Gossweiler

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

BULLETIN 1489

January 10, 1963

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ITEM

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1. APPELLATE DECISIONS - FARRELL v. ENGLEWOOD (CASE NO. 1).

Case No. 1 JAMES JOSEPH FARRELL, t/a FARRELL'S TAVERN, Appellant, v. COMMON COUNCIL OF THE CITY OF ENGLEWOOD, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

George S. Grabow, Esq., Attorney for Appellant.
LeRoy B. Huckin, Esq., by George G. Tennant, Jr., Esq.,
Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent whereby on June 19, 1962, it suspended the appellant's license for a period of eleven days, effective June 20, 1962, after finding appellant guilty of a charge alleging that on May 12, 1962, he sold an alcoholic beverage to a minor upon his licensed premises, in violation of Rule 1 of State Regulation No. 20. Appellant's premises are located at 34 Grand Avenue, Englewood.

"Upon the filing of this appeal, an order was entered by the Director on June 21, 1962, staying respondent's order of suspension until further order herein. R.S. 33:1-31.

"The appellant has also filed a petition of appeal to challenge the failure or refusal of the respondent to act with respect to his application for renewal of the 1962-63 license. Both actions were heard by me at the same time; however, for the purpose of procedural orderliness, both cases will be considered separately, i.e., the disciplinary matter will be known as Case No. 1 and the license renewal matter will be known as Case No. 2. Each case will be considered in a separate Hearer's Report.

"Appellant, in his petition of appeal, alleges that the action of the respondent was 'erroneous, improper and contrary to the weight of evidence produced at said hearing whereby a fair and impartial verdict of said respondent was not handed down.' Appellant further states that the said action was in violation of N.J.S.A. 33:1-24 and the principle and spirit of said statute.

"Respondent, in its answer, denies the substantive allegation of the petition, and declares particularly that the evidence 'adduced at the trial showed that an alcoholic beverage was permitted to be sold or served to a minor of the age of 20 years, and was sufficient to sustain the action taken by the

Common Council (respondent) in suspending the license of the appellant.'

"The hearing on appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15. Before this tribunal the appellant has been given a full opportunity to present testimony under oath and to examine and cross examine witnesses. Sidoroff, et al. v. Jersey City and Niebanck, Bulletin 1310, Item 1; Klein v. Township of North Bergen, 10 N.J. Super. 128 (App.Div. 1950).

"A brief precursory summary of the facts should be set forth in order to set the charge into focus. It appears from the testimony that Levi ---, age 20, and Edward ---, age 18, accompanied by Charlie Williams, an adult, had left a diner located across the street from the licensed premises after they had consumed some food and refused to pay for it. They entered appellant's licensed premises, seated themselves at the bar, and Williams then ordered three glasses of beer. When the bartender asked Edward how old he was, Edward replied that he was 18 years of age; the bartender told him that he was too young to be served. Before the bartender had an opportunity to inquire of Levi about his age (and concededly before the beer had been paid for, or consumed), several police officers entered the tavern in the company of the manager of the diner. The manager had called police headquarters to complain about the failure of these three persons to pay for the food which they had consumed several minutes before, and also demanded their arrest because they had threatened him and had also threatened to do damage to his premises.

"One of the police officers then questioned these three persons and directed them to accompany him to police headquarters. Levi resisted this invitation both by word and action, and a brief 'scuffle' ensued. He was forthwith subdued and escorted from the premises. These three persons were arrested and eventually arraigned in the municipal court. A criminal charge was also made against Flanagan, the bartender, for the sale of alcoholic beverages to a minor. He was subsequently tried in the municipal court on this charge and was found not guilty.

"At the hearing before the respondent, two charges were brought against the appellant, namely (1) for sale, service and delivery of alcoholic beverages on the date alleged to Edward and (2) for sale, service and delivery of alcoholic beverages to Levi. It is undenied that at that hearing, the two minors testified that Levi was served with the alcoholic beverages but that no service was made to Edward. Accordingly, the first charge involving the allegations as to Edward was dismissed for lack of evidence.

"However, at the hearing in the municipal court on the criminal charge involving Flanagan, both minors and Williams repudiated their testimony before the respondent and testified that, in fact, no alcoholic beverages were served to either of the minors.

"At the hearing on this appeal de novo, it is significant to note that the substance of the testimony of the minors, and of Williams, is the same apparently testified to by them in the municipal court. This is emphasized at this time because a further recital of the testimony will show that counsel for the respondent pleaded 'surprise', although it is established that

he knew of the substance and import of their testimony in the prior proceedings.

"In support of the charge before this Division, the respondent first called Edward John Doyle, an officer of the Englewood Police Department, who testified to the following effect: In response to a call for assistance by Joe Sharpe, the manager of the Grand Avenue Diner, located directly opposite the licensed premises, Doyle, in the company of Patrolman Stephen Alben, met Sharpe at the diner and, after being advised of the fact that three men had created a disturbance at the diner and were presently in appellant's tavern, they proceeded to the licensed premises. Sharpe pointed out Levi, Edward and Williams, who were standing at the bar. Patrolman Alben then went up to Levi and told him that a complaint had been made against the three of them and directed them to come to headquarters to 'straighten this matter out'. Levi then is purported to have said, 'Get the hell out of here. I'm not going anywhere until I finish my beer.' Levi then shoved the officer, and a scuffle ensued which lasted for a very short period of time, after which they were escorted from the tavern. The officer estimated that just a few minutes had elapsed from the time they received the call at headquarters until they entered the licensed premises and the incident occurred.

"Stephen Alben, the other police officer, essentially corroborated the testimony of his fellow-officer. On cross-examination, he admitted that he could not answer truthfully whether any of the beer had been consumed at the bar by either of the minors or Williams but states that he saw Levi with a glass of beer in his hand and that Levi put the glass of beer down before he 'shoved' the officer. He also admitted that he did not know whether these drinks of beer were actually served to the minors since he was not present at that time.

"Joe Sharpe, the manager of the diner, testified that these three persons came into his place at about 9:30 p.m. on the night in question; that they were disorderly and had apparently been drinking; that an argument started after they had consumed their food and they refused to pay for it. They then left the diner after threatening to cause him trouble, and he immediately telephoned the Police Department for assistance. Within a few minutes, the police arrived and accompanied him to the tavern where these men had entered. He stated that he saw three glasses of beer in front of these three persons but apparently was more concerned in picking out the three men and making their identity known to the police officers than observing whether or not any beer was consumed. He could not state with any certainty whether or not any of the beer was consumed by Levi and, in fact, did not see any beer consumed by this minor.

"Respondent then produced the three persons, including the two minors, who were allegedly served the alcoholic beverages on the evening in question. Their testimony was in complete contradiction to the testimony which was presented before the respondent at the hearing below. However, their testimony apparently was substantially the same as testified to in the Municipal Court at the trial of Flanagan.

"Williams testified that he entered the premises with the two minors and ordered three beers. The beers were placed before him and the bartender immediately asked Edward how old he was. When Edward told him that he was 18 years of age, the bartender said 'I cannot serve you.' As soon as this conversation

took place and before the bartender had an opportunity to question Levi, the police arrived, and the incident ensued as recited hereinabove. Williams stated that the whole incident took place in a period of two and three minutes from the time they entered the premises until the arrival of the police officers; that actually the transaction which he initiated with the bartender was not completed because the bartender insisted upon examining Edward's credentials regarding his age.

"Levi testified that he is 20 years of age; that he accompanied Williams on this night to the tavern after they had left the diner; that no beer was served to him nor did he consume any alcoholic beverages on the evening in question. Counsel for the respondent then pleaded 'surprise' and sought to impeach Levi's testimony by reading questions and answers from the transcript taken at the hearing below.

"The questions below were to the effect that Levi had ordered a drink of beer. Levi categorically denied that that was the fact and offered as his explanation that 'I was confused. You know, maybe make it light on myself; after I found out it was wrong.' He further testified that in the Municipal Court hearing before Magistrate Bendheim, in the case of State of New Jersey v. William Flanagan, he told the truth when he denied that he purchased any alcoholic beverages or that any beverages were sold to him.

"Edward, similarly called by the respondent, testified substantially to the same effect. He is 18 years of age and stated that after Williams had ordered three beers and before anyone had a chance to pay for them, the bartender questioned him with respect to his age. When he informed the bartender that he was 18 years old, the bartender refused to serve him. Immediately, after this conversation, the police officers arrived and the incident hereinbefore set forth ensued. Respondent's counsel similarly pleaded 'surprise' and sought to impeach this witness's testimony by referring to contradictory statements made by this witness at the hearing below. The witness admitted that he had made these statements before the respondent Common Council, but then repudiated that testimony in the Municipal Court. His testimony in the Municipal Court was repeated at this hearing.

"The appellant, in support of its defense, produced the bartender, William Flanagan, who denied that he had served any beer, whiskey or any alcoholic beverage to Levi or Edward on the night in question. He stated that these three persons entered the premises and Edward asked for a beer. He immediately questioned Edward regarding his age and, when Edward took a long time in producing his credentials, he went to the other side of the bar to wait on other customers. Before he returned to these three persons, the police officers arrived and engaged in a conversation with Levi and Edward. He explained the presence of the three beers on the bar as having been served a short time before to several other persons who had left the bar to play table pool.

"On cross examination, Flanagan was questioned rather closely about whether he had asked Edward for his credentials. He reiterated his previous testimony to the effect that Edward was very slow in producing any credentials and he became impatient and waited on other customers. He stated categorically,

however, that at no time did he serve Levi any beer or any other alcoholic beverages on this night or on any other night. He admitted that he had testified in the hearing below that when these three persons arrived in the premises, they ordered beer but he qualified it by stating that he immediately asked for proof of age. He stated that as soon as he asked for Edward's credentials, the police arrived.

"Elvira Vaughn, testifying on behalf of the appellant, stated that she is a regular patron of appellant's establishment and was present on the night in question. She saw these three persons, including the minor Levi, in the premises and gave her observation of what occurred in the following language: 'Well, these three fellows came in in a hurry, one stood by the bar, the other two walked away to the juke box, and one fellow started tapping on the bar. Mr. Flanagan, the bartender came over, and the fellow asked for something, and Mr. Flanagan asked for age, and this fellow looked in his pockets.'

"Thereupon, she continued, when Flanagan asked Edward his age, he stated that he was 18 and Flanagan said 'I am sorry. I can't serve you.' Immediately after that conversation, the police officers arrived and the incident ensued as related hereinabove. She stated categorically that none of these three persons were served nor did they consume any alcoholic beverages on this night.

"On cross examination, Miss Vaughn corroborated the testimony of the bartender that the glasses of beer which were on the bar immediately in front of these persons actually belonged to several men who were playing pool at that time. She insisted that neither of these persons had any glasses in their hands at the time the officers arrived and that the whole incident took only a few minutes.

"In this appeal de novo, the evidence presented is at substantial variance with that presented before the respondent at the original hearing. However, the same basic legal principles apply in the determination of this issue.

"The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32 C.J.S. Evidence, sec. 1042. By a preponderance of the evidence is meant evidence which is of greater weight or more convincing than that which is offered in opposition. 32 C.J.S., sec. 1021 at p. 1051, and cases therein cited. Disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N. J. 373, 378 (1956); Hornauer v. Division of Alcoholic Beverage Control, 40 N. J. Super. 501, 503.

"Before commenting on the testimony of the witnesses herein, it might be well to state this additional principle. The testimony, to be believed, must not only proceed from the mouth of credible witnesses but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N. J. 546; Gallo v. Gallo, 66 N. J. Super. 1. The accepted standard of persuasion relating to testimony governing the trier of facts is that the determination must be probably founded in truth. Riker v. John Hancock Mutual Life Insurance Co., 129

N. J. L. 508, 511.

"Bearing these principles in mind, my evaluation of the testimony satisfies me that the proofs do not show a sale, delivery or service of alcoholic beverages to Levi by the licensee. I am persuaded that this minor, together with his two companions, entered the licensed premises in a hurry after creating a disturbance in the diner across the street. I find further that Williams ordered beer and the bartender, after placing the order on the bar but before delivering the same to these individuals and accepting payment therefor, questioned the eligibility of Edward, the other minor. When Edward told him he was 18 years of age, the bartender refused to complete the transaction and told him that he was too young to be served. Before anything further happened, the evidence satisfies me that the police officers arrived with the manager of the diner and interrupted any further proceedings with respect to the alleged sale and service of these alcoholic beverages.

"It is clear from the testimony of all the witnesses that Levi, Edward and Williams were in the tavern for no more than two or three minutes before they were accosted by the police officers. I do not believe that any sale or service of beer was made to Levi as charged or that he consumed any alcoholic beverages. Whether he might have been served with alcoholic beverages had the incident referred to hereinabove not occurred is a matter of speculation and of no moment in the determination of this issue.

"As was pointed out, the respondent was in a much more difficult position in the trial of this appeal de novo than it was in the proceedings at the initial hearing below. There, both minors and Williams testified in such manner as would apparently justify a holding of guilt on this charge. However, all three witnesses categorically denied before me that there was any sale or service of beer to these persons, including the minors, nor was there any consumption of the said beer. Counsel for the respondent then stated that these were hostile witnesses and pleaded 'surprise.'

"There is a very serious question as to whether or not the respondent should have been permitted to plead surprise and cross examine these witnesses in view of the fact that it was well aware of their testimony in the Municipal Court in the matter relating to the alleged sale of alcoholic beverages by Flanagan. In the Municipal Court, all three testified to the same effect as before me, and insisted that their testimony was the accurate and truthful version.

"The prevailing rule is that where a witness testifies in a manner contradictory to a prior statement or testimony and where the party is 'surprised' by such unexpected testimony, it might neutralize the effect of such evidence by proving the self-contradictory statements of the witness to show that such statements were untrustworthy. In State v. D'Adame, 84 N. J. L. 386 (E. & A. 1913), the court quoted from Wigmore Evidence, sec. 1018, that the prior self-contradictions, when admitted, are not to be treated as assertions having any substantive or independent testimonial value. State v. Rappise, et al, 3 N. J. Super. 30, 33.

"As to whether such testimony creates an impeachment, or merely contradiction, see Lincoln Mortgage Co. v. McPhillips, 121 N. J. L. 114; State v. D'Adame, supra; Fox v. Forty-four Cigar Co., 90 N. J. L. 483.

"The doctrine of neutralization authorizes cancellation or erasure from cases of unexpectedly adverse testimony given by a party's own witness, when necessary to prevent a miscarriage of justice, and is available to both sides, although usually resorted to in criminal cases by the State. State v. Caccavale, 58 N.J. Super. 560; State v. Bovino, 89 N. J. L. 586; State v. D'Adame, supra.

"Under the doctrine of neutralization, when a witness surprises by supplying unexpectedly adverse testimony, the witness' prior written or oral statements may be admitted by the trial court in the sound exercise of its legal discretion, for purpose of wiping the slate clean of the specific evidence upon the point or points involved. 98 C.J.S. Witnesses, sec. 578, p. 540; State v. Perillo, 18 N.J. Super. 549; Ciardella v. Parker, 10 N. J. Super. 537; Becker v. Eisenstodt, 60 N. J. Super. 240.

"This rule is predicated upon the concomitant postulate that the party was genuinely surprised by the testimony of such witness. State v. Cooper, 10 N. J. 532; State v. Caccavale, supra. Cf. Moomaw v. United States (C. A. Ala.), 220 Fed. 2d 589.

"Although I had some reservation with respect to respondent's propriety in pleading 'surprise', in view of the testimony of these witnesses in the prior Municipal Court proceedings, I permitted counsel to cross examine these witnesses. However, the testimony of these three witnesses can only be used to neutralize their testimony, and could not be used to establish the truth of the pending charge with reference thereto. State v. D'Adame, supra. This means, therefore, that the slate is wiped clean so far as their testimony is concerned and the only affirmative and probative testimony upon which the respondent can rely to sustain the allegation in this case is that of the police officers and John Sharpe, the manager of the diner.

"In evaluating the testimony of Sharpe, it was manifest both from the testimony and from his demeanor on the stand that he was interested in only one thing, namely, the apprehension of the three persons who had created a disturbance in his diner on that night. He could not state with any measure of certainty that any of these three persons, and especially the minor Levi, were drinking or even that there was beer in front of them. As it appeared, he apparently made no accurate observations because he was excited and nervous and angry. His testimony therefore with respect to the critical issue was peripheral and insubstantial.

"I am frank to say that I was not pursuaded by the testimony of the police officers with respect to their specific observations at the bar. Neither of them, of course, testified that they saw any actual consumption by the minor of beer or any other alcoholic beverage. Their specific recollection of the transaction at the bar appeared to be transparent because they were overwhelmingly concerned with the object for which they were summoned; thus their testimonial objectivity was affected by their contacts with the minor at that time.

"The appellant, on the other hand, has presented a believable story when the bartender stated that he refused to serve Edward after ascertaining his age. He stated that at no time did he serve Levi, the minor involved herein, nor did Levi

consume any alcoholic beverage. The whole time involved was between three and four minutes, for he testified that the police officers arrived immediately after he had demanded verification of Edward's age. His testimony was supported and corroborated by Miss Vaughn, and I was impressed by her general demeanor, including her apparent sincerity and forthrightness on the stand. She insisted that no beer was served to any of these three persons, including the minor, and that the minor did not consume any beer in the few minutes during which he was in and upon these premises. Therefore, I believe her testimony was reasonable and worthy of being accepted. Hornauer v. Division of Alcoholic Beverage Control, supra.

"I cannot say that the evidence produced by respondent is of such probative force that it has engendered that feeling of reasonable probability in these circumstances. Loew v. Borough of Union Beach, 56 N. J. Super. 93. As Judge Jayne said in Davidson v. Fornicola, 38 N. J. Super. 365, 371 (1955):

> '...In exacting proof by the preponderance or greater weight of the evidence, the law does not prescribe the necessary quantum of the over-weight or the degree of excess of its superiority in credibility. A preponderance is attained where the evidence in its quality of credibility destroys and overbalances the equilibrium...'

"I do not believe that the respondent has produced such proof by the preponderance or the greater weight of the evidence and thus that its finding of guilt is not supported by a fair preponderance of the believable evidence. I therefore recommend that the action of the respondent with respect to this charge be reversed. Collazo v. Elizabeth, Bulletin 1410, Item 1; Schwarz Drug Stores, Inc. v. Newark, Bulletin 1361, Item 2; Royal Castle, Inc. v. Newark, Bulletin 1093, Item 2; Kurschner v. Newark, Bulletin 1081, Item 3."

Written exceptions to the Hearer's Report and written argument thereon were filed with me by respondent's attorney pursuant to Rule 14 of State Regulation No. 15. Oral argument was also had before me on the exceptions filed by the respondent.

Based on the record, oral and written argument, I conclude that a preponderance of the believable evidence favored the respondent and was sufficient to justify a finding of guilt by the respondent herein. I so find and shall affirm the action of the respondent as to the eleven-day penalty heretofore imposed by the respondent.

Accordingly, it is, on this 26th day of November 1962,

ORDERED that the eleven-day suspension of appellant's license imposed by the respondent is hereby reimposed and reinstated to commence at 8 a.m. Monday, December 3, 1962, and to terminate at 8 a.m. Friday, December 14, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - FARRELL v. ENGLEWOOD (CASE NO. 2).

Case No. 2 JAMES JOSEPH FARRELL, t/a FARRELL'S TAVERN,	)	
Appellant,	)	ON APPEAL CONCLUSIONS AND ORDER
v.	)	
COMMON COUNCIL OF THE CITY OF ENGLEWOOD,	)	
Respondent.	)	

George S. Grabow, Esq., Attorney for Appellant
LeRoy B. Huckin, Esq., by George G. Tennant, Jr., Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent Common Council of the City of Englewood (hereinafter respondent) wherein it failed or refused to take action on the application to renew the license of the appellant theretofore granted for premises at 34 Grand Avenue, Englewood. The appeal in this matter was filed simultaneously with an appeal from the action taken by the respondent whereby on June 19, 1962, it suspended the appellant's plenary retail consumption license for a period of eleven days after finding him guilty of a charge of sale and service of alcoholic beverages to a minor. The Hearer's Report in Case No. 1 sets forth the recommended determination reversing the action of the respondent therein.

"In the petition of appeal the appellant alleges that, although all of the plenary retail licenses then pending before respondent were renewed by the respondent by a resolution duly passed, no resolution was either presented or passed with respect to his license. Thus the said license was permitted to expire without any formal action taken thereon. The petition further alleges that no written objections were filed with respect to said application for renewal; the Police Department, Fire Department and Health Department of respondent 'approved' the renewal of appellant's license, and no hearing was held nor was any notice of hearing given appellant of intention of respondent with respect to the said application to renew.

"Appellant, therefore, contends that the action of respondent was 'erroneous, improper, capricious and arbitrary *** was in violation of the law and spirit of the statutes of this State in such case made and provided, and is not a fair and impartial exercise of the powers of said Respondent.'

"The answer of the respondent essentially denies the allegation charging that it failed, neglected and refused to pass a resolution renewing the license of appellant; admits that it did not introduce or pass any resolution with respect to the said license; further admits that there were no written objections filed to the renewal of same; and that there was 'approval' of the said application by the Police, Fire and Health Departments. It also admits that there was no hearing held on the charges nor was any notice of hearing given to the appellant, but denies that

its action was improper, arbitrary, erroneous or capricious.

"In separate defenses the answer sets forth that respondent has not taken any action either for or against the renewal of the license of appellant and that the appellant has no legal right to a renewal of his license.

"Pursuant to the filing of the notice of appeal an order was entered by the Director of this Division staying respondent's order, requiring respondent to show cause why the term of the license held by the appellant should not be extended pending the determination of the appeal, and it further ordered that the term of the said license be extended pending the return of the order to show cause and until further order of the Director.

"The hearing on both the order to show cause and the appeal were heard concurrently, and the same evidence was introduced for the determination of both issues in this Report. The appeal before this Division was heard de novo, with full opportunity for counsel to present testimony under oath and cross examine the witnesses. Rule 6 of State Regulation No. 15; Shapiro v. Long Branch, Bulletin 901, Item 2; Sideroff et als. v. Jersey City and Niebanck, Bulletin 1310, Item 1.

"The burden of proof in all of these cases which involve discretionary matters rests upon the appellant, and he must show manifest error or that the local issuing authority clearly abused its discretion. Downie v. Somerdale, 44 N.J. Super. 84, at 87; Nordco, Inc. v. State, 43 N.J. Super. 277, at 287. It is important to point out at the outset of the consideration of the evidence herein that a renewal of a license, just as in the issuance of a new license, will depend upon the sound reasons advanced by the applicant to justify such action. It is well established that there is no inherent right to the renewal of a license. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct. 1946); Kleinberg v. Harrison, Bulletin 984, Item 2; Bumball v. Burnett, 115 N.J.L. 254. No one has a right to demand a license. A license is a special privilege granted to the few, denied to the many. Meehan v. Jersey City, 73 N.J.L. 382. As Justice Field stated in Crowley v. Christensen, 137 U.S. 86, at p. 92:

> '***There is no inherent right in a citizen to thus sell intoxicating liquors by retail ***. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extend of regulation rest in the discretion of the governing authority.***'

"As a logical corollary, it must follow, as the true postulate, that the applicant, in all fairness, must be given a hearing in order to present his case for favorable consideration of his application. It follows that if, as the answer of the respondent indicates, there was no hearing, then the question to be considered is whether the appellant was given a forum for such presentation, and whether the absence of such forum constitutes a deprivation of his rights, an abuse of discretion and erroneous action on the part of respondent.

"The factual thesis developed by the evidence presented at this hearing is as follows: The appellant has operated a tavern in this community for more than twenty years and has had, up until the past year, a reasonably peaceful operation. It

appears that some promotional schemes introduced by his manager during the past year, which attracted a number of young people to his place, precipitated several incidents requiring the attention and action of the local police. The appellant did not or was unable to devote adequate time to the supervision and management of these premises, and attributed the troublesome activities to the overzealousness of his manager.

"On one occasion during the last licensing period he was called to Police Headquarters and conferred with the Chief of Police with respect to the activities at the licensed premises, and he promised to eliminate the 'special nights' which apparently precipitated the complaints. He was finally charged on two separate dounts with sale and service of alcoholic beverages to two minors. A hearing was held on those charges before the respondent, and one of the counts was dismissed because of lack of evidence. However, the appellant was found guilty of the first charge by respondent and his license was suspended for eleven days (coincidentally this brought it up to the end of the licensing period).

"Respondent had discussed this matter at an executive conference, and it was informally decided that, because this conviction represented the third conviction against this appellant, renewal of the license was unwarranted and unjustified. They, therefore, took no action thereon nor, indeed, did they conduct any hearing as required under R.S. 33:1-24.

"Appellant called as his witnesses the Mayor, and councilmen who serve as the local issuing authority for respondent. Mayor Volk testified that he did not participate either in the deliberations nor was he present when the decision was announced.

"Councilman Edward S. Brockie testified that he is familiar with the appellant's tavern because he represents the district in which it is located. He predicated his decision not to act upon the renewal (thus, in effect, denying renewal) upon the following: (1) that any licensee who has three convictions of liquor law violations is not entitled to hold such license in that community, and the appellant was, by reason of the conviction on June 19, thereby declared ineligible by his record; (2) that he had heard numerous complaints from people in the district, including parents, concerning the operation of the tavern; 'the police had to be called on numerous occasions to quell these disturbances. It disturbed the citizens so it disturbed me, naturally, as their representative;' that young people were attracted to these premises, and that their parents resented this operation; (3) on the basis of these complaints made to him, together with this third conviction, Brockie recommended to respondent that this license should not be renewed. Therefore, no action was taken and, in effect, the application was thus denied.

"Councilman William D. Dicknor testified that he arrived at his decision to vote for a suspension for eleven days and the further decision not to renew said license after full consideration and deliberation of all of the available evidence. He explained that the reason for the eleven-day suspension was that 'we imposed the longest penalty we could within the life of the license. That was what resulted in the decision on eleven days.' He explained that, while he did not think that eleven days was an adequate suspension, its effect would be in consonance with their determination not to renew the appellant's license. Thus there would be continuity between the sentence imposed and their failure

to take action. He admitted that their decision not to renew was taken on June 19; that it was based in some part upon the recommendation of Councilman Brockie and upon the fact that there were three convictions against this appellant. He further stated that it had been the policy of respondent for many years that, where there were three convictions, a license should not be renewed and that this policy had been strictly followed in this case.

"It was then decided by the respondent at the June 19 meeting that, consistent with such policy, it was their determinati not to renew the license and not to take any affirmative action on the application for renewal. He was asked whether his attitude with respect to renewal would be changed if there were a reversal of that conviction by this Division. His answer to that was, 'I think that it would take a considerable convincing to make me change my mind. However, I am not prepared to say what my final decision on the matter would be or that of my colleagues until such a time as the recommendation of the board had been made to us and we had the opportunity to study it in due course.'

"Councilman Vincent K. Tibbs testified that he participated in the executive conference preceding the public meeting and voted in favor of the suspension. He was also in agreement with the decision not to renew, although he admitted that no objections were made by any person to the renewal nor were there any objections made thereto by the Police, Health and Fire Departments.

"Councilman Franklin A. Botsford also testified that he voted in favor of the suspension but felt that it was undesirable to vote affirmatively for renewal of this license until an appellate determination of the suspension was made. However, he admitted that, regardless of the ultimate outcome of the disciplinary action by this Division, he was determined to vote against renewal of the appellant's license. This was based not only upon prior convictions of the appellant but because he felt that this tavern was catering to undesirable out-of-towners and he had heard that they had been selling drinks to minors. This was, of course, only on the basis of what people had told him but was not based on any reports on the police blotter or as a result of any specific charges brought against these premises.

"Councilman Kurt A. Erslev similarly voted for the eleven-day suspension and agreed that there should be no renewal. His reasons were based substantially on those advanced by the other councilmen who had heretofore testified. He was asked the following:

'Q. Was there ever any discussion at all with respect to whether the man was entitled to a hearing before you decided to, as you say, forfeit his license or refuse to renew?

A. We were at a disadvantage because our legal counsel was also a defendant in the suit. Is that correct?

Q. Just answer the question. If you don't know, don't answer the question.

A. Let me tell you this: We were without advice of legal counsel at that particular time, so we did not make any decision as to a future hearing.'

"Joseph A. Furey, the Chief of Police, called as a witness on behalf of the appellant, testified that he approved the application for renewal and saw no present objection to such action. He related that there had been some difficulty with this tavern during the past year and that he had received a report from the Detective Bureau that they noticed some people frequenting this tavern 'who we know are not of the best. I won't call them criminals. I won't call them -- maybe trouble makers we will call them. Our main reason for inspecting taverns is to prevent trouble.'

"Thereafter he had a conference with the appellant and and appellant promised to eliminate some of the apparent causes for conditions in his tavern. He received a report subsequent to this conference from his Detective Bureau indicating that there had been an improvement in the licensed premises.

"Sergeant Albert C. Hoeger testified that much of the trouble at this tavern emanated from a promotional operation known as 'fun night' on Thursday nights. On January 4, 1962, under his command, six detectives entered the premises for the purpose of checking male personnel for knives, guns or any other violations, and on this occasion 'we found several knives which were dropped to the floor.' He stated that he was unable to determine the ownership of these weapons but, 'in checking credentials it was noted that a group came from Paterson and Hackensack' as well as from Englewood. This routine was followed not only in these premises but at every other tavern in this community.

"The witness further testified that he attended the conference in Chief Furey's office at which the warning was given to the appellant regarding the lack of supervision at his tavern, and he has now found that there has been a general improvement in the operations of these premises.

"The appellant, testifying in his own behalf, stated that he has been in business for over twenty years and had had two prior violations -- one in 1955 for sale to minors, and one in 1957 for sale after hours. The substance of his testimony was that the trouble during the past year was occasioned by the tactics of his manager, whom he had hired in September 1961 in promoting 'fun night' on Thursday nights. This manager was subsequently discharged. He related the conference that he had with Chief Furey at which time it was suggested that the tavern would need his closer supervision. Immediately after the conference he did more closely supervise the activities and stopped the objectionable activities, including 'twisting' and the 'fun night.'

"The appellant also testified that he is presently in- with a pending contract for the sale of the tavern with a bona fide purchaser, and that he intends to sell the licensed business if permitted to do so.

"The appellant also produced a character witness who testified that the appellant has a very good reputation in the community in which he resides for truth and veracity.

"There are two dominant questions which form the central core of the inquiry herein and which must be determined in order to arrive at a final disposition herein. They are (1) did the appellant receive a hearing on his application for renewal as required under R.S. 33:1-24, and (2) do the facts as now appear

on this appeal de novo justify the affirmance of the action of the respondent.

"It is hardly necessary to belabor the point that no hearing, as such, was granted to the appellant on his application for renewal of the license. This has been testified to by the various councilmen who agreed that their only affirmative action was with respect to the disciplinary proceedings. It is clear that the intention of all the members of the local issuing authority was that the license should be permitted to expire at the termination of the then current licensing year and that no action should be taken with respect to renewal. This automatically would act as a termination of this license.

"It is also undenied that, even at the hearing in the disciplinary action on June 19, 1962, appellant was not granted the opportunity to present witnesses in support of his application to renew nor, indeed, were there any objectors to the renewal. It is equally significant that all of the other applications for renewal of existing licenses were acted upon at the June 19 meeting, but there was inaction on this application.

"There is abundant decisional authority to fortify the statutory injunction that an applicant is entitled to a hearing on its application for a renewal of a license. Florence Methodist Church et als. v. Florence and Christy, 38 N.J. Super. 85; Wilson v. Jersey City, 94 N.J.L. 119, 122 (E. & A. 1920); Miner v. Larney, 87 N.J.L. 40, 41 (Sup.Ct. 1915). As the court said in Handlon v. Town of Belleville, 4 N.J. 99, 105:

> 'The requirement of a "hearing" has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The "hearing" is "the hearing of evidence and argument." Morgan v. United States, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936); Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 59 S. Ct. 160, 83 L. Ed. 111 (1938); Pennsylvania R.R. Co. v. New Jersey Aviation Commission 2 N.J. 64 (1949).'

As Professor Davis defined it in Davis Administrative Law (1951), Sec. 67, p. 239:

> 'The Supreme Court once declared: "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." Londoner v. Denver, 210 U.S. 373.' Cf. Bi Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441; see also 1 Davis, "Administrative Law Treatise" (1958), Requirement of Hearing, p. 421.

"Revoking or refusing to renew the license without giving the licensee a chance to be heard on the issues of fact about the business is not fair treatment. See 1 Davis, 'Administrative Law Treatise', Requirement of a Trial Type Hearing, Chapter 7, p. 498; 70 Harvard Law Review 193, 262, 274 (1956).

"I, therefore, conclude that the appellant was denied a full and fair hearing before the respondent.

"However, the appellant has now had a full opportunity to be heard upon this appeal de novo, and the adjudication herein must be based upon the proofs as they have been adduced by this Division. Cino v. Driscoll, 130 N.J.L. 535; Florence Methodist Church et als. v. Florence and Christy, supra.

"It is apparent from the testimony of the councilmen testifying with respect to their decision that several, if not all of them, based their determination not to renew the license, at least in some part, upon the fact that their finding of guilt represented a third conviction and, therefore, under a long-standing rule, they justified such action. Several of the councilmen testified, in addition, that they were motivated equally by the fact that they were made aware by complaints of parents and other residents of the community that this tavern was a trouble spot and was catering to minors and was generally undesirable.

"The appellant counters these contentions by advocating that he had been operating this tavern for over twenty years and in that time had had only two convictions, one of which was for a sale to a minor. He further insists that, after the conference with the Chief of Police, the trouble dissipated and he thereafter operated his place in a manner satisfactory to the police authorities.

"I was impressed by the fact that Chief Furey and Sergeant Hoeger both felt that there was no substantial basis for refusing to renew this license. These men are in daily contact with this tavern as, indeed, with all the other taverns in the community, and police officials are generally circumspect about approving such applications where there have been violations of the law and convictions of the Alcoholic Beverage Law.

"The posture of this case is somewhat different today from what it was at the time of the June 19, 1962, hearing because I have determined that appellant was not in fact guilty of the violation charged against him at that time and have so recommended in my Hearer's Report in Case No. 1 (decided herewith).

"As was indicated hereinabove, the appellant is anxious to dispose of his licensed business and in fact has a bona fide purchaser. It would appear unduly inequitable and excessively harsh under those circumstances to deprive the appellant of his right to dispose of his business to another suitable licensee who would give more time and closer personal supervision to this operation. Since fairness is the touchstone in the administrative process, it would seem that, under these circumstances, a reasonable opportunity should be given to the appellant to liquidate his investment in the licensed premises. The public interest would be best served thereby.

"I, therefore, recommend that the action of the respondent be reversed, and that it be required to renew the appellant's license; but the renewal should be a modified one and subject to the express condition that the license of appellant is transferred to another and suitable person within sixty (60) days of the date of this order. Friedland v. Newark, Bulletin 1402, Item 1; cf. New Town Tavern, Inc. v. Pennsauken, Bulletin 1098, Item 2; Florence Methodist Church et als. v. Florence and Christy, supra."

Written exceptions to the Hearer's Report and written argument thereon were filed with me by respondent's attorney pursuant to Rule 14 of State Regulation No. 15. Oral argument was

also had before me on the exceptions filed by the respondent.

I have carefully considered the facts and circumstances herein, including the evidence and the Hearer's Report, and approve of the Hearer's recommendation that the respondent renew the appellant's license on condition that the said license be transferred to another within sixty days.

Accordingly, it is, on this 26th day of November 1962,

ORDERED that the action of the respondent be and the same is hereby reversed but that the reversal be a modified one requiring respondent to renew appellant's license for the 1962-63 licensing year subject to the condition that the license be transferred to another and qualified person within sixty (60) days of the date of this order.

William Howe Davis
Director