STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2404

June 22, 1981

TABLE OF CONTENTS

ITEM

1. DISCIPLINARY PROCEEDINGS (Wharton) - VIOLATIONS OF N.J.S.A. 33:1-26 and 33:1-43 - LICENSE SUSPENDED FOR BALANCE OF ITS TERM AND ANY RENEWALS WITH LEAVE TO MOVE FOR LIFTING UPON SUBMISSION OF PROOF THAT UNLAWFUL SITUATION WAS CORRECTED BUT NO SOONER THAN 10 DAYS FROM EFFECTIVE DATE OF SUSPENSION.

2. APPELLATE DECISIONS - BURATTI v. DOVER.

3. STATE LICENSES - NEW APPLICATIONS FILED.

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

June 22, 1981

BULLETIN 2404

1. DISCIPLINARY PROCEEDINGS - VIOLATIONS OF N.J.S.A. 33:1-26 and 33:1-43 - LICENSE SUSPENDED FOR BALANCE OF ITS TERM AND ANY RENEWALS WITH LEAVE TO MOVE FOR LIFTING UPON SUBMISSION OF PROOF THAT UNLAWFUL SITUATION WAS CORRECTED BUT NO SOONER THAN 10 DAYS FROM EFFECTIVE DATE OF SUSPENSION.

In the Matter of Disciplinary Proceedings against M S &W Distributors, Inc. Langdon and Meadow Streets Wharton, NJ 07885 Holder of Limited Wholesale License No. 3400-25-107-001 issued by the Director of the Division of Alcoholic Beverage Control.	S-11,906 CONCLUSIONS AND ORDER X-54,275-A

Morgan, Melhuish, Monaghan & Spielvogel, Esqs., by Elliott Abrutyn, Esq., Attorneys for Licensee.
Charles J. Mysak, Esq., Deputy Attorney General, Appearing for Division.

INITIAL DECISION BELOW

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: April 18, 1980 - Received: April 18, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by the licensee pursuant to N.J.A.C. 13:2-19.6.

In its Exceptions, the licensee argues that the finding of guilt to the first charge is not warranted on the substantive facts adduced, or, in the alternative, that such unlawful situation was de minimus; and the proposed penalty ($5,000.00 fine) is excessive.

As to the second charge and proposed finding of "guilty" and "voiding" of contractual provisions, the licensee submits that, in this "quasi-criminal proceeding", N.J.S.A. 33:1-26 is inapplicable because such statute does not make conditions against transferability of a license imposed by private parties unlawful.

My review of the records indicates the following activities of the various parties and entities mentioned in the Initial Decision and referable to interests in liquor licenses.

I - HISTORY OF ARLINGTON LIQCORP LICENSE

Arlington Shopping Plaza, Inc. owns and operates a shopping center in Parsippany, New Jersey. James Luke and Ralph Loveys are stockholders therein. Arlington acquired a retail liquor license on or about March 13, 1974. This license was transferred on or about May 13, 1975 to Liqcorp, Inc.

It is not clear who the stockholders of Liqcorp were at that time. However, it is abundantly evident that Arlington exercised dominion and control over this license. On October 17, 1974 it entered a leasehold agreement with Emersons Ltd. and provided therein that the Liqcorp stock was to be transferred to Emersons Ltd. and, in essence, revert back to Arlington or its assignee at the expiration of the lease term. At this posture, it is clear that, through these business arrangements, Liqcorp was merely a "front" for Arlington and the purported transfer of Liqcorp stock to Emersons constitutes a prohibited "lease out" of the license. This situation is not part of the subject proceedings but is relevant thereto, as will be hereinafter discussed.

When Emersons Ltd. experienced financial difficulties, the stock of Liqcorp was transferred to Arlington's nominees, James Luke and Joseph Wilf. This occurred on or about May 31, 1977. The Liqcorp license was renewed for the 1977-78 license term with, in effect, a special condition that the license certificate would be retained by the issuing authority until the licensed premises satisfy all Township requirements.

On or about July 5, 1977, the stock of Liqcorp held by James Luke and Joseph Wilf, was transferred to Kimba Limited, and B.C. Restaurant of Parsippany, Inc. The transferees are the latest and current tenants of Arlington and trade as Beefsteak Charlie's. The lease agreement between Arlington and Beefsteak Charlie's contains provisions similar in import as the Arlington-Emerson lease referenced heretofore.

II - HISTORY OF M S &W DISTRIBUTORS, INC.

On or about March 15, 1977, Robert Luke, James Luke and Ralph Loveys entered into an agreement to purchase the assets and Limited Wholesale liquor license of Sufferin Tri-County Distributors, Inc., which has its principal place of business in Wharton, New Jersey. A formal application to transfer said license was filed with the Division on or about May 27, 1977 by M S &W Distributors, Inc. M S &W is the corporation formed by the aforementioned individuals who own all of the corporate stock therein.

The transfer application of M S &W Distributors, Inc. was approved by the Division on July 1, 1977.

III - ANALYSIS AS TO CHARGE I

The coterminous holding of an interest in the retail license

of Liqcorp and the limited wholesale license of M S &W Distributors, Inc. by James Luke, directly, and Ralph Loveys, indirectly, (his ownership interest in Arlington which controlled the disposition of the Liqcorp license) for the five (5) day period of July 1, 1977 to July 5, 1977 violates the provisions of N.J.S.A. 33:1-43. Said statute makes it unlawful for a wholesale licensee"...to conduct, own either in whole or part, or be directly or indirectly interested in the retailing of any alcoholic beverages..."

There directly existed the prohibited dual ownership from July 1, 1977 to July 5, 1977. However, the infraction was de minimus since the retail license was not and could not be operational until the issuing authority issued the license certificate. This did not occur until the later part of July, 1977. The intent of the Tied House statute was not breached by this situation and I find no penalty warranted for this technical violation by M S &W Distributors, Inc.

I do find, however, that the stockholders of M S &W Distributors, Inc., through and by its ownership of the Arlington Shopping Plaza, Inc., effectively controlled one of the incidents of "retailing" alcoholic beverages by Liqcorp, Inc., i.e., the ability to dictate the ownership and location of the Liqcorp, Inc. license through lease provisions. Thus, a continuing violation of N.J.S.A. 33:1-43 exists under these facts. Further discussion of this concept and penalty therefore shall be set forth hereinafter.

IV - ANALYSIS AS TO CHARGE II

The proceedings in this matter are civil in nature and not criminal. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 NJ 373 (1956). The provisions of N.J.S.A. 33:1-26, which prohibit restrictions against transferability or alienation of a liquor license, except as otherwise provided by for in the Alcoholic Beverage Law, represent a policy of the State, and a breach thereof is specifically considered a basis for institution of disciplinary proceedings. N.J.S.A. 33:1-31(a). Licensee's Exceptions and attempt to impose a quasi-criminal interpretation is without basis in law and rejected.

The incidents of ownership of a liquor license involves, in basic principle, two aspects. One is the privilege to operate, without interference or control of third parties, a liquor licensed facility and receive the profits therefrom. The second aspect is the ability to site the license or dispose of same without third party restraints, subject only to the approval of the local issuing authority.

The current operator under the Liqcorp license, Beefsteak Charlie's, is the recipient of the profits from its license. The commercial shopping center lease rental provisions which include, in addition to a minimum fixed rental, a five (5%) percent gross profits provision is permissible herein. The provisions concerning the definition of gross rent and the percentage fixed therein

appears bona fide and does not constitute a prohibited interest in the profits of the licensed businss. Attorney General's Formal Opinion 1964-No. 3, Bulletin 1564, Item 2.

As to the second aspect, Liqcorp, Inc. does not possess unencumbered transferability or alienation rights to its license. The license is, in effect, "leased out" to it for the term of any leasehold or renewals. It can't be sold to another person. It can't be transferred to another location. The controller of those basic privileges of the license is Arlington. Arlington is controlled by James Luke and Ralph Lovey. This arrangement violates N.J.S.A. 33:1-43 and N.J.S.A. 33:1-26.

As the Administrative Law Judge noted, these lease provisions are unenforceable in a specific performance action. However, an administrative agency has no authority to declare a private contractual provision void. That finding in the Initial Decision is rejected. The Division's remedy is to suspend a license for the balance of its term and any renewals thereof which may be granted, with leave granted to lift the suspension when the licensee establishes, by Verified Petition, that the unlawful situation has been corrected, subject to a fixed minimum suspension to be served.

V - PENALTY

I am not unmindful that the basic purpose of such license reversion clause in a lease is often a business determination to insure that a commercial property always has a liquor license sited therein. While this does not validate such agreement, it is a relevant factor in considering an appropriate penalty.

In the instant matter, M S &W Distributors, Inc. has not hidden any of the facts herein and did specifically indicate same at the time of its application for transfer of the Limited Wholesale license to the Division investigator. While such disclosures were apparently the genesis for the subject charges, I do not understand why an affirmative recommendation to approve the limited wholesale license transfer application was issued prior to requiring a correction of the unlawful situation.

I am also aware of the continuous efforts of the licensee, during the course of this proceeding, to undertake any required corrective action.

As my penalty herein, I shall afford the licensee the opportunity to take appropriate corrective action. This should include the following:

(1) Total relinquishment of any interest, control or reversionary rights to the Liqcorp, Inc. license by the individuals who own the corporate stock of M S &W Distributors, Inc.

(2) Modification of the lease provisions between Arlington (which the limited wholesale license stockholders control) and Liqcorp, Inc. effecting an unencumbered outright sale of the Liqcorp, Inc. license. There can be no restrictions against the transfer or sale of the license or any other reversionary rights to Arlington or its stockholders; and

(3) M S &W Distributors, Inc. must agree, by affidavit to this Division, that it will not sell any alcoholic beverages to Liqcorp, Inc., any transferee or other retail liquor licensee located at the Arlington Plaza Shopping Center.

To insure that the unlawful situation is, in fact, corrected, and as a penalty for the findings of guilty to the charges herein, I shall suspend the license of M S &W Distributors, Inc. herein for the balance of its term, to wit, June 30, 1980 and for any renewals thereof that may be granted, with leave to the licensee to move for lifting of the suspension, by Verified Petition, upon proof that the unlawful situation is corrected, but, in no event, shall such suspension be lifted sooner than ten (10) days from the effective date of the suspension herein.

I shall commence the within suspension effective 10:00 p.m. June 28, 1980 to afford adequate time to complete the corrective action. If such corrective action is timely adopted, I shall permit the payment of a fine, in compromise, in lieu of license suspension in the amount of $1,000.00.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the legal memorandum submitted by the parties, the Initial Decision and the written Exceptions filed thereto by the licensee, I concur in the findings and recommendations of the Administrative Law Judge, except as heretofore rejected or supplemented, and adopt same as my conclusions herein. I find the licensee guilty as charged. Any other Exceptions not heretofore mentioned I find have been either adequately disposed of in the Initial Decision or are without merit.

By letter dated May 21, 1980 and received on May 23, 1980, the attorney for licenseee requests opportunity to orally "discuss" the legal issues. I find such request to be unwarranted, in fact, untimely, and is, accordingly denied.

Accordingly, it is, on this 29th day of May, 1980,

ORDERED that Limited Wholesale License No. 3400-25-107-001 issued to M S &W Distributors, Inc. by the Director, Division of Alcoholic Beverage Control for premises Langdon and Meadow Streets, Wharton be and the same is hereby suspended for the balance of its term, to wit, June 30, 1980, effective 10:00 p.m. Saturday, June 28, 1980 and for any renewal thereof that may be granted, with leave afforded the licensee to move for lifting the suspension upon submission of proof, by Verified Petition,

that the unlawful situation has been corrected; but in no event shall such suspension be lifted sooner than ten (10) days from the effective date of the suspension herein; and it is further

ORDERED that, in the event the unlawful situation is corrected and verified by the Director prior to June 28, 1980, I shall accept the payment of a fine of $1,000.00 in compromise, in lieu of license suspension for the minimum of ten (10) days suspension heretofore imposed.

JOSEPH H. LERNER
DIRECTOR

In the Matter of:

ALCOHOLIC BEVERAGE CONTROL BOARD

vs.

MS&W DISTRIBUTORS

INITIAL DECISION

OAL DKT. NO. A.B.C. 2820-79

Agency Dkt. No. S11,906, X-54, 275-A

Appearances:

Elliot Abrotyn, Esq.
attorney for MS&W Distributors

Charles J. Mysak, Esq.
Deputy Attorney General
for the Division of Alcoholic Beverage Control

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violation by Petitioners, MS&W Distributors, of N.J.S.A. 33:1-43, which provides, in part, that no licensed wholesaler of alcoholic beverages, its stockholders and officers shall directly or indirectly have interest in the retailing of alcoholic beverages and N.J.S.A. 33:1-26, which provides, in part, that under no circumstances shall a license, or rights thereunder be deemed property, subject to inheritance, sale, pledge, lien, levy, attachment, execution, seizure for debts, or any other transfer for disposition whatsoever, except to the extent expressly provided by Title 33.

Said violations allegedly occurred in or about June, 1977 and September, 1977. Petitioner was served with notice of alleged violations on October 18, 1978 and an answer and plea of not guilty was filed with the Director of the Division of Alcoholic Beverage Control. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A hearing was held on February 11, 1980. The issues of the hearing are whether or not during June of 1977 Petitioners directly or indirectly attempted to restrict the transfer of a license by the imposition of conditions and whether a licensed wholesaler of alcoholic beverages or its stockholders or officers were directly or indirectly interested in the retailing of alcoholic beverages. Final memorandum of law were filed with the Court on March 7, 1980.

The State presented one witness, Wilfred D. Blood, Senior Inspector with the Division of Alcoholic Beverage Control. Mr. Blood testified that on September 14, 1977 he had an occasion to investigate MS&W Distributors with regard to a person-to-person transfer of Tri-County Distributors to the MS&W Corporation. He personally visited the premises of MS&W and spoke with Robert Luke, President of MS&W Corporation. At the time of the investigation he was able to determine that MS&W also had an interest in Arlington Shopping Plaza, Inc., which in turn were the owners of plenary retail consumption license #3400-25107-001, more particularly known as License C-10. The Arlington Shopping Plaza, Inc. formed a corporation known as Liqcorp, Inc. and transferred said liquor license and all stocks to said corporation. At the completion of that transfer the license was then transferred over to Kimba, Ltd.,Inc., trading as Beefsteak Charlie's, who had premises at the Arlington Shopping Plaza. He then presented a copy of the lease agreement between Arlington Shopping Plaza and Kimba, Ltd. which was marked and admitted into evidence as R-2.

One of the provisions of the contract which he felt was in violation of Title 33 was the provision that gave Arlington Shopping Plaza, Inc. five percent of the gross receipts from Beefsteak Charlie's commencing during the 11th year through the 20th year of the term of the contract. He also stated that James B. Luke, secretary-treasurer and one of the major stockholders in the Arlington Shopping Plaza, Inc. also was a major stockholder in MS&W Distributors. Mr. Luke had both interests at the time that Liqcorp, Inc. was set up and negotiated the transferal of its liquor license to Kimba, Ltd. trading as Beefsteak Charlie's. Robert Luke's affidavit, marked R-3, was submitted into evidence. Said affidavit, according to Mr. Blood, substantiated his position that Mr. Luke had in interest in an wholesale license and a plenary retail consumption license at the same time. He also stated that R-1, the affidavit of James Luke, basically disclosed the interest of MS&W and Liqcorp, Inc. In addition there was a clause in the lease agreement between Arlington Shopping Plaza, Inc. and Kimba, Ltd. that in the event of a default, or any other reason, stock issued to Kimba, Ltd. by Arlington Shopping Plaza, Inc. for the Liqcorp, Inc. would revert back to Arlington Shopping Plaza, Inc. Additionally, the lease did not permit the transfer of the liquor license to any other location other than the leased premises nor did it permit transfer to any other firm or corporation. He felt said clause was also in violation of Title 33.

Under cross examination Mr. Blood admitted to investigating the person-to-person transfer of Suffern Tri-County Distributors to MS&W Distributors, the present holders, and upon the completion of his investigation he recommened to the Director of the Division of Alcoholic Beverage Control that the transfer be approved and the license was in fact issued on July 1, 1977. On June 24 he had an occasion to meet with Mr. Robert Luke who is President of MS&W Distributors, who advised him that Emerson's was the owner of a liquor license housed at the Arlington Shopping Plaza and they were currently going through bankruptcy proceedings. As a result of the bankruptcy proceeding the lease would be terminated, the liquor license transferred back to Arlington Shopping Plaza, who subsequently would transfer the liquor license to Beefsteak Charlie's. Mr. Luke then advised Mr. Blood that his brother James and Ralph A. Loveys were partners in the Arlington Shopping Plaza and when asked whether Mr. James Luke or Mr. Loveys would have an interest in a liquor license was advised by Mr. Robert Luke only as a landlord/owner of the building where the license would be located. After completion of Mr. Blood's investigation in June of 1977 he then recommended to Anthony T. Pepper, principal inspector, that the license be approved, who then transmitted same over to the licensing bureau for final action.

He stated that what he found objectionable in the lease was that in the event of a default by the tenant, Beefsteak Charlie's, the shares of stock of Liqcorp would revert back to the landlord. When closely examined he stated that to the best of his knowledge, pursuant to the terms of the lease, Kimba owned stock of Liqcorp and that at the time of the hearing they also stilled owned the stock of Liqcorp and the Arlington Shopping Plaza, Inc. did not own said license or stock. It was also admitted that notwithstanding his objections to the reversionary clause in the lease he still recommended that the license of a person-to-person transfer of wholesale liquor business be transferred.

He was then questioned with regard to his objections of the gross rental percentage clause where he again reiterated that he felt it exhibited some sort of control by the Arlington Shopping Plaza, Inc. over the operation of the Beefsteak Charlie's business. He admitted that the tenant of Beefsteak Charlie's was to pay a fixed minimum rent income from the inception of the contract and in addition would pay a percentage of gross income after the expiration of the ten year period. Again, his main concern was the indirect control by the owner of a limited wholesale license over a plenary retail consumption license whether or not the conditions to bring this control to bear occur or do not occur in the future.

Under redirect testimony he stated that his final conclusion in his report was "it would appear that Arlington Shopping Plaza, the principals of which are stockholders of the subject wholesale license and Liqcorp owners of retail license No. C-10 transferred the outstanding stock of Liqcorp to Kimba, Inc. trading as Beefsteak Charlie's and operating as Liqcorp trading as Beefsteak Charlie's to shield

an indirectly control and interest in the retail license." He then cited the liquor license termination agreement contained in the contractual arrangement between Arlington Shopping Plaza and Kimba. Same is as follows: "In the event of the liquor license for the leased premises is revoked as a result of the act of negligence of tenants or 'Liqcorp', their agents or employees (rather than as a result of general governmental policy) and of tenants and 'Liqcorp' shall be unable after such reasonable administration or judical effort as may be undertaken by tenants to have the liquor license reinstated. Then, in such event, upon the termination of this lease, the tenants covenant and agree to pay the landlord for compensation of the loss of liquor license the sum of $80,000 in cash." Then all documents previously examined and marked R-1 through R-6 were moved into evidence.

The State rested its case and Mr. James B. Luke was called to testify. He stated that he presently resides in Wayne and his occupation is that of a real estate developer and shareholder in Arlington Plaza, Inc. His partners in said company were Ralph Loveys, Harry and Joseph Wilf, each possessing 25% interest in same. He admitted to being shareholder in MS&W, as well as Ralph Loveys and that they obtained said wholesale liquor license on July 1, 1977. Prior to his obtaining interest in MS&W he, along with the other previously stated partners in the Arlington Shopping Plaza, Inc, had sold or assigned to Emerson's the stock of Liqcorp and that sometime in early 1977 Emerson's ran into financial difficulty resulting in the reversion of the Liqcorp stock to the Arlington Shopping Plaza and their holding same between May 31, 1977 and July 5, 1977. He denied having any personal knowledge however of owning shares of the Liqcorp stock between May 31 and July 5, 1977. Additionally he stated that MS&W has never sold any alcoholic beverages to Beefsteak Charlie's. Prior to his signing the affidavit which was submitted into evidence by the State, he made an inquiry through his attorney, Mr. Hochman, as to whether or not he had any interest in the Liqcorp corporation as a result of the Emerson default and was assured that he did not.

Under cross examination he admitted to being aware of the terms of the lease prohibiting Kimba from transferring or permitting the transfer of the Liqcorp license to any location other than the licensed premise or to any person, firm or corporation other than to the Arlington Shopping Plaza, Inc. He also admitted to having knowledge that the lease provided for receipt by Arlington Shopping Plaza, Inc. of a five percent of the proceeds from the 11th year to the 20th year. In addition he did not negotiate the terms of the lease by Mr. Wilf and the attorney did so.

Under redirect he stated that the liquor license was initially purchased as an inducement and benefit to the shopping plaza in that it would afford them the opportunity to attract either a restaurant or a liquor store and that they were not interested themselves in going into the retail alcoholic beverage business but only attracting same.

Mr. Robert Luke testified he is President of MS&W Distributors and James Luke, Ralph Loveys and himself are shareholders in same. MS&W Distributors received their license on July 1, 1977 and he received same on said date. He recalled being interviewed by Mr. Blood and disclosing to him in a conversation his relationship with Mr. Loveys and Mr. Luke in the Arlington Shopping Plaza, Inc. He advised Mr. Blood of the situation involving Emerson's, the liquor license and what they intended to do in terms of Kimba, Inc. trading as Beefsteak Charlie's.

Under cross examination he stated that MS&W Distributors never had any interest in Liqcorp Corporation nor have they ever owned any of the stock of same even though some of the officers and owners of MS&W had an interest in the Arlington Shopping Plaza, more particularly James Luke and Ralph Loveys had stock in Liqcorp. To his knowledge he did not believe that they ever owned same while principals in MS&W and was unfamiliar with the stock transactions of Liqcorp.

B. William Hochman testified that he is an attorney licensed to practice in the State of New Jersey and his area of expertise is real estate and commercial leasing. He is counsel to Arlington Shopping Plaza, Inc. and arranged the contractual arrangement between them and Kimba, Ltd. with regard to the transfer of Liqcorp's stocks. The first person intended to sell liquor on the premises was Emerson's, a restaurant chain, which began in 1974 and terminated in 1977. At the time of the termination the stock of Liqcorp Corp., holders of the liquor license, reverted back to Arlington Shopping Plaza, Inc. He further clarified that the stock of Liqcorp Corp. throughout the time of Emerson's lease were held by himself as escrow holder of same. He applied on behalf of Arlington Shopping Plaza, Inc. to reinvest them with the interest of the shares of Liqcorp, Corp. and eventually was able to obtain same.

On May 31, 1977 the stock of Liqcorp Corp. was transferred to Mr. Joseph Wilf and Mr. James Luke. In June of 1977 a contractual arrangement was arrived at between Arlington Shopping Plaza, Inc. and Kimba, Ltd., Inc. for the former lease property of Emerson's and pursuant to the lease arrangements Kimba acquired titles to the stock of Liqcorp on July 5, 1977. Under the terms of the lease in his opinion once the lease was executed Kimba obtained legal rights and ownership to the shares of Liqcorp but delivery was not effectuated until the July 5th date when they obtained the termiantion agreement from Emerson's with regard to the lease. He prepared the termination agreement and his client signed same on June 30, 1977 and forwarded same to Emerson's who also signed same on June 30, and returned it but due to the interceeding holiday, he did not receive same back until July 5th and at that time the stock was issued. If the termination agreement had been received prior to July 1 he would have issued the stock to Kimba at that time. He testified that during the period of July 1 through July 5, Kimba was doing work on the premises to renovate Beefsteak Charlie's and

there was no way possible that they could have sold any alcoholic beverages or any alcoholic beverages could have been sold from said premises. At present he is holding the shares of Liqcorp Corp. pursuant to the escrow arrangement in the lease.

Kimba pays a yearly lease rental payment of $55,000 and in addition in the 11th year receives five percent of the gross receipts that exceed the minimun annual rent. He was also familiar with the State of New Jersey practice which is used either by sellers of businesses which operate restaurants with a liquor license or retail liquor stores of similar nature. In those particular instances it was the practice to pledge the stock of a corporation holding a liquor license and that in order to secure the seller of payment for his purchase price the corporation would hold title to the liquor license and be the licensee and pledge all the capital stock of the corporation to the seller to ensure satisfaction of the payment obligations since to do otherwise there would be no real way the seller or owner could ensure getting paid, or without having an unscrupulous purchaser milk the business. It was his understanding that basically the lease provisions with respect to the shares of stock in Liqcorp Corp. is a recognized practice in the State of New Jersey.

Under cross examination he admitted that on July 1, 1977 through July 5, 1977 Mr. James Luke had an ownership interest in the stock of Liqcorp Corp.

In discussing the lease it was stated that the lease contemplated a pledger and it is a pledge agreement that controls a transfer or nontransfer of the stock or liquor license and not the lease agreement itself. The pledge agreement placed the stock in one depository, he being the repository which was in theory a transaction to prevent anyone from doing something with the license that would destroy liability and value to the detriment of the people who had paid for it and developed it. The pledge agreement stated that the license would not be separated from the property.

When discussing the five percent of the gross receipts described merely as a measure of payment of rent and not an interest in a business by reason of the five percent. The five percent figure only comes into operation when the sales for said establishment exceed the fixed rent and real estate taxes paid and is a measure of rent to which the landlord is entitled. He described the $80,000 payment in cash in the event that the license is so encumbered that it could not be reinstated as a measure of liquidated damages to the landlord. He, Mr. Hochman, stated that he did not negotiate the business aspects of the transactions, that was taken care of by Mr. Markowitz, who is employed by Mr. Wilf. All documents were then submitted into evidence, P-1 through P-4 and the parties rested their case pending submission or memoranda and briefs.

After having considered all the witnesses for both sides and considering the entire record including testimony, arguments of counsel, legal memoranda of law submitted, the Court makes the following findings of fact:

1. MS&W Distributors is the holder of a wholesale liquor distributors license.

2. MS&W obtained their wholesale distributors license from Suffern Tri-County Distributors, Inc. in a person-to-person transfer.

3. James Luke and Ralph Loveys, principal stockholders in MS&W, are also stockholders in Arlington Shopping Plaza, Inc.

4. Prior to the establishment of MS&W Distributors Inc., Arlington Shopping Plaza, Inc. was the owner of plenary retail consumption license no. 3400-25107-001 more commonly known as C-10.

5. Arlington Shopping Plaza, Inc. set up the Liqcorp Corp. as holders of the plenary retail consumption license and subsequently transferred same to Emerson's Ltd.

6. Emerson's Ltd. went bankrupt in 1977 and in May of 1977 the stock of Liqcorp Corp. reverted back to Arlington Shopping Plaza, Inc.

7. On July 1, 1977 a person-to-person transfer of stock from Suffern Tri-County Distributors, Inc. to MS&W Distributors, Inc. became effective and a wholesale liquor license was issued to MS&W Distributors, Inc.

8. On July 5, 1979 the stock of Liqcorp Corp. was transferred from the Arlington Shopping Plaza, Inc. to Kimba, Inc. trading as Beefsteak Charlie's.

9. From the period of July 1 through July 5, 1977 James Luke and Ralph Loveys, while officers and stockholders of MS&W, were also stockholders in Arlington Shopping Plaza, Inc.

10. On page three of a lease agreement contract between Arlington Shopping Plaza and Kimba, Inc. there is contained a five percent gross receipt sales clause which provides for said percentage to be paid to the landlord when same exceeds the minimum annual rent paid the 11th through 20th lease year.

11. Paragraphs 7.5(b) of the lease agreement provide that the tenant upon the actual expiration or termination of the lease is required to sign the stock Liqcorp and the liquor license to the landlord or its nominees or assigns.

12. Under 7.5(c) there is a provision in the event of revocation as a result of acts of negligence of the tenant or the Liqcorp. their agents or employees the lone landlord is to be compensated for the loss of liquor license in the amount of $80,000 in cash.

13. Under pledge agreement between Kimba, Inc., herein called pledger, and Arlington Shopping Plaza, Inc., hereafter called pledgee, Paragraph One the pledger grants the security interest to the pledgee and all the shares of stock of Liqcorp Corp.

In considering the facts and issues involved in this case the Court takes into consideration the express wording of N.J.S.A. 33:1-43 which prohibits wholesalers of alcoholic beverages, its stockholders or officers from directly or indirectly having interest in the retailing of alcoholic beverages. It is clear from the testimony of all parties, that during the period of July 1, through July 5, 1977 Arlington Shopping Plaza, Inc. did hold and have interest in the stock of Liqcorp Corp., holders of a plenary retail consumption license. In addition it is clear that Mr. James Luke and Ralph Loveys were stockholders in Arlington Shopping Plaza, Inc., and MS&W Distributors during this five day period of time and therefore as wholesalers did have interest in a retail consumption license even though said liquor license or the premises for which it was to be used were not capable of effectuating sales of liquor products. Though there was no intent by parties with regard to that particular transaction to violate the statute there still was a violation of same at that time.

With regard to the provisions contained in the lease agreement between Arlington Shopping Plaza, Inc. and Kimba, Ltd., Inc., more particularly Paragraph 7.5(b) and those that follow that deal with the reversion of the liquor license to Arlington Shopping Plaza, Inc. Lachow v. Alper, 130 N.J. Eq. 588 stated that where a holder of a building and business and holder of a liquor license sold the business and transferred the liquor license to a purchaser who leased the building agreeing that the liquor license would not be transferred from the premises during the duration of the lease or any renewal thereof and that any attempted transfer should constitute a breach entitling the landlord to dispossess tenant. The lease so far as related to the liquor license was void as contrary to the policy of the law regarding liquor licenses. It is clear in this particular

instance that said paragraphs heretofore stated are in direct conflict with Lachow vs. Alper, supra and in violation of N.J.S.A. 33:1-26. Therefore said paragraphs and said reversionary agreement should be voided.

With regard to the five percent gross sales rental agreement in Formal Opinion, 1964, No. 3, pg. 5, second and third paragraphs, the Court oulined that for receipt of four percent or six percent of the gross sales by the landlord from a liquor establishment in an arms length transaction was not considered to be unlawful. Therefore the Court finds with regard to the five percent provision that said agreement does not provide the landlord with an interest in the business of selling alcoholic beverages but merely is a manner in which to compute the fair market value of rent for some future date.

With regard to the issue of gross receipts being an interest the Court dismisses that particular portion of the complaint. With regard to the issues of the reversionary clause in the lease agreement and possession of a wholesale liquor license and retail liquor license at the same time, the Court does find that MS&W Distributors and Arlington Shopping Plaza, Inc. are in violation of the Alcoholic Beverage Control Laws. The Court hereby voids the reversionary clause portion of the lease agreement. With regard to the holding of a plenary retail consumption license and a wholesale retail consumption license the Court imposes a fine of $1,000 for each day in violation, or a suspension of business by MS&W Distributors for one day for each day in violation, whichever the licensee shall choose.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. APPELLATE DECISIONS - BURATTI v. DOVER.

#4291
Raymond J. Buratti,
t/a East End Tavern,

Appellant,

vs.

Board of Aldermen of the
Town of Dover,

Respondent.

ON APPEAL

CONCLUSIONS

AND

ORDER

Youngelson, Marx & Fanarjian, Esqs., by Manuel P. Fanarjian, Esq., Attorneys for Appellant.
Young, Dorsey & Fisher, Esqs., by John J. Dorsey, Esq., and James MacDonald, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Board of Aldermen of the Town of Dover (Board), which by Resolution dated October 24, 1978, found the appellant guilty on four (4) counts of violating N.J.A.C. 13:2-23.1, i.e., the sale of alcoholic beverages to minors, and suspended appellant's license for one hundred (100) days.

The alleged dates of sale as set forth in the charges are as follows:

December 10, 1976 - to one minor, aged seventeen
December 11, 1976 - to three minors, aged fourteen fifteen and sixteen
December 12, 1976 - to one minor, aged sixteen
December 3, 1976 - to two minors, aged fourteen and seventeen
December 4, 1976 - to two minors, aged fourteen and seventeen

Appellant alleges in its Petition of Appeal that the action of the Respondent-Board was erroneous, in that:

(1) Appellant was denied due process of law in that the Prosecutor at the disciplinary hearing was member of same firm as counsel for Mayor and Board of Aldermen;

(2) The findings were not supported by the evidence adduced;

(3) The deliberations regarding the imposition of penalty were unreasonable, arbitrary and capricious, as was the length of suspension under the circumstances, and, lastly;

(4) The request by the Board that appellant be denied the right (privilege) to pay a fine in lieu of suspension was arbitrary, capricious and without reasonable grounds.

The Board, in its Answer, denies the substantive allegations contained in appellant's Petition and affirmatively states that appellant was afforded a full hearing (over several days) and the opportunity to present a defense and that the findings are supported by the record.

Upon the filing of the within appeal, the Director of this Division, by Order dated November 2, 1978, stayed the suspension pending final determination of the matter.

A de novo hearing was scheduled in this Division pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses. However, by stipulation, the matter was submitted upon the transcripts of the hearings below, oral argument and summations.

- I -

The transcripts of August 16, 1978 and October 10, 1978 contain admissions by the various minors (except one killed in an accident) named in the charge, made under oath, that they were served alcoholic beverages and that little, or in most cases, no effort was made to ascertain ages or require the execution of the so-called "representation of age form."

- II -

Preliminarily, it should be noted that we are dealing with a purely disciplinary action directed at the license. Such action is civil in nature, not criminal. In re Schneider, 12 N.J. Super. 449, 454 (App. Div. 1951). Thus, the proof must be supported only by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Testimony, to be believed, must not only proceed from the mouth of a credible witness, but must be credible in itself. No testimony need be believed, but rather, so much or so little may be believed as the trier finds reliable. 7 Wigmore Evidence, Section 2100 (1940); Greenleaf Evidence, Section 201 (16th Ed. 1899).

Apparently the Board, who listened to the testimony and had the opportunity to observe the demeanor of the various witnesses as they testified, chose to believe witnesses who testified in support of the charges and/or gave less credence to the appellant's witnesses. The youths did not testify at the Division hearing; therefore, I may not make an independent finding relative to their credibility based upon observations of their manner and demeanor.

The burden of establishing that the Board acted erroneously and in an abuse of its discretion is upon appellant. The ultimate test in these matters is one of reasonableness on the part of the Board, or, to put it another way, could the members of the Board, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was clear abuse of discretion or unwarranted findings of fact or mistake of law by the Board. Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of Newark, 55 N.J. 292, 303 (1970); Hudson-Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957).

My examination of the facts in the entire record, and the applicable law generates no doubt that the truth of the charge was established by a fair preponderance of the credible evidence. I further conclude that appellant has failed to sustain the burden of establishing that the Board's action was erroneous and against the weight of the evidence, as required by N.J.A.C. 13:2-17.6.

Additionally, it should be observed that the suspension imposed in local disciplinary proceedings rests, in the first instance, within the sound discretion of the local issuing authority. The power of the Director to reduce the suspension is limited to those situations where it is manifestly unreasonable. Sventy and Wilson, Inc. v. Point Pleasant Beach, Bulletin 1930, Item 1. See also, Pom Bon, Inc. v. Cliffside Park, Bulletin 1897, Item 1, and cases cited therein, wherein a penalty of revocation of license was not disturbed; Delroz, Inc. v. West Orange, Bulletin 1755, Item 1; affirmed (App. Div. 1968), opinion not approved for publication.

Were this a disciplinary proceeding initiated by State ABC Agents and, after hearing the admissions by the minors served, as to their age, the following suspension would have been meted out:

> (A) The separate offenses committed during the evening of December 3rd into the early morning of December 4th, would have merged, for penalty purposes, and a fifty (50) days suspension imposed for service to a fourteen year old, plus five (5) days additional for the other juveniles, for a total of fifty-five (55) days suspension for serving the two minors on that evening; and
>
> (B) Similarly, for the evening of December 11th into December 12th, a fifty (50) days suspension for service to a fourteen year old, plus five (5) days additional for each of the other two juveniles, for a total of sixty (60) days suspension for serving the three minors on that evening.

For the purpose of the penalty aspect of the appeal, I have disregarded the charge relative to the minor who was killed

prior to the hearing, and limited it to those who admitted, under oath, to having been served by licensee's employees.

Had this been an original hearing in this Division, a minimum penalty, under our precedent, would have been one hundred fifteen (115) days. I find, therefore, that the penalty imposed is not inconsistent with similar cases, indeed it is less harsh.

Lastly, the Director of this Division has customarily refused to consider a fine in lieu of suspension where a child, fourteen year old minor, was served alcoholic beverages. Therefore, any expression of feeling by the Board pro or con relative to a fine, would in this instance, be disregarded barring extraordinary circumstances, which I do not find.

I, therefore, recommend that an Order be entered affirming the action of the Board, dismissing the appeal, and reinstating the suspension imposed by the Board.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the appellant pursuant to N.J.A.C. 13:2-17.14.

In his Exceptions, the appellant argues that the facts adduced do not establish the charges by a preponderance of the credible evidence. He submits that the absence of any proceedings against the minors, the failure to produce other witnesses with relevant knowledge of the facts, and the absence of proceedings against an individual who allegedly purchased and permitted minors to consume alcoholic beverages in his motor vehicle, minimize the effect of the direct proofs submitted in support of the charges.

The initial proceedings instituted by the Board was a disciplinary action commenced against the licensee. N.J.S.A. 33:1-31. The only issue for resolution was the appellant's culpability. The absence of adjunct proceedings in Juvenile and Domestic Relations Court or Municipal Court is not a prerequisite to such proceeding. I have reviewed the testimony submitted pursuant to N.J.A.C. 13:2-17.8 in this appeal and find no basis to reverse the factual findings and credibility evaluations reached by the Board. Thus, I reject these Exceptions as without basis in law or fact.

The appellant also asserts that the determination as to the extent of the penalty was arrived at improperly; the penalty was excessive; the refusal of the Board to recommend the payment of a fine was arbitrary and unreasonable; and the hearing below denied appellant due process. These arguments have been either correctly resolved by the Hearing Officer, or are without merit.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the written memoranda of the parties, the Hearer's Report and the written Exceptions filed thereto by the appellant, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein. I shall affirm the action of the Board of Aldermen and reimpose the one hundred (100) days license suspension.

Accordingly, it is, on this 10th day of June, 1980,

ORDERED that the action of the Board of Aldermen of the Town of Dover be and the same is hereby affirmed, and the appeal be and is hereby dismissed; and it is further

ORDERED that my Order of November 2, 1978, staying the within suspension pending determination of the appeal, be and is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 1409-33-005-001 issued by the Board of Aldermen of the Town of Dover to Raymond J. Buratti, t/a East End Tavern for premises 97 East Blackwell Street, Dover, be and the same is hereby suspended for the balance of its term, to wit, midnight, June 30, 1980 commencing 2:00 a.m. on Friday, June 20, 1980; and it is further

ORDERED that any renewal of said license that may be granted be and is hereby suspended until 2:00 a.m. Monday, September 29, 1980.

JOSEPH H. LERNER
DIRECTOR

3. STATE LICENSES - NEW APPLICATIONS FILED.

Edwin J. Wagner
t/a Wagner Beverages & Brielle
Brookdale Soda Depot
628 Higgins Avenue
Brielle, New Jersey
Application filed June 17, 1981
for person-to-person transfer
of a state beverage distributor's
license from Joseph P. Kelly.

The Beer Mart, Inc.
155 West Delaware Avenue
Pennington, New Jersey
Application filed June 19, 1981
for person-to-person and place-
to-place transfer of a state
beverage distributor's license
from Scarborough Distributors Inc.,
114 Girard Avenue, Trenton, New Jersey.

Joseph H. Lerner
Director