other distribution licenses, and three licensed taverns within the area of a block. In the new area there are three licensed taverns and no distribution license, and he considers that it is not sufficiently serviced properly without a distribution license. Such is the basic reason for his desire to move into the area, which is about four miles from his present location. He has a petition signed by 134 persons in favor of such transfer.

"The appellant's criticism of the hearing by respondent is that the meeting lasted for only twenty minutes, and he was not given an opportunity to discuss the removal of his license, and no one voiced any objection to such transfer, and hence it was an arbitrary, prejudicial and predetermined consideration of his application. He acknowledges that at the appeal hearing he has expressed every reason he has to think that his application should have been granted.

"A map presented in evidence discloses that his proposed location is on Eagle Rock Avenue about a block from Pleasant Valley Way; that there is a cluster of four licensed taverns at or near such intersection, two on Eagle Rock Avenue, the third, (O'Hara's, with a broad package privilege whereby he conducts a large package goods store in addition to a tavern), located on Pleasant Valley Way, and the fourth, a hotel, also located on Pleasant Valley Way; that a licensed package store and another licensed tavern are located on Pleasant Valley Way, each some distance in opposite directions from such intersection; that the next nearest area, at the intersection of Prospect Avenue and Eagle Rock Avenue, has a cluster of four licensed taverns, with three other licensed taverns located on Prospect Avenue, some distance from such intersection.

"The appellant describes the Pleasant Valley Way section as a one family area, with some business establishments on Eagle Rock Avenue - that it is a developing area, sparsely settled to the left of Eagle Rock Avenue, and wooded to the right.

"The O'Hara licensed premises are about 75 feet from Eagle Rock Avenue, and about 600 feet according to the appellant, and 400 feet according to the secretary of the respondent, distant from the premises where appellant desires to locate. The intersection of Eagle Rock Avenue and Prospect Avenue, is a half mile or less from the intersection of Eagle Rock Avenue and Pleasant Valley Way.

"The landlord of appellant's proposed new premises testified on his behalf that he occasionally purchases beer at O'Hara's, but generally orders alcoholic beverages from an establishment in Verona, and that as owner of such premises, he believes that appellant's establishment should be located there. Another witness presented by appellant merely testified that she has never purchased alcoholic beverages at O'Hara's because her husband will not permit her to go to a tavern.

"Louis P. Falcone, a member of respondent Board, testified that he was one of the members who attended the meeting at which appellant's application was considered; that appellant was not denied any opportunity to present any evidence concerned with, or to discuss, the merits of his application at such meeting; that he is familiar with the area to where transfer is sought; that it was the opinion of the Board that the licenses presently located at or near the intersection of Pleasant Valley Way and Eagle Rock Avenue are sufficient to supply the needs for alcoholic beverages; that basically he voted to deny the license because there is one liquor license in the immediate vicinity (O'Hara's) which has a package liquor store there; that this location is a small section of the town, and he felt that O'Hara's package store would amply service that immediate business section for the stores and people in that particular area; that he also felt that the tavern licenses in the area could cater, if they cared to, to purchasers of bottled alcoholic beverages.

"An Elder of a church located at the corner of Eagle Rock Avenue and Pleasant Valley Way testified that he had been authorized to appear on its behalf at the hearing and present the facts that about two years previous the trustees of the church, at a meeting, voted to oppose permission for the establishment of any additional liquor establishments in the area because the trustees considered that there were sufficient outlets there, and notice of such action was communicated to the town authorities.

"The transfer of a liquor license is not a right inherent in the license but is, rather, a privilege which the issuing authority may grant or deny in the exercise of a reasonable discretion. When the transfer is denied on reasonable grounds, such action will be affirmed.

"The question whether a license should be transferred to a particular location is a matter confided to the sound discretion of the issuing authority. The burden of showing that the issuing authority abused its discretion rests with the appellant. The Great Atlantic & Pacific Tea Company v. Passaic, Bulletin 1196, Item 1.

"In determining whether a plenary retail distribution license should be transferred to a particular location, a local issuing authority may properly take into consideration the number of plenary retail consumption licenses existing in that vicinity. Elberon Grocers and Liquor Store, Inc. v. Ocean Township, Bulletin 1136, Item 4.

"The facts presented lead me to the conclusion that appellant was not denied any substantial right at the meeting of respondent, since the only ground advanced by him for the transfer is that he does not consider two package stores, his for one, and the other O'Hara's, too many for the area. The respondent is of the contrary opinion, and its conclusion seems to be justified by the evidence presented.

"In all appeals to the Director the burden of proof to establish that the action of respondent was erroneous rests with appellant, Rule 6 of State Regulation No. 15. The evidence does not indicate any improper motivation on the part of the members of the respondent Board, and their denial of the application has not been shown to be arbitrary, prejudicial or unreasonable, or arrived at in advance of the meeting. In my opinion, appellant has therefore failed to sustain the burden of proof resting upon him.

"I therefore recommend that the action of the respondent Board be affirmed."

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 facts and circumstances herein, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 6th day of January, 1958,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the Town of West Orange be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

WILLIAM HOWE DAVIS
Director.

3. SPECIAL PERMITS - HOLDER MAY PURCHASE ONLY FROM RETAILER AT LISTED PRICES - CERTAIN PERMITTEES PRESENTLY EXCEPTED.

SPECIAL NOTICE TO MANUFACTURERS AND WHOLESALERS:

Questionable practices not in the interest of sound control have been prevalent in the operations of certain holders of Social Affair Permits issued by this Division.

Accordingly, I have ruled, effective January 2, 1958, that special permits issued to certain holders for social affairs scheduled on and after that date shall bear a special condition stamped on the face of the permit reading:

"The holder of this permit may purchase alcoholic beverages only from a retail licensee at not less than listed Minimum Consumer Resale prices."

Presently I am excepting from the restrictive provision of the special condition all church and religious groups, recognized charitable organizations, fraternal and benevolent groups, veterans service groups and fire and police units. Thus, only holders of permits not bearing the above condition may purchase from a manufacturer or wholesaler.

You are placed on notice and cautioned that when called upon to fill a purchase order placed by a holder of a special permit for a social affair scheduled on and after January 2, 1958, you must request evidence of the permit itself for examination in order to determine whether the holder of the permit may purchase at wholesale.

WILLIAM HOWE DAVIS
Director.

Dated: December 20, 1957.

4. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF RULE 1 OF STATE REGULATION NO. 38 - PRIOR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary)
Proceedings against)

MARECH'S TAVERN (a corp.))
275 - 18th Avenue)
Newark 3, N. J.,)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consump-)
tion License C-441, issued by the)
Municipal Board of Alcoholic)
Beverage Control of the City of)
Newark.)

Irving J. Zwillman, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., appearing for Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

The defendant pleaded non vult to a charge alleging that on Sunday, September 22, 1957, it permitted the removal from its licensed premises of an opened pint-bottle of Fleischmann's Preferred Blended Whiskey, in violation of Rule 1 of State Regulation No. 38.

The file herein discloses that at about 3:10 p.m. on above date an ABC agent asked Clarence Cochken (a bartender on duty in defendant's licensed premises) for a pint of Fleischmann's whiskey "to go."

The bartender thereupon removed a bottle of said brand of whiskey from a shelf, broke its seal, loosened its cap, handed the bottle to the agent and accepted \$2.75 in payment thereof. The agent left the premises with the alcoholic beverage and immediately re-entered the same with another agent. Both agents identified themselves to Harry Schlossberg (president of the within corporate licensee) and the bartender, who orally admitted the aforesaid violation.

By way of mitigation the attorney for the defendant has submitted a statement which I have carefully examined together with the file in the case and the reports of the agents. I, however, do not find any extenuating circumstances in this case which would impel me to impose less than the established penalties in cases of this kind.

The defendant has a prior adjudicated record. Effective March 18, 1957, its license was suspended for fifteen days by the Director for a sale of an opened bottle of whiskey after hours (Re Marech's Tavern (a corp.), Bulletin 1163, Item 9). The minimum suspension for an "hours" violation is fifteen days (Re Kozlow, Bulletin 1194, Item 10). Since the defendant

committed a similar violation within five years, the penalty will be doubled (Re Czaplicki, Bulletin 1170, Item 6). I shall suspend defendant's license for thirty days. Five days will be remitted for the plea entered herein, leaving a net suspension of twenty-five days.

Accordingly, it is, on this 6th day of January, 1958,

ORDERED that Plenary Retail Consumption License C-441, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Marech's Tavern (a corp.), for premises 275 - 18th Avenue, Newark, be and the same is hereby suspended for twenty-five (25) days, commencing at 2:00 a.m. January 13, 1958, and terminating at 2:00 a.m. February 7, 1958.

WILLIAM HOWE DAVIS
Director.

5. SEIZURE - FORFEITURE PROCEEDINGS - ILLICIT STILL AND MOTOR VEHICLE USED TO TRANSPORT ILLICIT ALCOHOLIC BEVERAGES - MOTOR VEHICLE RETURNED TO INNOCENT LIENOR - BALANCE OF SEIZED PROPERTY ORDERED FORFEITED.

In the Matter of the Seizure on) Case No. 9577
September 21, 1957 of a still,)
appurtenant equipment, fourteen)
barrels of mash, four five-gallon)
cans and a Chevrolet sedan, on) ON HEARING
and in the vicinity of Oakshade Road,) CONCLUSIONS AND ORDER
in the Township of Shamong, County of)
Burlington and State of New Jersey.)
-----)

Rhaseed Hassan, Pro se.
Chivian & Chivian, Esqs., by Louis Chivian, Esq., Attorneys
for General Motors Acceptance Corporation.
I. Edward Amada, Esq., appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This matter came on for hearing pursuant to R. S. 33:1-66 and R.S. 33:2-4, to determine whether a still, appurtenant equipment and a Chevrolet sedan, described in a schedule attached hereto, seized on September 21, 1957 and September 22, 1957 on and in the vicinity of Oakshade Road, Shamong Township, New Jersey, constitute unlawful property and should be forfeited, and further, to determine whether the premises should be padlocked.

"Rhaseed Hassan, the registered owner of the Chevrolet sedan, appeared at such hearing and sought return of the motor vehicle. An appearance was also entered on behalf of General Motors Acceptance Corporation which sought recognition of its alleged lien on such Chevrolet sedan. No one appeared to oppose forfeiture of the still and equipment.

"A New Jersey State Trooper testified as follows:

"He was on routine patrol of traffic on Oakshade Road at about 10:30 p.m. on the above date when he stopped Rhaseed Hassan driving the Chevrolet sedan in question. On inspection of the car he discovered two five-gallon cans in a burlap bag

and a bag of coke in the back of the car. He also found two more five-gallon cans and three bags of firewood in the trunk of the car. All of the cans had an alcoholic odor. A small quantity of alcohol was drained from the cans. The trooper took into custody the cans and motor vehicle, which were later turned over to ABC agents.

"The place where Hassan was stopped was about 150 feet from a pig farm. Hassan claimed that he was on his way to feed the pigs. The next morning the trooper went to the pig farm, where there was a path leading towards a wooded area. He followed the path and after traversing about 1200 feet came upon a still, where there was firewood similar to that found in the car and on the pig farm. In addition to the still equipment, a number of barrels with mash were there. ABC agents were notified and later that day accompanied the trooper to the still.

"An ABC agent testified that he received from the trooper about four ounces of alcohol which had been drained from the cans, and seized the still, its equipment and other paraphernalia. The alcohol was analyzed by the Division chemist, who reports that it is alcohol and water, fit for beverage purposes, with an alcoholic content by volume of 45.5 percent.

"The still was not registered with the Director of the Division of Alcoholic Beverage Control as required by R.S. 33:2-1. The records of the Division disclose that on October 28, 1956, there was seized from Rhaseed Hassan four one-gallon jugs of illicit alcohol at his dwelling in Lawnside, New Jersey, and on May 21, 1957 pleaded non vult in the county criminal court to the charge of possessing such alcohol and received a suspended sentence of six months' imprisonment in the county jail.

"Another ABC agent testified that he spoke with the owner of the pig farm, who stated that he rented such farm, on which there is a cinder block structure, to Yusuf Ali; that prior thereto he granted permission to Rhaseed Hassan to keep pigs there. Yusuf Ali permitted his uncle Rhaseed Hassan to continue to keep pigs there.

"The still, and its equipment and paraphernalia, is subject to forfeiture because such still was not registered with the Director of the Division of Alcoholic Beverage Control, pursuant to R. S. 33:2-2, and 5. The motor vehicle is subject to forfeiture because illicit alcohol, in cans which bore no tax stamps, was being transported therein, and further because the inference is justified that such vehicle was intended for the transportation of illicit alcohol. R. S. 33:1-66.

"Rhaseed Hassan testified that he did not have any whiskey in the car, nothing but the four cans and does not know why his car was seized merely because of the empty cans; that he resided in Philadelphia and raises hogs in Lawnside, and that he found the four cans on a dump and expected to use them to supply water to his pigs. This is a flimsy explanation for his presence at or near the pig farm late at night, especially in view of his past record. I am of the opinion that actually he was interested in the operation of the illicit still and hence recommend that his application for return of the car be denied.

"General Motors Acceptance Corporation presented in evidence a conditional sales contract, which it holds by assignment, covering the purchase on September 19, 1957 of the Chevrolet sedan in question by Rhaseed Hassan, with an unpaid balance of \$1315.68. The present balance due on such contract after rebate for prepayment is \$965.50.

"Before accepting such contract and extending credit to Rhaseed Hassan the finance company was informed that Hassan resided at a Philadelphia address for four years, formerly resided at another Philadelphia address for four years, was employed by a Pennsylvania concern for 10 years as a laborer, was the owner of a house and five acres of land, and was furnished with the name of a local finance company as a business reference.

"General Motors Acceptance Corporation checked with such reference, which reported that it had an account with Hassan which it described as fair, and had no derogatory information concerning Hassan; checked with a local credit bureau which reported that it had no record against Hassan; and accepted Hassan's representation as to residence, employment and ownership of real estate. The loan was granted on that basis, and the additional factor that a reputable dealer submitted the application.

"In my opinion this should be accepted as evidence of an adequate investigation by the finance company, inasmuch as Hassan, who testified on his own behalf, stated that he was a resident of Philadelphia and confirmed his employment for ten years by the one employer.

"The failure of the finance company to check on Hassan's ownership of real estate, which was actually located in Camden County, New Jersey, is not fatal, since the facts within its knowledge were not of such character as to lead a reasonably prudent person to suspect that he might have a criminal record, and it is mere speculation that such a check would have disclosed that Hassan had been arrested in October 1956 for possession of illicit alcoholic beverages although not then convicted. Cf. Seizure Case No. 9472, Bulletin 1192, Item 3.

"Accordingly, I recommend that the lien claim of General Motors Acceptance Corporation against the Chevrolet sedan to the extent of \$965.50 should be recognized.

"It does not appear probable that the amount realized at a public sale of the motor vehicle will exceed the costs of seizure and amount of the lien. I further recommend that the motor vehicle be returned to such finance company.

"The evidence presented indicates that the still was not seized on the pig farm. Hence those premises cannot be padlocked. R. S. 33:2-5. I therefore recommend that no order of padlocking be entered.

"Lastly, I recommend that the balance of the property seized be ordered forfeited and disposed of in accordance with law."

No exceptions were taken to the Hearer's Report within the time limited by Rule 4 of State Regulation No. 28.

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

Accordingly, it is DETERMINED and ORDERED that if, on or before the 10th day of January, 1958, the General Motors Acceptance Corporation pays the costs incurred in the seizure and storage of the Chevrolet sedan, described in Schedule "A" attached hereto, such motor vehicle will be returned to it; and it is further

DETERMINED and ORDERED that the balance of the seized property listed in the aforesaid Schedule "A" constitutes unlawful property, and the same be and hereby is forfeited in accordance with the provisions of R. S. 33:1-66, and shall be sold at public sale for the use of the State in accordance with State Regulation No. 29 or 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.

WILLIAM HOWE DAVIS
Director.

Dated: December 31, 1957.

SCHEDULE "A"

- 14 - barrels with mash
- 4 - 5 gallon empty cans
- 1 - copper coil
- Miscellaneous equipment, and firewood and coke, and empty glass jugs
- 1 - Chevrolet sedan, Serial and Engine No. 56B071515, Pennsylvania Registration 69067.

6. DISCIPLINARY PROCEEDINGS - SALE AT LESS THAN PRICE LISTED IN MINIMUM CONSUMER RESALE PRICE LIST - MITIGATING CIRCUMSTANCES - LICENSE SUSPENDED FOR 5 DAYS, LESS 2 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

BOLESLAW SUDOL)
T/a WILLOW GROVE)
81 Lester Street)
Wallington, N. J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-25, issued by the Mayor and Council of the Borough of Wallington.)

Boleslaw Sudol, Defendant-licensee, Pro se.
David S. Piltzer, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded guilty to a charge alleging that he sold alcoholic beverages at less than the price listed in the Minimum Consumer Resale Price List then in effect, in violation of Rule 5 of State Regulation No. 30.

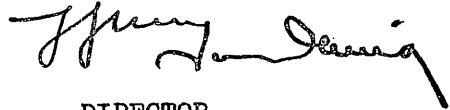
The file herein discloses that on Monday, August 26, 1957, Andrew Pavlec, a bartender on duty at the defendant's licensed premises, sold three cans of Rheingold beer to an agent of this Division for 55¢. The minimum consumer resale price then in effect for one can of Rheingold beer was nineteen cents and, hence, the minimum price of three cans was 57¢. After the sale was consummated the agent and another who accompanied him identified themselves to the bartender and the licensee who witnessed the aforesaid violation.

In mitigation of penalty the licensee states he knew that the minimum price for a pack of six cans is \$1.10 and believed three cans would therefore sell for 55¢; that he did not know that the said sale constituted a violation and never intended to violate the regulation.

Defendant has no prior adjudicated record. Ordinarily the minimum penalty for the within violation is ten days. However, I believe there is some merit to the licensee's statement of mitigating circumstances and, hence, I shall suspend defendant's license for five days. Re Chmielowiec, Bulletin 1185, Item 2. Two days will be remitted for the plea entered herein, leaving a net suspension of three days. Cf. Re Club 209 Bar & Grill, Inc., Bulletin 1036, Item 4.

Accordingly, it is, on this 6th day of January, 1958,

ORDERED that Plenary Retail Consumption License C-25, issued by the Mayor and Council of the Borough of Wallington to Boleslaw Sudol, t/a Willow Grove, for premises 81 Lester Street, Wallington, be and the same is hereby suspended for three (3) days, commencing at 3:00 a.m. January 13, 1958, and terminating at 3:00 a.m. January 16, 1958.



DIRECTOR.