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

BULLETIN 1442 April 17, 1962

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ITEM

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

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1. APPELLATE DECISIONS - POMBO ET ALS. v. TOTOWA AND CHICKEN BARN, INC.

FRANK POMBO, NORMAN GRIZZANTI, LOUIS AND RAYMOND MIESCH, AND ANTHONY MURPHY, Appellants,	)	
v.	)	ON APPEAL CONCLUSIONS AND ORDER
MAYOR AND COUNCIL OF THE BOROUGH OF TOTOWA, AND CHICKEN BARN, INC., t/a TWO GUYS CHICKEN BARN, Respondents.	)	

Hofstra and Hofstra, Esqs., by Howard Stern, Esq. and Reginald F. Hopkins, Esq., Attorneys for Appellants Pombo, Grizzanti and Murphy.
Dominic Barra, Esq., Attorney for Appellants Louis and Raymond Miesch.
Francis R. Giardiello, Esq., Attorney for Respondent Mayor and Council.
Simon, Jaffe & Denstman, Esqs., by Sidney S. Jaffe, Esq., Attorneys for Respondent Chicken Barn, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent Mayor and Council of the Borough of Totowa (hereinafter referred to as Council) whereby on December 27, 1960, it granted the application of the respondent Chicken Barn, Inc., t/a Two Guys Chicken Barn, for a plenary retail distribution license for premises located at U. S. Route 46 and Riverview Drive, in the Borough of Totowa.

"The petition of appeal alleges that the action of the respondent Council was erroneous, for reasons which may be summarized as follows:

A. The application of the respondent Chicken Barn, Inc. was improperly accepted by the respondent Council, in violation of N. J. R.S. 33:1-24, in that at the time of its acceptance, the respondent Council was not lawfully authorized to issue the said license, and the said license was granted on condition that the plenary retail consumption license of the respondent Chicken Barn, Inc. be surrendered.

B. That the said license was issued to the respondent Chicken Barn, Inc. as a preferred applicant under circumstances which barred consideration of other applicants, and thus was granted in an unfair and improper manner.

C. Said Chicken Barn, Inc. failed to disclose in its application and at the time of the hearing below information regarding all beneficial interests in the parent corporation of the said Chicken Barn, Inc.

At the hearing before this Division, the petition of appeal was amended to include these two additional grounds:

D. Appellants allege abuse of discretion on the part of the respondent Council and undue influence used by appellant. It was asserted that no public hearing was granted on the said application.

E. Appellants allege that an attorney representing the appellant was an office associate of the municipal attorney at that time and was therefore proscribed from appearing at the hearing below.

"Respondent Council, in its answer, admits:

A. That the plenary retail distribution license of Chicken Barn, Inc. was granted on condition that its plenary retail consumption license be surrendered, but denies that the said granting was invalid or unlawful.

B. The respondent Council sets forth as a separate defense that it has complied with all the requirements of the statute and exercised its sound discretion in issuance of the license.

"Respondent Chicken Barn, Inc., in its answer, admits the allegations of the appellants with respect to the procedural steps as set forth in the petition of appeal, which were conditions precedent to the granting of the said application by the respondent Council, and sets forth the following two defenses:

A. That the respondent has complied with all the requirements of the State of New Jersey and Borough of Totowa having reference to the license in question and the application therefor.

B. The said license was lawfully granted and issued, and the action of the Mayor and Council of the Borough of Totowa was lawful in all respects.

"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. The transcript of the proceedings before the respondent Council was admitted into evidence under Rule 8 of the said Regulation. For the purpose of disposition of this appeal, it will be appropriate to discuss the facts as they apply to the substantive arguments raised by the appellants.

"As to Point A of appellants' argument: The following facts appear to be undisputed. Respondent Chicken Barn, Inc. operates a large retail discount facility in the Borough of Totowa, and was on November 22, 1960 the holder of a plenary retail consumption license issued by the said Borough for its present premises.

"On November 22, 1960, it filed with the respondent Council a letter, in which it offered to surrender its consumption license if a distribution license were granted to it. It appears that, at that time there were in existence ten plenary retail consumption licenses in the Borough, five over the statutory quota, all of which were allowed to continue as transfers and/or renewal of pre-existent licenses. R.S. 33:1-12.16. As of that date, the appropriate ordinance of the

Borough of Totowa limited the number of plenary retail distribution licenses to one, and one place was already licensed for such purpose.

"On December 6, 1960, the said respondent, Chicken Barn, Inc. filed an application, consistent with its intentions as set forth in its letter of November 22, 1960, with the clerk of the said respondent Council, and the clerk was duly directed by the said respondent to hold the application 'in abeyance'. On that day an amendatory ordinance raising the distribution quota from one to two was introduced, and passed on first reading, and after being duly advertised, the ordinance was adopted on final reading by a vote of four to two on December 20, 1960 and became effective on December 22, 1960. The contents of the said ordinance was as follows:

> '1. That section 3B, sub-paragraph (b) of the ordinance to which this is an amendment shall be amended to read as follows:
>
> Section 3B, (b). The number of places licensed for plenary retail distribution shall be limited to two.
>
> '2. All ordinances or amendments to ordinances inconsistent herewith are hereby repealed.
>
> '3. This ordinance shall take effect after final passage and publication as provided by law.'

"Prior to December 20, 1960, the respondent Chicken Barn, Inc., in purported compliance with Rule 5 of State Regulation No. 2, completed publication of the appropriate notice. Although apparently first scheduled for December 19th, the Mayor and Council held public hearings on December 22 and December 27, 1960 on written objections filed against the said application by the appellants. At a continued hearing which took place at a Council meeting on December 29, 1960, the resolution in issue was then adopted by a three-to-two vote, granting the distribution license to Chicken Barn, Inc. upon the express condition that it surrender its plenary retail consumption license.

"On December 22, 1960, and immediately subsequent to the publication of the foregoing ordinance, each of the appellants filed an application for a new plenary retail distribution license and undertook publication in compliance with Rule 5 of State Regulation No. 2.

"Appellants contend that the application of the respondent Chicken Barn, Inc. was improperly filed and invalid because it was filed at a time when the ordinance quota of one was still in existence, citing R.S. 33:1-24, which states that it shall be the duty of each local issuing authority 'to receive applications for such licenses as such issuing authority is authorized to issue'; and, thus, the issuing authority had no jurisdiction to accept the application.

"It has been abundantly established that the acceptance of an application is a ministerial and mandatory function. R.S. 33:1-24 enjoins the local issuing authority to accept applications for such type of licenses as the statute has thus authorized them to issue. Accepting the application is obviously not tantamount to the granting of a license. It is not the status of the law prevailing at the time of the filing of applications for a license or permit that controls, but the status of the law prevailing at the time the agency's decision is rendered. Sayreville Italian-American Club, Inc. v. Sayreville, Bulletin 1411, Item 1; Ming's Chinese Restaurant Inc. v. Teaneck, Bulletin 1279, Item 2; Socony-Vacuum Oil Co. Inc. v. Mount Holly Township, 135 N.J.L. 112 (Sup. Ct. 1947); Franklin Stores Co. v. Elizabeth, Bulletin 61, Item 1; Bock Tavern, Inc. v. Newark, Bulletin 952, Item 1;

Cohen v. Wrightstown, Bulletin 1064, Item 1; Tice v. Woodcliff Lake, 12 N.J. Super. 20, at page 25 (App. Div. 1951); Marchi et als. v. Clifton et al., Bulletin 1385, Item 1. The appellants cite the case of Scheerer et al. v. Dailey, 1312 Kentucky 226, 226 S.W. Second 955 (Ct. of Appeals of Kentucky 1955) in support of its contention that consideration of the application can be had properly only as of the date of the filing of such application. This is clearly not the law in New Jersey. The law that existed at the time of the actual granting of the application for a license controls and, thus, the respondent Council did not lack jurisdiction in the matter. Dorio v. East Amwell et al, Bulletin 965, Item 3; Cf. Goldberg and Taylor v. Lincoln Park et al, Bulletin 733, Item 1.

"At the time of the granting of the application by the respondent Council, the other applications of the appellants were on file and the respondent was well aware of such filing.

"Lengthy hearings were held before the respondent Council on several days. Great latitude was given to the appellants to present their objections and examine their witnesses and cross-examine witnesses of the respondent. This was similarly true at the trial de novo before this Division. The granting of this application after the objectors had been heard was indicative of, and in substantial satisfaction of, the purposes of the rule (Rule 10 of State Regulation No. 2). It appears from the substance of the adopting resolution that the respondent Council considered the elimination of a consumption license as desirable and in the best interest of the community, and concluded that the exchange of such license for a plenary retail distribution license would serve such interest. Thus, exercising its sound discretion and best judgment, it adopted, by an affirmative vote of three to two, the relevant resolution which, in its operative part, provides as follows:

> 'WHEREAS, Chicken Barn Inc. a corporation of the State of New Jersey, trading as 2 Guys Chicken Barn, made application to the Borough of Totowa for a plenary retail distribution license, and
>
> WHEREAS, Chicken Barn Inc., trading as 2 Guys Chicken Barn Inc. is presently the holder of a plenary retail consumption license for premises located at Route 46 and Riverview Drive in the Borough of Totowa, County of Passaic and State of New Jersey, and
>
> WHEREAS, the applicant is desirous of obtaining a plenary retail distribution license, and
>
> WHEREAS, the applicant has expressed its desire and intention to surrender the present existing plenary retail consumption license held by it for the aforementioned premises, and
>
> WHEREAS, objection to the application was made in writing and a hearing was had thereof, in accordance with the rules and regulations as prescribed by the Alcoholic Beverage Control Commission, and
>
> WHEREAS, the Board of Council of the Borough of Totowa is desirous to attempt to conform with and to give effect to the intention of N.J.S. 33:1-12.14, and
>
> WHEREAS, in the exercise of the sound discretion vested in the Mayor and Council with reference to the granting or denying of applications for licenses for the consumption or distribution of licenses for alcoholic

beverages, this Board of Council deems it expedient to issue a plenary retail distribution license to the applicant, provided, however, that the applicant surrenders the present existing plenary retail consumption license held by it, and

WHEREAS, this Board of Council in the exercise of its sound discretion has considered the public need and convenience and the general welfare of the community, now therefore,

BE IT RESOLVED BY THE BOARD OF COUNCIL OF THE BOROUGH OF TOTOWA, that the application of Chicken Barn Inc. for a retail distribution license be granted.

BE IT FURTHER RESOLVED, that the Borough Clerk be authorized and he is hereby directed to issue a plenary retail distribution license to the Chicken Barn Inc., trading as 2 Guys Chicken Barn, for premises presently covered by the present existing consumption license, SUBJECT to the special condition that the plenary retail distribution license shall not be issued unless and until the applicant's plenary retail consumption license shall first have been surrendered to the Borough of Totowa.'

"As to Point B: Appellants allege and respondent admits that the respondent Chicken Barn, Inc. is totally owned by Vornado Inc.; that it failed to disclose the same information pertaining to the parent corporation as the statute requires of the applicant corporation itself. In support of this contention, they cite R.S. 33:1-22. New Jersey R.S. 33:1-25 provides that holders of more than ten per cent of stock of a corporate applicant, directly or indirectly, must qualify in all respects as an individual applicant. It further provides that in such applications, the names and addresses of and the amount of stock held by all stockholders holding one per cent or more of any of the stock thereof, and the names and addresses of all officers and of all members of the Board of Directors, must be stated in the application, and if one or more of such officers or members of the Board of Directors fail to qualify as an individual applicant in all respects, no license of any class shall be granted.

"The appellants called as their witness Leo Zwiebach, the assistant vice-president of Vornado Inc., who stated that Vornado owns one hundred per cent of the stock of Chicken Barn, Inc., and that the said Chicken Barn, Inc. is its wholly owned subsidiary. He further stated that this is the only liquor outlet which is owned by Vornado Inc. and is one of the departments in the Totowa facility of this very large discount store chain. In its answer to Question No. 22 of the application requiring the setting forth of names and addresses of all stockholders holding one per cent or more of the issued and outstanding stock of applicant corporation, respondent Chicken Barn, Inc. set forth 'Vornado Inc.; 16 shares; 100 per cent of stock issued and outstanding'.

"Respondent Chicken Barn, Inc. argued that it made proper disclosure concerning its corporate set-up and there was no holding back of any required information. It contends that Vornado Inc. has a large business and its shares are sold on the American Stock Exchange, there being some 3,000 shareholders in the corporation. Vornado Inc. is a complex of many subsidiary corporations, as reflected in the testimony before the respondent Council on December 27th. In support of its position, respondent cites The Great Atlantic & Pacific Tea Company v. Clifton, Bulletin 1319, Item 1, where the same argument

was raised with respect to the Great Atlantic & Pacific Tea Company, a Maryland Corporation, which owned one hundred per cent of the common stock, and ninety-nine per cent of the preferred stock in a corporate applicant for a plenary retail distribution license. The Director overruled the same argument in that case and held:

> 'There is no provision in the Alcoholic Beverage Law or the Rules and Regulations of this Division which requires that, if the shares of an applicant corporation are owned by another corporation, the names of the officers, directors or stockholders of the latter corporation must be disclosed in the application for a license. If a case should arise wherein there was evidence or reason to believe that the corporate structures were set up for the purpose of perpetrating a fraud, it would be the duty of an issuing authority to investigate the facts. Re McNair, Bulletin 368, Item 14. However, in this case there is no evidence of fraud.'

"Based upon the ruling in that case, I sustained objections to counsel's question regarding the identity of such stockholders and members of the Board. However, after this hearing was concluded, upon reconsideration, I decided to set another hearing date for the purpose of permitting appellants to obtain information regarding the officers and stockholders of Vornado Inc. and advised appellants that I would direct the respondent to make full and complete disclosure at this hearing. They would then have additional time, if necessary, to subpoena these persons for additional testimony if they so desired. There was an allegation by appellants that there was a possibility of fraud which could only be ascertained by a full disclosure. Appellants further contended that, notwithstanding the decision in the aforementioned case, it was clearly the intention of the rules and regulations that there be a full disclosure so that a possible objector may be advised whether the parent corporation contains stockholders who are unfit to hold the license.

"The new hearing date was set for August 29, 1961. In a letter dated August 18, 1961, counsel for the appellant Frank Pombo stated that he 'will decline to participate in the hearing scheduled' for the following reasons: (1) the information (relating to the beneficial ownership of the stock of the applicant corporation) should have been included in the original application ... and (2) 'we should be entitled' that disclosure be made, before the hearing, of the names and residence addresses of the officers and directors of Vornado Inc., and of persons vested with more than ten per cent of the stock therein.

"On August 22, 1961, counsel for the respondent Chicken Barn, Inc. sent me a letter, copies of which were sent to all other parties in this matter, wherein he states that without conceding the correctness of the appellants' exposition of the applicable law, he advised me that he is submitting therewith a list of the officers and directors of Vornado Inc. and a list of the addresses of such directors and officers. He also set forth the names and addresses of the stockholders of record holding ten per cent or more of the issued and outstanding stock of Vornado Inc.

"Appellants absented themselves from the hearing on August 29, 1961. Respondents appeared and the correspondence as set forth hereinabove was admitted into evidence and made part of the record.

"It is fundamental that an appeal to this Division is a trial de novo and facts existing at the time of the determination of the appeal are controlling. Watson and Hardeman v. Camden et al, Bulletin 1010, Item 1; Socony-Vacuum Oil Co. v. Mount Holly Township, supra. Since

there has been an allegation of a possible fraud, I decided that appellants should be given this opportunity to obtain full disclosure and examination of such witnesses as appellants desired. The appellants, at the trial de novo, had full latitude to present all the evidence that they would require and, if further witnesses were to be subpoenaed, it was within my contemplation that an additional hearing would be granted. This continued hearing was in consonance with the general principle as set forth in Central Home Trust Co. v. Gough, 5 N. J. Super. 295 (App. Div. 1949) at page 301, where the court said, 'Administrative agencies have inherent power, comparable to those possessed by the courts...to rehear and reconsider'.

"The failure of the appellants to go forward at this hearing with the information thus obtained leads me inescapably to the conclusion that no competent evidence of fraud existed, nor was any such evidence adduced as of the date of the conclusion of this hearing. Thus, there is nothing in the record to indicate that respondent is ineligible to hold a license.

"With respect to Point C: Appellants set forth that there was undue influence used upon the respondent Council and the Council abused its discretion by its action in granting the license in question. The only evidence introduced in support of its charge of undue influence was testimony that Salvatore Del Vecchio, one of the councilmen, received a telephone call from an individual whose voice he did not recognize, but who identified himself as a Mr. Fazio, a friend of an officer of the respondent Chicken Barn, Inc. The fact is that this councilman, after revealing the same to the Council at the meeting, abstained from voting on said ordinance.

"I have already discussed hereinabove the allegation made by appellants that the respondent Council abused its discretion and that its action was not a bona fide and reasonable exercise of its sound discretion. Councilman Rocco Musillo, testifying at the hearing before this Division, expressed his feeling, and what he persuaded was the feeling of that body in its deliberation on this application, in the following language:

> 'Well, we caused the application of the Two Guys that evening--we were trying to get the feeling of the rest of the Council how they felt about this application, how they felt about issuing another license and we took into consideration that the Two Guys of Harrison already had a C license and we felt that in the best interest of the Borough we would rather give a license to this sort of an outfit, to a corporation, as Two Guys, who are paying a large tax to our Borough and eliminate the other license they already had. We were giving them a license with a lesser use than the license they already had. Another thing we took into consideration was the license they had would be retired and this was a less desirable license because with this license they were serving drinks at the bar in a highly congested area which is a shopping center and this would more or less tend to bring undesirables within that area. So by thinking along the lines of issuing a license to a corporation such as Two Guys, I, myself, felt that we would be doing justice to the Town, and this is my feeling that night.'

"I have examined the exhibits in evidence, including photographs of the liquor department showing its general location in this tremendous discount department store. It is hard to conceive of any place less desirable for the operation of a plenary retail consumption license than in this location. It is well established that the number of

licenses to be issued in a municipality rests in the sound discretion of the local issuing authority (subject of course to the provisions of the State Limitation Law), and that, in the absence of a showing that the number is arbitrary or unreasonable, or adopted in bad faith, the action of the authority will not be disturbed.

"It is equally fundamental that the Director's function on appeals of this type is not to substitute his personal opinion for that of the issuing authority's, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal views. Broadley v. Clinton et al, Bulletin 1245, Item 1; Weiss v. Newark, Bulletin 1079, Item 7.

"Point D has been fully discussed hereinabove in Point A.

"As to Point E: I have considered the contention raised in Point E and find that there is insufficient competent evidence in support thereof.

"I have considered all of the contentions presented by the appellants at the instant hearing, as well as the arguments of counsel for the appellants and the respondents. I have examined and considered the exhibits and documents, as well as the arguments set forth in the memoranda filed herein, and find the evidence insufficient to warrant a reversal of the action taken by the respondent issuing authority.

"Under the circumstances of this case, I am satisfied that the respondent Chicken Barn, Inc. has fulfilled the statutory requirements, and that there is no preponderant evidence presented herein to satisfy me that the respondent Council, in arriving at the determination here, was unduly influenced, biased, arbitrary, or acted in abuse of its discretion. I conclude that the appellants have not sustained the burden of proof imposed upon them in establishing that the respondent Council acted in an erroneous manner. Rule 6 of State Regulation No. 15.

"I recommend that the action of the respondent Mayor and Council of the Borough of Totowa, in approving the application for the issuance of the license in question to the respondent Chicken Barn, Inc., t/a Two Guys Chicken Barn, for premises U. S. Route 46 and Riverview Drive, Totowa, be affirmed, and that an order be entered affirming such action and dismissing the appeal."

Well reasoned and highly articulate briefs were submitted by the attorneys for the appellants, and by the attorneys for Chicken Barn, Inc., advocating on behalf of respondents. Pursuant to Rule 14 of State Regulation No. 15, the attorneys for appellants filed exceptions to the Hearer's Report and written argument thereto, which were supported by resubmission and reference to his earlier brief. Attorneys for respondent referred to briefs theretofore filed and requested that they be considered by way of answer to the said exceptions.

After carefully considering the entire record herein, including the transcript of the testimony, exhibits, briefs, the Hearer's Report, and the written exceptions and argument with respect thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is on this 20th day of February, 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - AIDING AND ABETTING UNAUTHORIZED TRANSPORTATION - TRANSPORTATION WITHOUT INVOICE - FAILURE TO FILE NOTICES OF DEFAULT - LICENSE SUSPENDED FOR 10 DAYS.

In the Matter of Disciplinary Proceedings against	)	
DORCHESTER, INC. 60 Railroad Street Hasbrouck Heights, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Wholesale License W-69, issued by the Director of the Division of Alcoholic Beverage Control.	)	

Shanley & Fisher, Esqs., by Harold H. Fisher, Esq., Attorneys for Defendant-licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Defendant pleaded not guilty to the following charges:

'1. On divers dates between January 30, 1959 and November 4, 1960, you aided and abetted Philip P. Silverstein in the sale and transportation of alcoholic beverages not pursuant to an within the terms of a license, or as otherwise expressly authorized under the State Alcoholic Beverage Law, contrary to R.S. 33:1-2 and R.S. 33:1-50(a); in violation of R.S. 33:1-52.

'2. On divers dates between April 29, 1959 and July 29, 1960, you, a wholesale licensee, directly or indirectly transported alcoholic beverages to retail licensees without an accompanying bona fide, authentic and accurate delivery slip, invoice, manifest, waybill or similar document stating the names and addresses of the retail licensees; in violation of Rule 6 of State Regulation No. 39.

'3. Within 3 days after a retail licensee, R.C.S. Enterprises, Inc., t/a The Tally-Ho, 111 Madison Avenue, Lakewood, New Jersey, became in default to you under Rules 1 and 2 of State Regulation No. 39 on February 13, 27, April 3, 9, May 6 and July 30, 1960, you failed to file with the Director of the Division of Alcoholic Beverage Control notices of default; in violation of Rule 5(b) of State Regulation No. 39.'

"On motion of the attorney appearing for the Division and without objection thereto, Charge 1 is amended to read as follows:

'1. On divers dates between January 30, 1959, and November 4, 1960, you sold alcoholic beverages to Philip P. Silverstein and aided and abetted Philip Silverstein in the sale and transportation of alcoholic beverages, not pursuant to and within the terms of a license or as otherwise expressly authorized under the State Alcoholic Beverage Law,

contrary to R.S. 33:1-2 and R.S. 33:1-50(a);
in violation of R.S. 33:1-52 and R.S. 33:1-50(a).'

"Furthermore, Charge 3 was amended whereby the date of February 27, 1960 was deleted therefrom.

"ABC Agent H testified that shortly after 6:00 p.m. on November 5, 1960, he and Agent T were stationed across the street from Craig-Wood Ford Agency, which is located on the southwest corner of Sewell Avenue and Main Street, Asbury Park, when an automobile driven by Philip Silverstein (hereinafter Silverstein), employed as a solicitor by the defendant, drove up to the agency where Silverstein took bottles which appeared to contain alcoholic beverages from the trunk of the car and sold a fifth of Seagram's Seven Crown Whiskey to a salesman employed by said agency; that he (Agent H) saw Agent D come out of the agency, approach Silverstein and, as a result of some conversation, Silverstein took two bottles of alcoholic beverages from the trunk of his car and handed them to Agent D, who gave him a sum of money and then walked away; that he (Agent H) and Agent T approached Silverstein and subsequently brought him to Police Headquarters where he gave a signed and sworn statement in which he admitted that in the past few months he had made several such sales; that the agents searched the trunk compartment of Silverstein's car and found eighteen bottles of alcoholic beverages, consisting of eight bottle of gin and ten bottles of assorted alcoholic beverages; that Silverstein stated some of the bottles of alcoholic beverages had been purchased from his employer as sample bottles and that the other bottles found in the trunk were part of an order which he directed his employer bill to a licensee named Gordon W. Munoz, t/a Colt's Neck General Store, which merchandise had never been delivered to said licensee.

"Agent H further testified that on November 7 and 16, 1960, respectively, he visited defendant's place of business and obtained divers copies of invoices of various licensees to whom alcoholic beverages were listed as having been delivered between the dates set forth in Charge 1 as amended, and also, he obtained a ledger card of defendant pertaining to R.C.S. Enterprises, Inc., a retail licensee (marked as Exhibit S-13 in evidence).

"Agent H's testimony further disclosed that he obtained five checks drawn by R.C.S. Enterprises, Inc. to the order of defendant, which checks were dated February 10, 1960, April 11, 1960, April 21, 1960, May 6, 1960 and August 24, 1960, and in the amounts of $85.74, $42.09, $54.43, $81.31 and $48.78 respectively. All of these checks were deposited by the defendant in its account in Peoples Trust Company of Bergen County. The payment of check dated February 10, 1960 in the amount of $85.74 was credited on defendant's ledger card to R.C.S. Enterprises, Inc. on February 18, 1960 and the bank perforations on said check shows that it was paid on February 25, 1960. Invoice No. 47588 (written on said check) discloses that the delivery date of alcoholic beverages to said R.C.S. Enterprises, Inc. was on January 13, 1960, the amount billed for said merchandise delivered being $71.80. The said check in the amount of $85.74 also included the amount shown on Invoice No. 50878, the sum of $13.94 for alcoholic beverages delivered on January 27, 1960 (not included in Charge 3 herein).

"The check dated April 11, 1960 in the amount of $42.09, but credited on defendant's ledger card to R.C.S. Enterprises, Inc. in the amount of $33.83 on April 7, 1960, was in payment of Invoice No. 61214 for alcoholic beverages delivered to said retail licensee on March 3, 1960. The bank perforated date on the said check representing payment thereof, was April 22, 1960.

"The check dated April 21, 1960 in amount of $54.43, which included the sum of $27.97 for alcoholic beverages to R.C.S. Enterprises,

Inc., credited to said retail licensee on defendant's ledger card as of April 20, 1960 (Invoice No. 62827) was for alcoholic beverages delivered on March 9, 1960. The bank perforated date on said check representing payment thereof was April 28, 1960.

"The check dated May 6, 1960 in amount of $81.31 (Invoice No. 71,296) for alcoholic beverages delivered on April 6, 1960 was credited to R.C.S. Enterprises, Inc. on the ledger card of defendant as of May 20, 1960 and showed bank perforated date of payment on check as May 25, 1960.

"The check dated August 24, 1960 in amount of $48.78 (Invoice No. 96695) for alcoholic beverages delivered on June 30,1960 was credited to R.C.S. Enterprises, Inc. on the ledger card of defendant as of August 4, 1960 and showed bank perforated date of payment as August 30, 1960.

"It was stipulated and agreed by the attorneys representing the respective parties herein that if Agent T were called as a witness, his testimony would be similar to that of Agent H.

"William Munoz testified that the premises for which he and another hold a liquor license are located in Colt's Neck and that during 1959 or 1960, Silverstein, as the solicitor for the defendant, called at his place of business; that the assorted alcoholic beverages listed in twenty-six invoices (marked Exhibit S-1) shown him by the attorney appearing for the Division, were never delivered to his licensed premises and that the respective signatures appearing on the receipts for said beverages are not his signature. On cross-examination, Munoz testified that although he has never been on the Default List, he has at times taken advantage of the thirty-day period for payment of alcoholic beverages, and prior to the deadline for such payment, has received warning notices; that he 'does not bother' to look through them so that 'there might have been a number of warning notices coming from Dorchester that he never looked at'; that he follows such procedure because he knows that he is not in default and when the salesman comes in, he (Munoz) will have 'plenty of time to pay him'.

"Eight other licensees or employees of said licensee, who had knowledge when alcoholic beverages were delivered to their respective licensed premises, testified that at various times they permitted orders of alcoholic beverages consigned to other licensees to be delivered to their premises and subsequently 'picked up' by Silverstein. Each of these witnesses professed innocence of any wrongdoing on his own part or knowledge of wrong-doing on the part of Silverstein.

"Silverstein testified that when defendant furnished him with bottles of alcoholic beverages bearing a sticker reading 'Sample bottle not for resale', he would thereafter remove the said stickers from the bottles; that at times when he accompanied other solicitors in their cars to defendant's premises, he picked up orders of alcoholic beverages for delivery to retail licensees but, instead of making such delivery, he would retain such liquor, sign the delivery receipt in the name of the licensee or another name, and thereafter pay cash to the defendant for such merchandise; that at other times he would call in orders to defendant for delivery of alcoholic beverages to retailers who had supposedly placed orders, but would request that the beverages be delivered to other retail licensees, giving as a reason therefor that the premises to which the alcoholic beverages were consigned would not be open at the time of delivery and advised the defendant that he, himself, would call for the goods and deliver it to the retail licensee set forth in the shipping ticket. Silverstein further testified that he carried on this sort of practice without the knowledge of his employer.

"Charles Baer testified that he is employed by defendant in the capacity of traffic manager and, pursuant to such position, his duties are 'taking care of the warehouse, checking out drivers, checking in drivers' and overseeing the checking of orders being shipped to various customers; that at times orders would reach the shipping department with a tag placed thereon requesting that the merchandise be delivered to another retail licensee other than the one shown on the shipping ticket; that when the shipments were requested to other licensed retailers who were accounts of Silverstein, the latter had stated that the consignees would be closed and would not 'open for business until later hours'; that he accepted said explanation because he was of the opinion that Silverstein would thereafter obtain the respective merchandise and deliver to those who had ordered same; that at no time would alcoholic beverage orders be permitted to be placed in a motor vehicle unless it had a proper decalcomania thereon which permitted such alcoholic beverages to be transported therein; that he put the sample sticker on the bottles of alcoholic beverages before giving it to any 'salesman'.

"Walter Blumberg, assistant secretary, assistant treasurer and general manager of defendant corporate-licensee, testified that the latter employs forty-five salesmen and operates eleven trucks; that he is personally familiar with the nature in which orders are filled; that when a salesman calls in an order, it is prepared in the sales department and then is forwarded to the credit department; that after the latter gives its approval, the order form then goes to the billing department wherein IBM machines are used; that the invoice is prepared and then sent to the warehouse; that occasionally, a salesman will call up and state that he would like to pick up the order to make delivery thereof; that the salesman signs the shipping ticket, takes two copies thereof with him, leaves one copy with the retailer when the merchandise is delivered and then mails in to the defendant the other copy upon which the receipt of the goods has been acknowledged; that up to the time when Silverstein had been apprehended, the company had never been notified by a retailer that an invoice was received for merchandise which had not been delivered; that the customers make payment by sending in their personal or business checks and, at times, the salesmen will mail either checks or money orders to cover cash which they had collected; that on occasion a salesman would accept a third party check from the licensees, which checks will be forwarded to the defendant; that the salesmen are not permitted to send in their own check in payment of monies which they had collected from licensees; that twenty days after delivery of the merchandise, if the bill has not been paid, a warning notice is sent to the retail licensee advising him that if thirty days are permitted to elapse, he may be placed on default with the Division; that an item of $81.31 shown as paid on the ledger card of defendant on May 20, 1960, for merchandise presumably sold on April 6, 1960, he (Blumberg) had no personal knowledge thereof but referred to a listing of various licensees (marked Exhibit D-3 in evidence) wherein were notations made in the ordinary course of business that the salesman (Silverstein) 'will get' and also 'mailed'; that on June 30, 1960, merchandise was delivered for which a bill of $48.78 was submitted, which bill, according to the ledger card of R.C.S. Enterprises, Inc., was paid on August 4, 1960; that at times where a salesman has collected from retailers monies due for merchandise delivered, he will notify the office that he will turn over said payment to the company within a few days when he called at the company's office. On cross-examination, Walter Blumberg's attention was directed to a check of R.C.S. Enterprises, Inc., in the amount of $48.78 which was dated August 24, 1960, and as aforementioned represented payment for merchandise delivered to said retailer on June 30, 1060 and, in explanation thereof, Walter Blumberg testified that the company records indicated that Silverstein had called the credit department advising that he had received a check in the amount in question and was sending it or bringing it in to the defendant. His attention was further called to a check dated April 21, 1960 from the

R.C.S. Enterprises, Inc., payable to the defendant in the amount of $54.43, which included the sum of $27.97 for alcoholic beverages delivered to said retailer on March 9, 1960.

"Walter Blumberg further testified that he had no knowledge of the activities of Silverstein over the period of time set forth in the charges in this case.

"Jerome Blumberg, secretary and treasurer of defendant corporate-licensee, testified that he is personally in charge of all the administrative procedures of the company and that a sincere effort has always been made to see that all of the employees of defendant are familiar with the rules and regulations of the Division of Alcoholic Beverage Control; that it becomes an imposibility 'to know exactly what every salesman is doing every moment of the day'.

"The violations set forth in Charges 1 and 2 occurring over a long period of time might justifiably arouse suspicion that the officers of the defendant were or should have been aware of the illegal transactions participated in by Silverstein. However, the proof produced in connection therewith appears insufficient to substantiate the fact that such activities were aided and abetted or ratified by other representatives of the defendant. Suspicion, in itself, cannot be accepted in lieu of adequate proof.

"Insofar as Charge 3 is concerned, the situation appears quite different. Walter Blumberg testified that at various times solicitors collect monies from retailers but delay in forwarding such receipts to defendant, and as a result thereof, the ledger accounts of the respective retailers are not credited with payment until the amount of money collected by the solicitors actually reaches defendant's home office. Although the five payments of R.C.S. Enterprises, Inc., in question for alcoholic beverages delivered disclose that said payments were overdue from eleven to thirty days, respectively, the defendant failed to file a notice of default pursuant to Rule 5(b) of State Regulation No. 39. This is no isolated offense which, under certain circumstances might be excusable or at least be considered in mitigation of penalty. It is apparent in the instant matter that the defendant has acquiesced in the repeated course of conduct by accepting overdue payments from R.C.S. Enterprises, Inc., in violation of the regulation pertaining thereto.

"It is recommended, because of insufficient evidence adduced by the Division to warrant a finding of guilt on the part of the defendant herein, that Charges 1 and 2 be dismissed. Inasmuch as the violations set forth in Charge 3 have been proven by the Division by a preponderance of the evidence, it is recommended that defendant be found guilty thereof. Defendant has no prior adjudicated record. It is further recommended that in view of the fact that only one licensee was involved in Charge 3, defendant's license be suspended for a period of fifteen days. Cf. Re F & A Distributing Co., Bulletin 1342, Item 2."

Written exceptions to the Hearer's Report and written argument thereto were filed with me by the defendant-licensee, in which it excepted to the recommended finding of guilt on Charge 3 and the recommended penalty of fifteen days license suspension. Oral argument was held before me at which the defendant's attorney confined his argument to the type and quantum of penalty to be imposed. In this connection, defendant contends that it should be permitted to obtain a permit in lieu of the imposition of a license suspension or, in the alternative, the length of suspension should be reduced.

After carefully considering the entire record herein, I concur in the Hearer's recommendation that defendant be found not guilty of Charges 1 and 2. Said charges are therefore dismissed.

As to Charge 3, I agree with the Hearer's recommended findings and conclude that defendant's guilt has been established by a fair preponderance of the believable evidence in the record. The only remaining question is the penalty to be imposed.

While it is realized that the magnitude of the businesses of some wholesale licensees is such that violations may be committed by them notwithstanding the exercise of due diligence by their management in the over-all operation of their businesses, I feel that the instant case does not fall within such category. Accepting defendant's claims at face value, for the sake of argument, it is clear that defendant's management was aware of its practice of carrying retail licensees' credit accounts past the dead-line date for reporting them on default, in reliance upon the mere statements of its solicitors that payment had been received by them from the retailer, but despite undue delay in the remitting of these "payments" to the defendant by these solicitors. (Rule 2(b) states that for the purpose of Regulation No. 39 a check not promptly deposited for collection is not deemed payment.)

All licensees, regardless of their size or volume of business, are responsible for strict compliance with the Alcoholic Beverage Law and Regulations, including the credit regulations at both the wholesale and retail level of the industry. Here, at the least, defendant's management received such information that reasonably should have put it on notice that the Division's credit regulation probably was being violated by its failure to report retailers on default in the face of the repeated tardy remittances of collections by its solicitor. Yet, no steps were taken by defendant (either by direct verification with the retailer or otherwise) to ascertain the true facts in connection with these apparent violations. If the wholesale industry in general engaged in such lax practices, corrective action might well require the abrogation of the applicable credit regulation or a prohibition against solicitors receiving collectins from retail accounts.

Under all the circumstances, I cannot accede to defendant's request for permit action in lieu of license suspension. However, I do find some mitigation in the case and will therefore reduce the recommended penalty to ten days suspension of defendant's license.

Accordingly, it is, on this 19th day of February 1962,

ORDERED that Plenary Wholesale License W-69, issued by the Director of the Division of Alcoholic Beverage Control to Dorchester, Inc., for premises 60 Railroad Street, Hasbrouck Heights, be and the same is hereby suspended for ten (10) days, commencing at 12:01 a.m., Monday, February 26, 1962, and terminating at 12:01 a.m., Thursday, March 8, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - ORDER DEFERRING EFFECTIVE DATE OF SUSPENSION.

In the Matter of Disciplinary Proceedings against

DORCHESTER, INC.
60 Railroad Street
Hasbrouck Heights, N. J.

Holder of Plenary Wholesale License W-69, issued by the Director of the Division of Alcoholic Beverage Control.

AMENDED ORDER

Shanley & Fisher, Esqs., by Harold H. Fisher, Esq., Attorneys for Defendant-licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

On February 19, 1962, I entered an Order suspending the license herein for a period of ten days, commencing February 26, 1962. The licensee has now filed a petition requesting that the imposition of the suspension be deferred and, for good cause appearing therein, I shall grant such petition.

Accordingly, it is on this 23rd day of February, 1962,

ORDERED that Plenary Wholesale License W-69, issued by the Director of the Division of Alcoholic Beverage Control to Dorchester, Inc., for premises 60 Railroad Street, Hasbrouck Heights, be and the same is hereby suspended for ten (10) days, commencing at 12:01 a.m., Monday, April 2, 1962, and terminating at 12:01 a.m. Thursday, April 12, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE BELOW FILED PRICE - AGGRAVATING CIRCUMSTANCES - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
EARL R. MINER t/a MINER'S DELICATESSEN 496 Broadway Paterson, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Distribution License D-50, issued by the Board of Alcoholic Beverage Control for the City of Paterson.	)	

Earl R. Miner, Licensee, Pro se.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads guilty to a charge alleging that on divers days during December, 1961, he sold various quantities and kinds of alcoholic beverages below the filed price, in violation of Rule 5 of State Regulation No. 30.

It appears from the reports of investigation that the sales, all to the same customer, were made on eight occasions in a total amount of $863.40, as to which a prohibited 10% discount was afforded, and that the licensee admitted affording the discount because "I have been losing too many of my customers because of price and I did not want to lose this one".

Absent previous record and considering this to be an aggravated violation by reason of the large quantity of alcoholic beverages sold, I shall suspend the license for twenty days, with remission of five days for the plea entered, leaving a net suspension of fifteen days. Cf. Re Orbin, Bulletin 1360, Item 4.

Accordingly, it is, on this 21st day of February, 1962,

ORDERED that Plenary Retail Distribution License D-50, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Earl R. Miner, t/a Miner's Delicatessen, for premises 496 Broadway, Paterson, be and the same is hereby suspended for fifteen (15) days, commencing at 9:00 a.m., Monday, February 26, 1962, and terminating at 9:00 a.m., Tuesday, March 13, 1962.

William Howe Davis
Director