Director Davis
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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 1079 SEPTEMBER 14, 1955

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ITEM

STATE OF NEW JERSEY
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1060 Broad Street Newark 2, N. J.

BULLETIN 1079 SEPTEMBER 14, 1955

1. COURT DECISIONS - BUTLER OAK TAVERN, A CORP. v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL ET AL. - ORDER OF DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-401-54

BUTLER OAK TAVERN, a corporation,

Plaintiff-Appellant,

-vs-

DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DEPARTMENT OF LAW AND PUBLIC SAFETY, STATE OF NEW JERSEY, and WILLIAM HOWE DAVIS, Director of said Division,

Defendants-Respondents.

Argued August 1, 1955; decided August 22, 1955.

Before Judges Hughes, Hetfield and Mariano.

Mr. Abraham I. Mayer argued the cause for the appellant, (Mayer and Mayer, Attorneys for and of Counsel).

Mr. Samuel B. Helfand, Deputy Attorney General, argued the cause for the respondents (Mr. Grover C. Richman, Jr., Attorney General of New Jersey, Attorney).

The opinion of the court was delivered by

MARIANO, J.S.C. (temporarily assigned)

Plaintiff appeals from an order of the Division of Alcoholic Beverage Control revoking its Plenary Retail Consumption License.

On December 21, 1954 written charges were filed against the appellant where it was alleged that it did, on two separate occasions on December 18, 1954, sell cases of whiskey at less than the minimum price established in the then current effective minimum resale price list published by the then Director of the Division of Alcoholic Beverage Control. On December 23, 1954 an additional written charge was preferred against the appellant wherein it was alleged that it did on December 21, 1954 sell a case of whiskey at less than the minimum price thereof. The said sales were made in violation of Rule 5, State Regulations #30 of the Alcoholic Beverage Control Division, promulgated and adopted pursuant to statutory authority. See N.J.S.A. 33:1-23.1. To these charges the appellant entered pleas of non vult. Apparently, in accordance with his practice, the Director granted the request

of the licensee to appear personally before him on the question of penalty and fixed the date of March 1, 1955 for oral argument respecting the penalty to be imposed.

The illegal sales were made by one Joseph Dilzer who, together with his wife, owns forty-eight (48) of the fifty (50) shares of stock issued by the appellant corporation. In October, 1940, while Dilzer held a license individually, the local issuing authority suspended the same for five days because of a curfew infraction. In September, 1943 the then Commissioner of Alcoholic Beverage Control suspended his license for twenty days after he had pleaded guilty to the charge of having refilled four bottles of alcoholic beverage with other tax-paid liquor. In February, 1947 his first minimum price violation resulted in a twenty day penalty with five days off for a confessive plea. In July, 1949 he received a twenty-five day penalty with five days off for a confessive plea for a second minimum price violation. In May, 1952, although the proceedings were dismissed because of a failure to prove the charge by a preponderance of the evidence, there was enough in the record to suspect that the defendant (Dilzer) was selling case lots of whiskey at less than the minimum price established therefor.

Appellant urges that the penalty of revocation was so unduly harsh as compared with penalties imposed in similar cases before and since the violations in question as to be arbitrary.

The entry of the pleas of non vult eliminated all issues of law or fact and waived all defects of record except those relating to jurisdiction and left nothing remaining except the imposition of the penalty. State v. Pometti, 12 N. J. 446, 452 (1953); In re 17 Club, Inc., 26 N. J. Super. 43 (App. Div. 1953).

The extent of the penalty to be imposed rests within the sound discretion of the Director of the Division of Alcoholic Beverage Control. Grant Lunch Corp. v. Driscoll, 129 N. J. L. 408 (Sup. Ct. 1943); affirmed 130 N. J. L. 554 (E & A 1943); cert. den. 320 U. S. 801, 88 L. Ed. 484 (1944); In re Larsen, 17 N. J. Super. 564, 573 (App. Div. 1952); Mitchell v. Cavicchia, 29 N. J. Super. 11 (App. Div. 1953); Benedetti v. Board of Commissioners of Trenton, 35 N. J. Super. 30, 35 (App. Div. 1955).

The burden of rebutting the presumption of validity and regularity of the administrative action rests upon the appellant. Carls v. Civil Service Commission, 31 N. J. Super. 39 (App. Div. 1954), affirmed 17 N. J. 215 (1955); Welsh Farms, Inc. v. Bergsma, 16 N. J. Super. 295 (App. Div. 1951).

Appellant contends that the director in imposing the penalty under review abused the discretion reposed in him. In substantiation of this contention appellant directs our attention to the decisions of the director dealing with penalties imposed by him for minimum price violations during the years 1954 and 1955 and to decisions dealing with penalties imposed by the director for miscellaneous offenses where there have been previous records of convictions, all of which penalties are less severe than that imposed upon the appellant.

Appellant further contends that by reason thereof the action of the Director of the Division of Alcoholic Beverage Control in revoking the license was arbitrary, capricious and denial of the appellant's constitutional right of equal protection under the law.

No constitutional guarantees are involved in the revocation of a liquor license, which implicates no inherent rights of citizenship nor any privileges or immunities of the citizens of the several states. Meehan v. Excise Commissioners, 73 N.J.L. 382, 387 (Sup. Ct. 1906); affirmed 75 N.J.L. 557 (E & A 1908).

Fundamental principles of fairness and justice do prohibit arbitrary discrimination in treating licensees similarly situated; however, discrimination does not become arbitrary merely because varying penalties are imposed for different classifications of offenses. Camden County v. Pennsauken Sewerage Auth., 15 N. J. 456 (1954):

> "Equality in the constitutional sense does not mean mathematical exactitude. And disapproval of the wisdom or fairness of the act is not alone a ground for judicial interference, if it is not beyond the sphere of the constituted authority. In the latest pronouncement on the subject by the Federal Supreme Court, Mr. Justice Jackson said:
>
> > 'Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned difference, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.' Walters v. St. Louis, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. (1953)."

Moreover, there must be an affirmative showing of intentional and purposeful discrimination. In the Camden County case, above, Justice Heher further said (at 469):

> "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, 'even though the denial of the right to one person may operate to confer it on another. * * * The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.' Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944)."

With these principles in mind it little profits the appellant to manifest the imposition of a lesser penalty for infractions of a similar nature. In any event there clearly and apparently appears distinguishing characteristics between the reasons for the imposition of the penalties as imposed by the Director in previous cases and that in the case sub judice. The cited cases by the appellant neither reach nor parallel the situation existing in the instant case. None of the cited cases discloses the aggravated circumstances present herein, nor the brazen recurrence of the identical violation after being caught "red-handed", nor the same previous record either in kind or degree. The later illegal sale on December 21, 1954, to which appellant pleaded non vult, after the illegal sales on December 18, 1954 and the charge thereof on the 21st day of December, 1954 most certainly was accomplished in purposeful violation of the regulations. It was such an act as would have been avoided had

appellant shown any disposition to abide by the lawful regulations. Undoubtedly the reason for the revocation was not only the appellant's guilt of the charges, to which it pleaded non vult, but also because of the previous violations and the flaunting violation on December 21, 1954 and the persistent failure to abide by the lawful rules and regulations governing the conduct of its business.

The discrepancy, if any, which exists between the penalty imposed in this case and that in other cases of similar violations is not such a departure from the customary scale of penalties which would lead us to interfere or disturb the penalty imposed on the ground that it is too harsh, or indicative of being arbitrary, capricious or oppressive when viewed in the light of the facts and circumstances surrounding the violations which caused the director to order the revocation.

Appellant's attempt to analogize the requirements of the criminal law of including prior convictions in indictments, in order to justify the imposition of a statutory sentence greater than that permitted for first offenders, is without merit. Such theory has no application to disciplinary proceedings conducted by the Director of the Division of Alcoholic Beverage Control for such proceedings are purely civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948); In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); Mazza v. Cavicchia, 15 N.J. 498 (1954).

In addition thereto, a liquor license is subject to revocation for a first offense. N.J.S.A. 33:1-31. It is also to be noted that the previous violations were admitted by the appellant in its application for license.

Based upon the principle of exclusiveness of the record, appellant claims it was wrong, after the entry of the plea of non vult, to consider in aggravation of the penalty to be imposed the previous bad conduct record.

In Mazza v. Cavicchia, supra, our Chief Justice forcibly stated that it was improper for the Director, in reaching a decision in a contested case, to consider an ex parte report of a hearing officer. Failure to have shown hearer's report to appellant clearly violated his right to have the decision based exclusively upon matters in the record which are known to him and can consequently be controverted by him. The litigant is entitled to be apprised of the materials upon which the agency's finding of guilt is based.

The case sub judice is easily distinguishable from the Mazza case. In the latter the issue of guilt was contested at a full hearing. In the former pleas of non vult were entered which obviated the necessity of proving guilt by the type of hearing involved in the Mazza case. Having made unnecessary a full hearing on the question of guilt there remained nothing except the imposition of the penalty. In re 17 Club, Inc., supra. In addition, the Director granted licensee's request to be heard with respect to the penalty before the imposition of the same. At the said hearing held on March 1, 1955 there can be no doubt that the appellant was personally acquainted with the previous bad record and the details thereof, as was the Director for it was admitted by the appellant in its application for renewal of its license for the year 1954-1955 and for previous years.

It is to be observed that our courts have consistently held that "the liquor business is one that must be carefully

supervised and it should be conducted by reputable people in a reputable manner." Zicherman v. Driscoll, 133 N.J.L. 586 (S. Ct. 1946). "As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils." Crowley v. Christensen, 137 U.S. 86, 34 L. Ed. 620 (1890); Eskridge v. Division of Alcoholic Beverage Control, 30 N. J. Super. 472 (App. Div. 1954).

The governmental power extensively to supervise the conduct of the liquor business and to confine the conduct of that business to reputable licensees who will manage it in a reputable manner has uniformly been accorded broad and liberal judicial support. In Re Schneider, supra; Mazza v. Cavicchia, supra.

The flagrant disregard of the delicate balance of the price structure relating to alcoholic beverages requires stringent enforcement of the salutary regulations designed to insure stability in the sale of alcoholic beverages at retail. While isolated sales below minimum prices leave their limited mark upon the pricing system, and warrant license suspensions, the practice, as here, of the indiscriminate sale of alcoholic beverages at "cut rate" prices, if persisted in long enough, can only lead to the disruption of an orderly market and the evils that result therefrom. Applicant's conduct established its unfitness to be entrusted with the privilege of a liquor license and it has exhibited a callous and deliberate disregard of lawful regulations and there exists no doubt that the revocation was the only appropriate penalty. The penalty imposed is within the lawful delegative authority of the agency and tends to serve the legitimate interest of society in connection with the regulations of a business attended with danger to the community.

The revocation of the license under the circumstances here presented does not appear to have been arbitrary or capricious, nor violative of due process, either substantive or procedural, nor an abuse of discretion, but amply justified by the licensee's infractions.

The determination of the Director here brought under review is affirmed.

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2. NEW LEGISLATION - R. S. 33:1-26 AMENDED - APPEAL TO DIRECTOR FROM MUNICIPAL DENIAL OF LICENSE TRANSFER - PERIOD FOR APPEAL CHANGED TO 30 DAYS FROM DATE APPLICANT IS GIVEN NOTICE OF DENIAL.

Assembly, No. 460 was approved by the Governor on June 2, 1955, and thereupon, effective immediately, became Chapter 43 of the Laws of 1955.

Heretofore, R. S. 33:1-26 permitted appeal to the Director within 30 days after the date a municipal issuing authority granted or denied an application for license transfer. Chapter 43 of the Laws of 1955 continues, unchanged, the period for appeal from the grant of a transfer, but changes the period of appeal from denial of a transfer. Pursuant to this amendment, if a municipal issuing authority "shall refuse to grant a transfer the applicant shall be notified forthwith of such refusal by a notice served personally upon the applicant, or sent to him by registered mail addressed to him at the address stated in the application, and such applicant may, within 30 days after the date of service or mailing of such notice, appeal to the director from the action of the issuing authority." (Underscoring added.)

As stated in the Statement accompanying Assembly, No. 460, this amendment removes the former unfairness in the law's transfers section by running the 30-day appeal period from the date an applicant for transfer is given notice of denial, just as is provided by law (R. S. 33:1-22) with respect to denial of application for a license renewal or for a new license.

WILLIAM HOWE DAVIS
Director.

Dated: September 6, 1955.

3. NEW LEGISLATION - R. S. 33:1-14 AMENDED - NEW TYPE OF LICENSE CREATED: BROKER'S LICENSE.

Assembly, No. 357 was approved by the Governor on June 28, 1955 and thereupon, effective immediately, became Chapter 101 of the Laws of 1955.

Heretofore, R. S. 33:1-14 has covered a single type of license, Public Warehouse License. This amendment makes provision, in R. S. 33:1-14, for a new type of license known as a "Broker's License" as follows:

> "The holder of this license shall be entitled, subject to rules and regulations, to act as a broker in the purchase and sale of alcoholic beverages for a fee or commission, for or on behalf of a person authorized to manufacture or sell at wholesale alcoholic beverages within or without the State. Such license shall not entitle the holder to buy or sell any alcoholic beverages for his own account, or take or deliver title to such alcoholic beverages for his own account, or take or deliver title to such alcoholic beverages, or receive or store any alcoholic beverages in his own name in this State, or offer, negotiate for the sale of or sell any alcoholic beverages to any wholesaler or retailer within this State; but such licensee shall be permitted, subject to rules and regulations, to use samples of alcoholic beverages in connection with the exercise of the privileges of such license. Such licensee's activities hereunder shall not be deemed to constitute a sale within

the meaning of paragraph 'w' of section 33:1-1 of the Revised Statutes. The fee for this license shall be $200.00."

Assembly, No. 357, as introduced, carried the following Statement:

"A person acting as a broker in connection with the purchase or sale of alcoholic beverages is presently required to obtain a plenary wholesale license although he does not purchase or sell such alcoholic beverages for his own account. To remove the inequity this bill, patterned after the New York statutory provision relating to 'broker's permit,' creates a new State license known as a 'broker's license' authorizing limited brokerage activities in the sale of alcoholic beverages to out-of-State purchasers."

WILLIAM HOWE DAVIS
Director.

Dated: September 6, 1955.

4. NEW LEGISLATION - R. S. 33:1-31 AMENDED - REVOCATION OF LICENSE OF A CORPORATION - DISQUALIFICATION EXTENDED TO THE OFFICERS AND DIRECTORS AND OWNERS OF MORE THAN 10% OF THE STOCK OF THE CORPORATION.

Assembly, No. 531 was approved by the Governor on June 17, 1955 and thereupon, effective immediately, became Chapter 80 of the Laws of 1955.

R. S. 33:1-31 has long provided that revocation of a license held by an individual or a partnership renders the individual or partners ineligible for license for two years following the revocation, but the section failed to provide for ineligibility of officers and directors and stockholders of corporations whose licenses have been revoked. This amendment corrects the anomalous situation. It provides that "A revocation shall render the licensee and the officers, directors and each owner, directly or indirectly, of more than 10% of the stock of a corporate licensee ineligible to hold or receive any other license, of any kind or class under this chapter, for a period of 2 years from the effective date of such revocation and a second revocation shall render the licensee and the officers, directors and each owner, directly or indirectly, of more than 10% of the stock of a corporate licensee ineligible to hold or receive any such license at any time thereafter."

In filling the gap in our law's revocation provisions the amendment, as noted, does not disqualify all stockholders but only the holders of more than 10% of the corporation's stock, thus conforming with R. S. 33:1-25 which provides (with certain exceptions) that holders of more than 10% of a corporate licensee's stock must qualify to the same extent as individual applicants for license.

WILLIAM HOWE DAVIS
Director.

Dated: September 6, 1955.

5. APPELLATE DECISIONS - GREENBERG v. MIDDLESEX.

EDWARD R. GREENBERG, trading as GREENIES,
Appellant,
-vs-
BOROUGH COUNCIL OF THE BOROUGH OF MIDDLESEX,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Lyness & Bedell, Esqs., by Joseph I. Bedell, Esq., Attorneys for Appellant.
Joseph J. Mutnick, Esq., and George Mutnick, Esq., Associate, Attorneys for Respondent.

BY THE DIRECTOR:

This is an appeal from the action of respondent whereby it suspended appellant's plenary retail consumption license for ninety days (to commence March 6, 1955) after finding him guilty of the following charges: (1) working upon the licensed premises while actually or apparently intoxicated, in violation of Rule 24 of State Regulations No. 20; (2) allowing a female employee to accept beverages at the expense of or as a gift from customers and patrons, in violation of Rule 22 of State Regulations No. 20; and (3) allowing and permitting a brawl, act of violence and disturbance upon the licensed premises, in violation of Rule 5 of State Regulations No. 20. The members of respondent Council voted unanimously that appellant was guilty of said charges and suspended his license as follows: 10 days on charge (1), 20 days on charge (2), and 60 days on charge (3), or a total suspension of 90 days.

Upon the filing of this appeal I entered an order on March 4, 1955, staying the effect of respondent's order of suspension pending determination of the appeal. R. S. 33:1-31.

In the petition of appeal it is alleged by the appellant that the respondent's action was erroneous because it was not supported by the evidence and because "the resolution and order served upon the appellant March 2, 1955 is contrary to and not in conformity with the resolutions of the Mayor and Council of the Borough of Middlesex passed and adopted at a special meeting of said Mayor and Common Council on February 26, 1955." These allegations were denied in respondent's answer.

Hearing of this appeal consumed a greater part of three days extending over a period of approximately one month. The stenographic transcript of the appeal and the transcript containing the testimony taken before the respondent (marked as an exhibit herein by consent of the attorneys for the parties hereto) total 577 pages of testimony and argument.

An attempt to make a detailed analysis of the testimony given by the various witnesses herein would burden this opinion with much that is immaterial and irrelevant. An examination of the evidence presented in the case makes it apparent that events took place in appellant's premises that were not conducive to the best interests of the alcoholic beverage industry. As a result of a fight, injuries were sustained by the licensee and also by a female. Although sympathetic with those that sustained any injuries, my concern in this case is limited to

violations of the Alcoholic Beverage Law that allegedly took place on the licensed premises. The testimony in regard to the exact location of the encounter appears to be contradictory. Appellant and some of the witnesses produced by him placed the scene of the conflict in the kitchen. The latter, incidentally, although adjacent to the barroom, is not listed as part of the licensed premises. Respondent produced witnesses herein who testified that the initial blow which set the action in motion was struck in the barroom.

I have made a careful and impartial examination of the evidence in this case in order to insure a just and proper determination in the matter. I am satisfied that much of the testimony of the appellant, his wife Helen, and Margaret Hogan (three of the participants in the fracas) is unworthy of belief. It is necessary, therefore, that I look to the testimony of other witnesses in order to obtain a true picture of the events with relation to the brawl that took place at the time in question. Because of the gravity of the alleged violations, an investigation was made by ABC agents in the matter. As a result of such investigation one Elizabeth Bradley, who was a patron in appellant's licensed premises on October 24, 1954, was interrogated on November 16, 1954, by the agents. In a written statement sworn and subscribed to by said Elizabeth Bradley (marked Exhibit R-14 in evidence) she narrated the events which took place at the time in question as follows:

> "I arrived at Greenberg's Tavern between 12:30 A.M. and 1 A.M. Sunday October 24, 1954, accompanied by a girlfriend, I do not wish to disclose her identity. Mr. Greenberg greeted me cordially. My girlfriend and I walked through the bar to the service bar in the rear. I went to the bar and ordered a Manhattan Cocktail. Mrs. Helen Greenberg was on duty at this bar. During my second drink and while I was conversing with several girls I knew at the bar Edward Greenberg came into the bar extremely drunk swinging his arms and using foul language. He walked towards me and threatened to hit me. I got up to leave and I walked from the back bar to the front bar and as I got to the front bar Mr. Greenberg grabbed my left arm and twisted it around to my back and told me to leave, that he did not want me in his place. Mr. Greenberg's wife Helen came from the back bar and told Eddie to leave me alone. Eddie released my arm and turned around and hit his wife in the eye with his fist, Mrs. Greenberg fell on the floor. Margaret Hogan stepped into help Mrs. Greenberg at this time. Edward Greenberg hit Margaret with his fist in her face at the bridge of her nose. This entire activity took place in the main barroom. I ran out of the premises to get in the car when Eddie Greenberg came running from the side of the building and grabbed my arm again and twisted it behind my back and was about to hit me when Eddie Zobrosski, the bartender came to my assistance and grabbed Mr. Greenberg. I got in the car and drove home."

I am not unmindful of the fact that at the instant hearing Elizabeth Bradley endeavored to change her account of the incidents which she claimed occurred at the time in question as were related by her to the agents on November 16, 1954. Despite this abortive attempt on her part, I believe her description of the occurrences as originally given to the agents. Veronica Cooney testified that she was in the kitchen with a girlfriend

who was ill when she heard "loud noises and screaming;" that she saw that appellant had hold of Elizabeth Bradley's arm and was screaming at her; that she observed the appellant strike Margaret Hogan in the eye with his fist. Veronica Cooney testified that this happened in the barroom.

I am satisfied that the brawl which took place on October 24, 1954, happened in the barroom and that appellant not only initiated the fracas but was an active participant therein.

I am also satisfied from the evidence produced herein that appellant, if not actually intoxicated, was apparently intoxicated. His demeanor on the occasion in question indicated conclusively that he had imbibed too much and was under the influence of liquor. In fact, appellant admits to consuming "half dozen in the course of the evening." I also conclude from the credible testimony presented with reference to the employment of Margaret Hogan that she actually performed various services for the appellant, especially acting as barmaid from time to time in the licensed premises. The fact that Margaret Hogan did not receive compensation for her services is immaterial. In Kravis v. Hock, Justice Eastwood, speaking for the Supreme Court (137 N.J.L. 252) with reference to the regulation prohibiting female employees to accept food or beverage at the expense of and as a gift from any customer or patron, made the following observation:

> "It will be observed that said regulation only makes it necessary to prove that the females are 'employed on the licensed premises'. To sustain a conviction for a violation of that regulation it is immaterial whether said females were in the employ of the licensee or were independent contractors. The only issue is: were they employed on the licensed premises and, while so employed, did they accept any drinks as gifts from any customer or patron of the licensee? Webster defines the word 'employ': "To use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose." The Commissioner, since the adoption of this regulation in November, 1940, has consistently construed the word 'employed' as used in said regulation to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship.' Such a construction seems to be a logical one."

I am mindful that various other witnesses were produced by the parties herein whose testimony was given either before respondent and/or at the instant hearing. I have carefully examined the testimony of all the witnesses and the evidence adduced in this case and conclude therefrom that the appellant was guilty of the charges preferred by the respondent.

Appellant's attorney contends that the resolution in which appellant herein was adjudged guilty of the charges preferred and the separate penalties imposed for the separate offenses committed was defective because it did not state whether the penalties were to run concurrently or consecutively. He has submitted a memorandum of law containing precedents in criminal cases wherein the courts have consistently held that, where any ambiguity in the sentence exists, it should be resolved in favor of the defendant and the sentences imposed should be construed to be concurrent rather than consecutive. All of the cases cited therein are criminal in nature, whereas the present proceeding is civil in nature. Grant Lunch Corp. v. Driscoll,

129 N.J.L. 408; aff'd 130 Id. 554; certiorari denied, 320 U. S. 801; The Panda v. Driscoll (E. & A.), 135 N.J.L. 164; Kravis v. Hock, supra; In re Schneider, 12 N. J. Sup. 449. I am of the opinion that the arguments advanced by appellant's attorney with reference to the penalty and the cases cited in substantiation thereof are inapplicable in the present situation. I might also point out that, in Agostino v. Newark, Bulletin 251, Item 11, wherein separate penalties for separate offenses were imposed, Commissioner Burnett stated:

> "Respondent was justified in imposing separate penalties for each offense. In Re Vanderzee, Bulletin 241, Item 3, the licensee was found guilty of serving beer during prohibited hours on Sunday and also keeping the licensed premises open during those hours. I imposed a penalty of five (5) days for each offense. The same procedure was followed in Re Four Hundred Social Club, Inc., Bulletin 242, Item 8. Hence, I see no objection to imposing a separate penalty for each offense in this case. As to the length of the suspension: the measure or extent of penalty to be imposed in a disciplinary proceeding against a municipal licensee rests within the sound discretion of the issuing authority. I have on infrequent occasion reduced an excessive penalty. The abuse of discretion, however, must be palpable. Dzieman v. Paterson, Bulletin 233, Item 10. The penalty inflicted in the instant case is not excessive."

I am satisfied that the sentiments expressed on that occasion by Commissioner Burnett are applicable herein.

I shall affirm respondent's action.

Accordingly, it is, on this 23rd day of August, 1955,

ORDERED that the action of respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the ninety-day suspension by respondent of appellant's plenary retail consumption license C-4, for premises 660 Bound Brook Road, Middlesex Borough, be and the same is hereby restored and reimposed to commence at 2:00 a.m. August 31, 1955, and terminate at 2:00 a.m. November 29, 1955.

WILLIAM HOWE DAVIS
Director.

6. APPELLATE DECISIONS - SAFEWAY STORES, INC.; CUNICELLA; QUALITY MARKET, INC. AND BUONANNO v. WESTFIELD.

SAFEWAY STORES, INC.; NICHOLAS CUNICELLA, t/a LIBERTY FOOD STORE; QUALITY MARKET, INC., and EDWARD BUONANNO, t/a P. & E. GROCERIES,	)	
Appellants,	)	ON APPEAL
-vs-	)	CONCLUSIONS AND ORDER
TOWN COUNCIL OF THE TOWN OF WESTFIELD,	)	
Respondent.	)	

Carpenter, Gilmour & Dwyer, Esqs., by Elmer J. Bennett, Esq. and Robert R. Whelan, Esq., Attorneys for Appellant Safeway Stores, Inc.

Dughi & Johnstone, Esqs., by Irvine B. Johnstone, Jr., Esq., Attorneys for Appellants Cunicella, Quality Market, Inc., and Buonanno.

Robert S. Snevily, Esq., Attorney for Respondent.

BY THE DIRECTOR:

On June 27, 1955, the respondent adopted a resolution denying the renewal applications of all six of its outstanding limited retail distribution licenses. Four of these applicants have appealed such action and, since the appeals involve a common question of law, they have been consolidated for the purpose of this decision. The four applicants are presently operating pursuant to extensions granted by me upon the filing of their appeals. See R. S. 33:1-22.

The respondent's answer to the petitions of appeal states that the reasons for denial in all cases were that (1), in view of N.J.S.A. 33:1-12.27, which prohibits the issuance of any new limited retail distribution licenses after May 23, 1952, the renewals "would create unfair competition *** [and grant] an unfair privilege and advantage to those few stores who had procured licenses prior to the enactment of said law"; (2) the issuance of such licenses "creates the opportunity for minors to purchase *** alcoholic beverages contrary to law"; and (3) the "people in the community may purchase beer from the package stores *** and therefore will not be deprived of any benefits or inconvenienced by the denial of such applications for renewal."

By agreement of counsel, this hearing was limited to oral argument before me, and submission of briefs, on the legal question whether the respondent's action was invalid in view of the provisions of R. S. 33:1-12.3(b) which, so far as here pertinent, provides:

> " The governing board or body of each municipality may, by ordinance, enact that no limited retail distribution license shall be granted within its respective municipality." (Emphasis supplied.)

The legislative intent is clear. The grant or denial of individual licenses, since the statute specifies no particular mode of procedure therefor (see R.S. 33:1-19 and 24), may be accomplished by resolution. Eggers v. Kenny, 15 N.J. 107, 123 (1954). Where, however, an entire class of licenses is sought to be terminated, such objective requires the passage of an ordinance. R. S. 33:1-12.3(b), quoted above. The distinction is not technical. It is vital. The conclusion is inescapable that

the legislature intended that, before an entire class of licenses could be outlawed, notice thereof be given to interested persons and that they have an opportunity to be heard thereon. See R.S. 40:49-2.

It is to be noted that the reasons for denial herein do not relate to the qualifications of any individual license holder, or the suitability or location of any individual premises, all of which would be pertinent to each renewal application, but, rather, relate to all of the licenses in question as a class. The avowed principle of the discretion lodged in municipal issuing authorities to determine, by resolution, whether individual licenses shall be renewed may not be invoked to validate the failure to follow the express legislative directive when eliminating an entire class of licenses. Since the action taken was by resolution, and not by ordinance, it has no force and effect, and must be reversed. Howard v. City of Paterson, 6 N. J. 373 (1951).

There is an additional reason for reversal. The six limited retail distribution licenses in the respondent municipality, and the license fees therefor, were fixed by ordinance. Since, as heretofore appears, no new limited retail distribution license may be issued, the refusal to renew all such outstanding licenses is tantamount, for all practical purposes, to a repeal of the ordinance creating such licenses. It is settled that the repeal of an ordinance may not be effected by resolution. Am. Malleables Co. v. Bloomfield, 83 N.J.L. 728, 734 (E. & A. 1912); Antonelli Construction v. Milstead, 34 N. J. Super. 449, 456 (L. Div. 1955).

Accordingly, it is, on this 24th day of August, 1955,

ORDERED that respondent's action in refusing to renew the limited retail distribution licenses of Safeway Stores, Inc.; Nicholas Cunicella, t/a Liberty Food Store; Quality Market, Inc., and Edward Buonanno, t/a P. & E. Groceries, be and the same is hereby reversed, and respondent is hereby directed to issue such renewal licenses in accordance with the applications heretofore filed.

WILLIAM HOWE DAVIS
Director.

7. APPELLATE DECISIONS - WEISS v. NEWARK.

GEORGE F. WEISS, trading as NEW LEAF MARKET,
Appellant,
-vs-
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Louis K. Press, Esq. and Joseph A. D'Alessio, Esq., Attorneys for Appellant.
Vincent J. Torppey, Esq., by Nicholas Albano, Esq., Attorney for Respondent Municipal Board.
Herman E. Dansker, Esq. and Morris Barr, Esq., Attorneys for Objectors.

BY THE DIRECTOR:

This is an appeal from respondent's denial of appellant's application, filed January 20, 1955, for transfer of plenary

retail distribution license then held by him from premises 348 Clinton Avenue to premises proposed to be constructed diagonally opposite at 345 Clinton Avenue.

The Municipal Board considered the application at its meeting held on March 3, 1955, and heard objections to the transfer voiced by representatives of two churches in the vicinity, and various other objectors, and also heard a number of persons who testified in favor of the transfer and, at a meeting on March 10, 1955, a majority of the Board voted to deny the application for the reasons that (1) the transfer would materially affect and alter the residential character of the immediate surrounding neighborhood -- that it would create an objectionable condition to those persons living in the immediate neighborhood and their enjoyment of their property and peace and quiet; (2) it would be a detrimental influence and interference with, and will be harmful to, the nearby churches and would constitute a moral hazard to their youth activities; and, last, there are adequate facilities in the area to serve the needs and convenience of the public in the area.

Appellant, in his petition of appeal, contends that respondent's action was an abuse of discretion, arbitrary and capricious and, from a standpoint of economy and hardship, he was unjustly denied the privilege of the transfer of his business location.

Respondent, in its answer, denies these allegations and reiterates the grounds upon which it denied the application as above set forth.

The evidence presented before the Municipal Board, augmented by the evidence presented on appeal, discloses that, while both sides of Clinton Avenue at that point are zoned for business, the area to which transfer is proposed is actually an oasis of one-family old-fashioned residences (some converted into rooming or boarding houses), all erected on a high embankment or terrace and uniquely different from other mixed commercial and residential structures in the immediate vicinity. The premises for which transfer is sought is one of these one-family dwellings. Appellant proposes to excavate the terrace and construct a store there without any alteration to the upper floors. If permitted, it would be the first outright commercial structure in that particular area.

It further appears from the evidence presented that, while the proposed new premises would perhaps not be any nearer to the Central Presbyterian Church (one of the objectors), it would be nearer to the Trinity Temple Seventh Day Adventist Church (another objector) by about sixty-five feet (the width of Clinton Avenue) and would be two hundred thirty-seven feet and six inches from the entrance to that church. This church has a congregation of approximately two hundred twenty-five members and conducts a day-school for children five days a week.

The appellant's primary ground of appeal, whereby in effect he seeks to counterbalance the considerations of residential area and nearer proximity to the church, is his claim that denial of the transfer will work an undue hardship because of increased rental for the premises which he occupies and other possible difficulties with his landlord. Aside from the fact that he has paid the same rental for several years (which his landlord testified is all that he presently demands), and that whatever other difficulties he has with his landlord do not appear to be unsurmountable of settlement, it is a settled principle that, in a conflict between private interests and the interests of the community at large, the latter must prevail. Pasquale v. Tenafly, Bulletin 1012, Item 1.

The general principles involved are that a licensee has no absolute right to the transfer of a license to sell alcoholic beverages, and that the decision as to whether or not a license should be transferred to a particular location rests within the sound discretion of the local issuing authority in the first instance.

Ordinarily, a transfer of a license from one side of the street to the other in the same area should be granted. However, there are exceptions to such principle, such as where the issuing authority has a policy against issuance of two licenses of the same class on the same side of the street in any block as in Schengrund and Minkoff v. East Orange, Bulletin 1024, Item 4; where it deems it undesirable to transfer a license next door to another licensed premises, as in Jasinski v. Jersey City, Bulletin 972, Item 5; where the transfer would aggravate the concentration of licenses in the area, as in Willner's Liquors v. Camden, Bulletin 669, Item 14; or where the new premises are deemed to be located in too close proximity to a church, as in Moraitis v. Lower Penns Neck, Bulletin 839, Item 11.

Such exception is equally applicable in principle where the proposed new location, although zoned as a business area, opposite the old location, is actually an island of residences or boarding houses, untouched by any outward appearance of a commercial aspect.

The Director's function on appeal is, not to substitute his opinion for that of the issuing authority but, rather, to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal views. Cimarosa v. Maywood and Maywood Inn Corp., Bulletin 1075, Item 9.

The burden of establishing that the respondent's action was erroneous and should be reversed rests with the appellant. Rule 6 of State Regulations No. 15. The decision of respondent that the proposed new location is in a residential area and nearer to a church is supported by the evidence. After considering most carefully all of the evidence and all of the facts and circumstances in this case, I find that appellant has failed to sustain the burden of establishing that respondent's action was erroneous and should be reversed.

Accordingly, it is, on this 24th day of August, 1955,

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

WILLIAM HOWE DAVIS
Director.

8. APPELLATE DECISIONS - PIGNOTTI v. WEST NEW YORK (AMENDED ORDER).

Cases Nos. 1 & 2
JOHN PIGNOTTI and MARIE PIGNOTTI, t/a SKY CLUB,

Appellants,

-vs-

BOARD OF COMMISSIONERS OF THE TOWN OF WEST NEW YORK,

Respondent.

ON APPEAL
AMENDED ORDER

Alexander White, Esq., Attorney for Appellants.
Samuel L. Hirschberg, Esq., Attorney for Respondent.

BY THE DIRECTOR:

Following entry of Conclusions and Order dated August 11, 1955, in the above cases, the attorney for appellants advised me that part of the suspension had been served prior to the entry of an order staying respondent's order of suspension. A review of the file discloses that two separate orders entered by respondent suspended appellants' license for a total period of thirty days effective April 21, 1955, at 7:00 a.m., and that the order granting the stay was entered by me on April 26, 1955, immediately after the filing of the appeal. My Conclusions and Order in these cases in effect reduced the suspension from thirty days to twenty days, and reimposed the sentence to commence at 3:00 a.m. August 22, 1955, and to terminate at 3:00 a.m. September 11, 1955. It now appears to my satisfaction that appellants had served five days of the suspension prior to the entry of my order dated April 26, 1955, and that they should now be required to serve only the balance of said suspension. Arnone v. Red Bank, Bulletin 1034, Item 3.

Accordingly, it is, on this 25th day of August, 1955,

ORDERED that the third paragraph of the order heretofore entered herein be amended to read as follows:

> "ORDERED that the balance of the twenty-day suspension of appellants' plenary retail consumption license C-1, for premises 6301 Dewey Avenue, West New York, imposed by respondent after a finding of guilt as to Charge 2, be and the same is hereby restored and reimposed against appellants for the same premises, to commence at 3 a.m. August 22, 1955, and to terminate at 3 a.m. September 6, 1955."

WILLIAM HOWE DAVIS
Director.

9. STATE LICENSES - NEW APPLICATIONS FILED.

Warehouse Receipts Corporation
48-52 Essex Street, Jersey City, N. J.
Application filed September 9, 1955 for Warehouse Receipts License.

El Dorado Transportation Company, Inc.
266 Surf Ave., Stratford, Connecticut.
Application filed September 12, 1955 for Transportation License.

William Howe Davis
Director.