Division of
ALCOHOLIC BEVERAGE CONTROL

Bulletin

140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2472 JANUARY 24, 1997

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Division of
ALCOHOLIC BEVERAGE CONTROL

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140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2472 January 24, 1997

1. NOTICE OF AMENDMENT TO BRAND REGISTRATION STATUTE N.J.S.A. 33:1-2.

On December 27, 1996, legislation was enacted amending the State's brand registration statute, N.J.S.A. 33:1-2. This law streamlines the administrative process and reduces paperwork for all brand registrants. The fee for each brand registration has been changed to $23.00 per brand. Repeat vintage wines of the same brand no longer are required to be registered and are not subject to the brand registration fee. Overall, the legislation reallocates revenues and, in fact, will result in a small loss of revenue to the Division of Alcoholic Beverage Control.

As part of this reform, the Division has revised its brand registration application so that multiple products may be listed on one application. In addition, the Division will no longer require that registrants file with the Division BATF approvals or letters of authorization. Please be advised, however, that the Division will expect that upon demand, all registrants produce this documentation to the Division immediately. This change will result in a significant reduction of paperwork for the industry.

With respect to the permitting process, the Division will offer licensees the option to obtain one permit that will allow that licensee to engage in those activities authorized by sampling permits, product information permits, gratuitous gift permits and gratuitous service permits. Rather than having to apply for each permit numerous times over the course of the year, licensees will have the option to obtain an Omnibus Permit for $500.00 that will allow a licensee to engage in the activities of all four permits as many times as they want during the year. This will also significantly reduce the paperwork of many licensees. Licensees will still be able to obtain permits on an individual basis if they so desire. The fee for sampling permits will be raised from $25.00 to $40.00 and the fee for product information, gratuitous gift and gratuitous service permits will remain the same.

2. OPINION LETTER - CLARIFICATION OF COMBINATION SALES N.J.A.C. 13:2-24.6.

September 24, 1996

Ms. Carol Katz
Public Strategies/Impact
196 West State Street
Trenton, New Jersey 08608

Re: Request for Clarification of N.J.A.C. 13:2-24.6

Dear Ms. Katz:

Thank you for your recent letter to Director Holl concerning your request for clarification of the Division's recently amended N.J.A.C. 13:2-24.9. The Director has asked me to provide you with a reply.

On Monday, June 17, 1996, the Division adopted Regulation 13:2-24.9(c) which permits:

> The holder of a Class A or B license authorized to sell to retailers, may sell any combination of distilled spirits, malt alcoholic beverages and wine provided that the combined products offered for sale are all within one of the three noted categories.

This regulation also requires that:

> No licensee shall sell or offer to sell any alcoholic beverage product upon terms that permit purchase of that product, by size and price only when purchased in conjunction with a different product or the same product in a different size. N.J.A.C. 13:2-24.9(a).

You have asked if a wholesaler can offer a price discount for Product A and Product B at the 100 case price discount if, the Retailer buys a total of 100 cases of either product. You state:

> Suppose that prior to the new regulation being adopted, a wholesaler offered a $40 per case discount on Wine A if

retailer bought 100 cases, and a $10 per case discount on Wine B also for 100 case purchase. Further suppose that now the wholesaler offers those discounts as long as the retailer buys a total of 100 cases of either or both wines. That is, the retailer may buy 50 cases of A and 50 cases of B, 40 of A and 60 of B, 70 of A and 30 of B or any other such combination, and receive the same discount per case ($40 off each case of Wine A and and $10 off each case of Wine B, as she would have had she bought 100 cases of either product.

Please be advised that the Division interprets the current regulation to permit a wholesaler to offer to retailers the opportunity to receive a 100 case discount price on Product A and Product B if the retailer purchases a total of 100 cases of either product, provided the wholesaler offers that same discount to retailers who purchase 100 cases each of Product A or Product B. In other words, the Division would prohibit a wholesaler from offering a combination discount for the purchase of a set number of two products when the wholesaler does not make the same discount available to retailers who purchase only one product at the total set number of cases. In the scenario presented, the wholesaler would have to offer Product A and Product B at the discounted rate if the retailer bought 100 cases of Product A or 100 cases of Product B.

Next, you ask if the wholesaler would violate N.J.A.C. 13:2-24.9 if a retailer chooses to buy 15 cases of Wine A and 85 cases of Wine B, (and receives the discounted rate of a 100 case purchase), must that wholesaler then make the discounted 15 case rate of Wine A generally available to any other retailer "whether or not the retailer also buys Wine B?"

Please be advised that the Division does not interpret the current regulations to require that the offer in this scenario, (the 15 cases of Wine A at the $40 per case discount) be made available to any retailer who purchases 15 cases of product A. However, the Division interprets N.J.A.C. 13:2-24.9 (a) to prohibit a wholesaler from offering a combination discount that dictates how much of each product the retailer must buy in order to receive the discounted price. In other words, the wholesaler may not require retailers to purchase 50 cases of Product A and 50 cases of Product B in order to receive the discount. This example would be considered a tied-sale violation.

Accordingly, the Division would prohibit, for example, a greater discount offered to a retailer who purchases a total of 100 cases of two products, but that discount is not available to the retailer who purchases 100 cases of only one product. In other words, a wholesaler would be prohibited from offering to retailers a $50 discount on Product A and a $20 discount on Product B if the retailer buys 50 cases of each product, but, the wholesaler otherwise offers a $40 discount on the purchase of 100 cases of Product A or a $10 discount on the purchase of 100 cases of Product B.

We hope this information provides assistance to you and your client.

Very truly yours,

/s/ANALISA SAMA HOLMES
ANALISA SAMA HOLMES
DEPUTY ATTORNEY GENERAL
REGULATORY BUREAU

3. VISIONS LOUNGE, INC. V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ELIZABETH - FINAL CONCLUSION AND ORDER ACCEPTING INITIAL DECISION AND GRANTING REQUEST TO DE-LICENSE PREMISES.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

APPEAL NO. 6377 VISIONS LOUNGE, INC., PRCL # 2004-33-095-003 APPELLANT, V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ELIZABETH RESPONDENT.	)	FINAL CONCLUSION AND ORDER ACCEPTING INITIAL DECISION AND GRANTING REQUEST TO DE-LICENSE PREMISES OAL DKT. NO. ABC 5715-96 AGENCY DKT. NO. 6377 MUN. REV. NO. 9620

Charles Kaess, Esq., for Appellant.
Rocco DiPaola, Esq., for Respondent.

INITIAL DECISION BELOW

HONORABLE MARYLOUISE LUCCHI-McCLOUD, ADMINISTRATIVE LAW JUDGE

Decided: September 23, 1996 Received: September 26, 1996

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed on behalf of the Respondent on October 22, 1996 in accordance with the provisions of N.J.A.C. 1:1-18.4(d). Counsel for the Appellant filed Replies on November 19, 1996. The time to render a final decision was extended by a properly executed Order; therefore, the Final Conclusion and Order must be issued on or before February 10, 1997.

PROCEDURAL HISTORY

The Respondent denied the Appellant's application for de-licensure by Resolution adopted on April 29, 1996. On May 10, 1996, the Division of Alcoholic Beverage Control acknowledged the filing of Appellant's Notice and Petition of Appeal. Additionally, the Appellant moved for relief by way of Affidavit and Order to Show Cause requesting the Director to hear the matter in an expedited fashion. By Order dated May 24, 1996, I denied the Appellant's request and transmitted the matter on June 5, 1996 to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

FINDINGS OF FACT

As noted by the Administrative Law Judge (ALJ), the facts in this matter are not in dispute. Both parties have stipulated that it has been the Appellant's intention to close its business and de-license the premises located at 1213 Magnolia Avenue, Elizabeth, New Jersey. The application for de-licensure was heard by the Respondent on April 29, 1996. A Resolution was approved by the Respondent which denied the application. A review of the Resolution and the transcript of the April 29, 1996 meeting of the Respondent fails to show that any reasons were offered to support the Respondent's action.

The Initial Decision indicates that testimony was taken before the ALJ from a manager of the Appellant. Although I have not been provided a transcript for review, the ALJ notes, and I accept as a finding of fact, that testimony revealed that Appellant's business had not made a profit between September, 1995 and April, 1996, the date of its closing. The Initial Decision does not set forth any other testimony that was considered and there is no record of any evidence offered by the Respondent to support its action.

EXCEPTIONS

I note that Exceptions must specify the findings of fact or law to which exception is taken. N.J.A.C. 1:1-18(b)(1). Exceptions must state supporting reasons. N.J.A.C. 1:1-18.4(b)(3). Further, Exceptions to factual findings must specify the witness' testimony relied upon. Id. Moreover, the excepting party has the burden of providing the necessary transcripts for review. In re Morrison, 216 N.J. Super. 143, 157-158 (App. Div 1987). I again note that no transcript of the hearing before the ALJ has been provided in this case.

Counsel for the Respondent has filed Exceptions. The Exceptions assert that the testimony before the ALJ, regarding the loss of profit of the Appellant, was given by witnesses who have an interest in a proposed incoming tenant of the premises seeking de-licensure. Counsel for the Respondent asserts that these witnesses have an interest in a "juice bar" that will be located on the de-licensed premises. Counsel then concludes, without support from any evidence in the record, that the Respondent's broad discretion to protect the public health, safety and welfare justifies the denial of the application for de-licensure.

Counsel for the Appellant replies that there is no factual basis in the record for the assertions made by Respondent. I concur and note that Respondent has neither cited witness testimony with specificity, nor stated any authorities to support its Exceptions. Therefore, based upon the limited record before me, I reject the Exceptions.

CONCLUSION

The municipal issuing authority has the primary responsibility of enforcing alcoholic beverage control laws. Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of City of Newark, 55 N.J. 292 (1970). Local authorities have wide discretion in performing this responsibility, and should use the public interest as their principal guide. Lubliner v. Bd. of Alc. Bev. Control, 33 N.J. 428, 446 (1960). Actions of the municipal issuing authority are reversible when they constitute an abuse of discretion, a manifest mistake, or are clearly unreasonable. The Grand Victorian Hotel v. Borough Council of the Borough of Spring Lake, 94 N.J.A.R.2d (ABC) 43 (1993). Thus a ruling will be upheld if there is reasonable support in the record. Lubliner, supra at 446. The burden rests with the Appellant to establish that the municipal issuing authority acted in error or in bad faith, and should therefore, be reversed. Pilon v. Board of Alcoholic Beverage Control of Paterson, 112 N.J. Super. 436 (App. Div. 1970).

Appellant has sustained its burden in this case. Beyond the assertions of counsel for the Respondent, there is nothing in the record which establishes reasonable support for the action of Respondent in denying the application for de-licensure. The Resolution adopted by the Respondent does not offer any reasons in support of the action and the stipulated facts before the ALJ do not reflect any proffer of evidence in support of Respondent.

The voluntary expansion or any de-licensing of all or a portion of licensed premises can only be accomplished through an application for a place-to-place transfer of the license. N.J.S.A. 33:1-26 and N.J.A.C. 13:2-7.2(d). Regulations require that a full place-to-place transfer (reduction of premises) application be filed for a voluntary de-licensure. A licensee must provide appropriate details concerning the proposed reduction. The local issuing authority is then able to review the application with all relevant facts before it and take appropriate action. Counsel for the Appellant cites a recent case which confirms this procedure, In Re J & M Restaurant, 95 N.J.A.R.2nd (ABC) 11, and attempts to distinguish this matter by noting that the application here is for the entire premises and not a portion thereof as in J & M. The limited record before me in this case, which does not present any support for the action of the Respondent, allows me to rule accordingly without having to address whether a de-licensure of an entire premises presents issues which are distinguishable from the holding in J & M.

For the reasons noted above, I adopt the Initial Decision of the ALJ and reverse the action of the Respondent in denying the application of the Appellant for de-licensure of its licensed premises. This renders any issues with respect to the inactive status of the license to be moot and any further applications for renewal of Appellant's inactive license shall be guided by N.J.S.A. 33:1-12.39 and pertinent case law.

Accordingly, it is on this 3rd day of January, 1997.

ORDERED that the action of Respondent, in denying Appellant's application for voluntary de-licensure of its licensed premises by Resolution dated April 29, 1996 is hereby **REVERSED**, and it is further

ORDERED that the application for de-licensure of Plenary Retail Consumption License No. 2004-33-095-003, located at 1213 Magnolia Avenue, Elizabeth, New Jersey is hereby **GRANTED**.

/s/John G. Holl
JOHN G. HOLL
Director

4. ANTOINE SERVICES, INC., T/A ANTOINE'S SPORTS CLUB AND RESTAURANT V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF LINDEN - FINAL CONCLUSION AND ORDER ADOPTING INITIAL DECISION.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

ANTOINE SERVICES, INC., T\A ANTOINE'S SPORTS CLUB AND RESTAURANT Appellant, vs. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF LINDEN, Respondent.	FINAL CONCLUSION AND ORDER ADOPTING INITIAL DECISION OAL DKT. NOS. ABC 0552-95, 3471-95, 7299-96, 9965-95 AGENCY DKT. NOS. 6222, 6248, 6261, 6383, 6400

Gerard Antoine, Pro Se, for appellant
Louis Di Leo, Esq., for respondent
(Municipal Board of Alcoholic Beverage Control of the City of Linden)

INITIAL DECISION BELOW

HONORABLE LINDA BAER, ADMINISTRATIVE LAW JUDGE

DECIDED: September 12, 1996 RECEIVED: September 18, 1996

BY THE DIRECTOR:

Written exceptions to the Initial Decision were filed on behalf of the appellant, Antoine Services, Inc., t/a Antoine's Sports Bar, holder of plenary retail consumption license, 2009-33-032-008 ("Antoine"), in accordance with the provisions of N.J.A.C. 1:1-18.4. The Respondent, the Municipal Alcoholic Beverage Board for the City of Linden ("Linden"), filed a reply. The time to render a Final Decision was extended by Order until December 19, 1996.

For the following reasons, I reject the exceptions filed on behalf of the appellant and adopt the factual findings and conclusions of law contained in the Administrative Law Judge's (ALJ) Initial Decision and incorporate them at length herein. As a result, appellant's appeal is dismissed.

This case chronicles the notorious activities of a licensee who created a chronic nuisance in a residential neighborhood. In its first appeal, Antoine challenged an October 11, 1994 Linden resolution suspending the license for 25 days for remaining open and selling alcohol after closing hours, permitting 50 patrons to remain on the premises after closing hours and hiring two employees to work without the requisite Linden permits-all in violation of local ordinances. In its second appeal, Antoine appeals a March 1, 1995 Linden resolution revoking its Linden entertainment permit and suspending its license for 6 months for immoral activities, disturbances and nuisances in violation of Division regulation N.J.A.C. 13:2-23.6(a)(2) & (3). In its third appeal, Antoine appealed a May 10, 1995 Linden resolution revoking its license for continued disturbances, excessive noise and nuisances in violation of N.J.A.C. 13:2-23.6(a)(2) & (3) and for employing three employees

not on the E-141 form in violation of N.J.A.C. 13:2-23.13. In its fourth and fifth appeals, Antoine appealed a June 20, 1996 Linden resolution denying the renewal of its license for the 1996-97 license term for operating "in an irresponsible manner" in violation of N.J.S.A. 33:1-32 and for violating Linden's prior resolution by having illegal entertainment on numerous occasions.

For the first three appeals, I issued stay orders permitting the licensee to remain open pending a full hearing and disposition on appeal. On May 23, 1995, Linden filed a motion to immediately vacate the stay orders and immediately suspend the license to protect the public's health, safety and welfare. This request was granted permitting Antoine to seek an emergent hearing on the matter. After an emergent hearing, I vacated the suspension under the general conditions that Antoine close the licensed premises at 11:00 P.M., and that no entertainment whatsoever, music or otherwise, take place on the licensed premises. A subsequent motion to lift these special conditions by Antoine was denied.

After six days of hearings, the ALJ found that there was ample evidence to support the actions of Linden to suspend and ultimately revoke the license of Antoine. The ALJ concluded that Linden provided sufficient proof that this license constituted a nuisance and perpetual trouble spot in the community. I wholeheartedly agree.

I reject the appellant's exceptions as unpersuasive or irrelevant. On behalf of the license, Mr. Gerard Antoine filed exceptions that rebut the findings of fact of the ALJ and raised new facts in controversy. The Office of Administrative Law Uniform Administrative Procedure Rules require that exceptions of fact must be specific, supported by witnesses' testimony or documentary evidence. N.J.A.C. 1:1-18.4(b)(1)-(3). Exceptions may not consist of new evidence not presented at the hearing. N.J.A.C. 1:1-18.4(c). The excepting party bears the burden of providing the relevant portions of the transcript when challenging the ALJ's factual findings. In re Morrison, 216 N.J. Super. 143, 157-58 (App. Div. 1987).

I reject appellant's exceptions based on new facts not on appeal. Appellant failed to provide me with a hearing transcript. Thus, I also reject appellant's exceptions that dispute the ALJ's findings of fact without specific references to hearing testimony or hearing evidence.

Appellant also alleged in his exceptions that the Linden Municipal Court dismissed "all noise violations" and therefore the issuing authority could not suspend the license for noise and music violations. This exception is meritless. No evidence was offered at the hearing before the ALJ or me to support the allegation that the Linden Municipal Court dismissed "all noise violations". Nevertheless, an administrative charge is not barred because of a criminal dismissal of summonses. See, e.g., Division of Youth & Family Serv. v. V.K., 236 N.J. Super. 243, 252 (App. Div. 1989) (Res judicata or double jeopardy principals do not bar a civil action as a result of a criminal acquittal due to different burdens of proof), certif. den. 121 N.J. 614 (1990), cert. den. 110 S. Ct. 2178, 495 U.S. 934 (1990); In re Pennica, 36 N.J. 401, 418-19 (1962)(acquittal of criminal charges does not bar subsequent administrative disciplinary proceedings based on same conduct or charge). Accordingly, this exception is rejected.

Respondent's reply to the exceptions urged that the ALJ's decision be adopted to protect the public's health, safety and welfare. I accept Linden's reply.

Appellant has failed to sustain its burden that the issuing authority's suspension and revocation of its license was erroneous. N.J.A.C. 13:2-17.6. See, e.g., Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292 (1970). The respondent offered well documented proof at the hearing that this license at this location constituted a trouble spot. Nordco, Inc. v. New Jersey, 43 N.J. Super. 277 (App. Div. 1957). In light of the overwhelming evidence of the licensee's continued violations I cannot rule that Linden's actions to suspend, revoke and not renew this license were unreasonable, an abuse of discretion or erroneous.

A licensee is responsible to maintain control of its patrons and its licensed and surrounding premises. In re Nathan's Realty, Inc., 96 N.J.A.R.2d (ABC) 25 (Jan. 1996). This licensee allowed its premises to become a den of degeneracy which spilled over into a residential neighborhood. For a period of at least two years the premises were the site of brawls, violence and underage drinking. Music was played so loudly that it made the neighborhood walls vibrate. The licensee's residential neighbors were subjected to screaming, drunken patrons urinating on their properties. They left prophylactics, empty bottles and broken glass in their wake. Neighbors were subjected to fights, disorderly conduct, arrests and on two occasions, riots. These riots necessitated the assistance of six neighboring police departments. There were injuries to numerous patrons and police as a result of the licensee's conduct.

Linden police reported 95 times to the licensed premises in the first year of operation. Policemen, municipal employees, two councilmen and 22 citizens testified that the licensee was a nuisance. More telling was the diary of a neighbor who kept daily notes of the ongoings at Antoine and its patrons. What is most distressing was the licensee's deliberate, repeated violations of municipal ordinances and Division rules in the face of mounting municipal charges. Despite Linden's revocation of Antoine's entertainment permit, Antoine continued to have entertainment between July 29, 1995 and May 19, 1996, with 22 Linden police violations and 13 municipal summonses for illegal entertainment. Antoine demonstrated its utter lack of regard for local or state authority in the operation of its license and put both patrons and the community at serious risk.

This license is a trouble spot with demonstrated, persistent disregard for the law. The City of Linden acted correctly in revoking this license.

Accordingly, it is on the 25th day of November, 1996,

ORDERED that the Appeal of Appellant Antoine Services, Inc., is hereby **DISMISSED**; and it is further,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Linden revoking the Plenary Retail Consumption License No. 2009-33-032-008 held by Antoine Services, Inc. t/a Antoine's Sports bar located at 800 Roselle, Street, Linden, be and is **AFFIRMED**; and it is further,

ORDERED that the remaining actions of the Municipal Board of Alcoholic Beverage Control of the City of Linden suspending the the Plenary Retail Consumption License No. 2009-33-032-008 held by Antoine Services, Inc., be and are **DISMISSED** as moot.

/S/John G. Holl
JOHN G. HOLL
DIRECTOR

5. NOTICE OF PERSONNEL APPOINTMENT.

On January 13, 1997, Attorney General Peter Verniero and Director John G. Holl appointed Charles Sapienza as Deputy Attorney General In-Charge of the Regulatory Bureau in the Division of ABC. Mr. Sapienza replaces Deputy Attorney General Gerald Griffin who formally held that position and now is with the Division of Criminal Justice. Mr. Sapienza previously served in the Attorney General's Office from 1976 until 1982 as Deputy Attorney General In-Charge of the Anti-Trust Section. Prior to his appointment in the Division of ABC he was a practicing attorney and served as Acting Chairperson for the New Jersey Alcohol Industry Council.

Director Holl welcomes Mr. Sapienza's insight on industry issues and his extensive experience as a practicing attorney in New Jersey since 1968.

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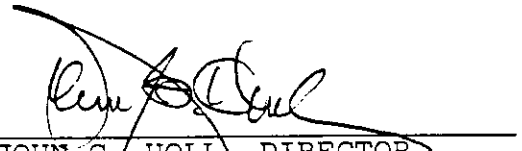
Publication of Bulletin 2472 is hereby directed this
24th Day of January, 1997



JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL