STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, N. J.

BULLETIN 491 JANUARY 27, 1942

1. APPELLATE DECISIONS - PLAYDIUM, INC. v. MUNICIPAL BOARD OF THE CITY OF ORANGE.

LOCAL ISSUING AUTHORITIES MAY ACT ONLY IN FORMAL MEETING ASSEMBLED - BURDEN OF ESTABLISHING ERROR IN RESPONDENT'S ACTION RESTS UPON APPELLANT.

PLAYDIUM, INC., a corporation of New Jersey,

Appellant,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ORANGE,

Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Samuel S. Ferster, Esq., Attorney for Appellant.
Edmond J. Dwyer, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from the denial by respondent, of appellant's application for a transfer of a Plenary Retail Consumption License from James Joseph McGrath to Playdium, Inc. and from 560 Forest Street to 512 Main Street in the City of Orange.

In its petition of appeal, the appellant alleges that the action of the respondent was erroneous in that the denial of the application was arbitrary, capricious, without warrant of law and an abuse of respondent's discretion. The respondent's answer alleges that the refusal of the appellant's application was based on the evidence presented below and was made in the exercise of respondent's sound discretion.

Because of the issues raised by appellant at the hearing, it may be necessary to consider a number of facts which ordinarily would not be considered material.

The evidence discloses that, for a number of years prior to July 1, 1940, a Plenary Retail Consumption license had been in existence for a building occupied by the Knights of Columbus and located on a portion of the plot of ground on which the building at 512 Main Street is now located. This license was not renewed on July 1, 1940, and sometime thereafter the old building was torn down. After the demolition of the latter, the owner of 512 Main Street, having first obtained a building permit, began the construction of a modern business building containing a number of stores and a bowling alley.

The evidence discloses that in July 1941 Mac A. Kaplus, an officer of the appellant corporation, filed an application with the respondent requesting a transfer of a Plenary Retail Consumption license to him and to the premises now sought to be licensed. That license had been held for the prior fiscal year by one Curcio, for

other premises in the City of Orange. At a meeting held on August 4, 1941, respondent denied the application of Mac Kaplus. From the minutes of that meeting it appears that the denial was based solely upon the ground that Curcio had not renewed his license for the then fiscal year, and hence there was no license in existence which could be transferred to Kaplus. At the time this action was taken, no objection or protest, either as to the applicant or to the premises to which the transfer was sought, had been filed and apparently the only question before the Board at that time was the legal question as to whether or not there was any license in existence which could be transferred.

There is a serious conflict in the evidence as to certain statements allegedly made by members of the respondent board immediately following the denial of the Kaplus application. An officer of the appellant testifies that the members of the respondent board then agreed that they would approve the transfer of a valid license to the premises in question. The chairman of the board, however, testified that, at that time, he consulted with the other two members of the board and then stated that there would be no "legal" objection to the transfer of a proper license to the premises. Whatever may have been said at that time by the chairman or the other members of the Board, it appears that no official action was taken at that time.

At the hearing below on the instant application which was filed after the Kaplus application had been denied, the board had before it a written objection to the transfer signed by the President of Village Green, a new housing development located almost directly across Main Street from the site to which transfer of the license was sought. The board below also had before it a letter from the President of the Board of Education objecting to the transfer and calling attention to the recently completed Orange High School Stadium which is located directly in the back of the premises for which the license was sought. The president of Village Green likewise appeared at the hearing before the Respondent on September 5, 1941 and renewed the objections stated in his letter. Mayor Ovid Bianchi entered an appearance on behalf of the Board of Commissioners of the City as well as the Board of Education.

At the conclusion of the hearing below, respondent unanimously denied the application for transfer and stated its conclusions as follows:

> "1. The Board cannot, and did not, consider any differences which the City Commissioners, and particularly the Mayor, had with the owner of the property regarding promises which it is claimed were not fulfilled. That is not part of the function of the Board.
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> "2. The Board cannot, and did not, consider the effect of a tavern on land values where the land is zoned for business; its only consideration is the suitability and adaptability of the location to take on an additional tavern. Land values has nothing to do with this question. Our only concern is location and need.
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> "3. In the opinion of the Board, a school stadium does not come within the law prohibiting a tavern within 200 feet of a church or school. Furthermore, if it did, according to the legal established method of measuring the distance between the proposed tavern and the stadium is in excess of 200 feet.

"However, the Board feels, in the exercise of its discretion, that it cannot take lightly a protest from the Board of Education objecting to a tavern being located in the same block as the stadium. This question goes to the suitability of the location to accept a tavern.

"4. Because this building is located in a business zone, the Board need not go into the question of location. Our only concern is the need of a tavern in this particular area. It has been represented to us that the transfer of the license is sought for a particular use and clientele, namely, the patrons of the bowling alley to be erected. However, after considering this question, we feel we have no right to consider this in a special or particular light, but to deal with it as just another tavern open to the public.

"The record shows that in this particular area there now exists four plenary retail consumption licenses, one plenary retail distribution license and one club license. This number the Board considers more than sufficient for the demand now and in the future of this locality. It has been the policy of the Board to refuse additional competition in an already congested area.

"On motion of Mr. Rossi, seconded by Mr. Callaghan, it was unanimously resolved that the application for a transfer of Plenary Retail Consumption License #C-68 from James Joseph McGrath, 560 Forest Street to the Playdium, Inc., 512 Main Street, be denied."

The appellant relies in part upon statements allegedly made by members of the respondent board following the denial of the first application for transfer in August. Whatever statements may have been made at that time, a license issuing authority is not bound by informal remarks made by its members or even by action taken prior to a hearing on objections filed. Hobbs v. Lower Penns Neck, Bulletin 372, Item 6; Pergola v. Jamesburg, Bulletin 398, Item 6; Harvey v. Pemberton, Bulletin 463, Item 2; Larry's Shamrock Tavern v. Fort Lee, Bulletin 467, Item 6. Whether or not any representations were made on August 4, 1941, respondent is not legally bound thereby, as appellant seems to contend. Local issuing authorities may act only in formal meeting assembled. Curbstone opinions of their members are a vain thing for safety. Because of this, however, members of issuing authorities should refrain from expressing any opinions which may lead wishful thinkers to believe that they have received the go-ahead signal.

It further appears that the issue presented to the local board on September 5, 1941 when the present application was denied was substantially different from that before the board in August when the application of Kaplus was denied.

Appellant has suggested on the record and sought to prove that the local excise board was unduly influenced by Mayor Bianchi in reaching its decision. A careful reading of the evidence fails to convince me that such was the case.

The transfer of a liquor license is not an inherent or automatic right. The issuing authority may grant or deny the transfer in the exercise of a reasonable discretion. If denied on reasonable

grounds, such action will be affirmed. On the other hand, if it appears that the refusal was arbitrary, the action of respondent will be reversed. Shapley v. Delaware, Bulletin 294, Item 7. Under the rules governing appeals, the burden of establishing error in the respondent's action rests upon the appellant. A careful study of the record in this case leads me to the conclusion that the appellant has not sustained the burden of proof imposed upon it. I am of the opinion that the reasons stated by the respondent board must be considered the true reasons for denial of the applications below. The chairman of the respondent board testified that his board has been attempting to eliminate the undue congestion of taverns in various sections of the City. At the present time plenary retail consumption licenses are in existence for premises at 548 Main Street and 558 Main Street, both of which are located within six hundred feet of the premises to which the transfer is now sought; a similar license is in existence at 465 Main Street, which is within five hundred feet of the premises to which the license is sought and a similar license is in existence at 406 Main Street, within eleven hundred feet of the premises to which transfer is sought.

The number of licenses which shall be permitted in any given vicinity is a matter confided in the first instance to the sound discretion of the issuing authority. Kalish v. Linden, Bulletin 71, Item 14; Drucker v. Trenton, Bulletin 474, Item 9; Service Liquors, Inc. v. Hackensack, Bulletin 482, Item 3.

Considering the changed character of the neighborhood, as evidenced by the recently completed Orange High School Stadium and the substantial housing development known as Village Green, I cannot say that respondent abused its discretion in refusing to transfer another license into this section of the city. It is true that since July 1, 1940 there has been one less license than formerly existed in this section of the city, but local issuing authorities will be upheld where I am satisfied that they acted in good faith in seeking to lessen the congestion of taverns in any given vicinity.

Accordingly, it is, on this 10th day of January, 1942,

ORDERED, that the petition of appeal be and the same is hereby dismissed.

ALFRED E. DRISCOLL,
Commissioner.

2. ELIGIBILITY - DRIVING WHILE DRUNK - ASSAULT AND BATTERY - VIOLATION OF ALCOHOLIC BEVERAGE CONTROL ACT - NO MORAL TURPITUDE INVOLVED - APPLICANT NOT DISQUALIFIED BY STATUTE - FITNESS TO HOLD LICENSE TO BE DETERMINED BY ISSUING AUTHORITY.

January 5, 1942

Case No. 400

Applicant herein has requested a ruling as to whether he is disqualified by statute from holding a liquor license in the State of New Jersey.

In September 1933 he was found guilty by a local Recorder on a charge of driving while drunk. He appealed to the Court of Common Pleas, which affirmed the conviction and imposed a fine of $250.00. This conviction, however, does not constitute conviction of a "crime" within the meaning of R. S. 33:1-25. Re Case No. 133, Bulletin 170, Item 7; Re Case No. 302, Bulletin 357, Item 10.

In July 1935 applicant was again convicted by a local Recorder on a charge of assault and battery and fined $10.00. At the hearing herein he testified that this conviction resulted from a complaint made by a woman that he had struck her son. Applicant says that the boy had knocked down a sign in front of his store and denies that he struck the boy. The question of his guilt or innocence cannot be redetermined here but there appear to be no aggravating circumstances and in my opinion the crime of assault and battery under these circumstances does not involve moral turpitude. Re Case No. 271, Bulletin 315, Item 4.

In March 1939 applicant was again arrested, charged with a violation of the Alcoholic Beverage Control Act. It appears that a few days prior to the date of his arrest an investigator of this Department visited applicant's grocery store; purchased from him two glasses of whiskey and purchased from his wife four bottles of tax-paid beer. The store was not licensed for the sale of alcoholic beverages. As the result of a search, pursuant to search warrant, a five-gallon can, containing about three gallons of untaxed alcohol, was found in a bedroom and a pint bottle of tax-paid whiskey was found in the kitchen of applicant's home. After his arrest, applicant was fined $50.00 for violating a local ordinance and subsequently indicted on charges of selling alcoholic beverages on unlicensed premises and possessing untaxed alcoholic beverages with intent to sell, in violation of the provisions of the Alcoholic Beverage Control Act. He pleaded non vult to said indictment and was sentenced to serve thirty days in jail.

At the hearing herein applicant testified that the alcohol which was found in his home was used for "radiators and liniment for rubbing." The investigation made by this Department at the time of his last arrest does not disclose any evidence that the applicant operated an unregistered still.

Violation of the Alcoholic Beverage Law is not per se a crime involving moral turpitude. Re Case No. 261, Bulletin 305, Item 13. While the cases hold that moral turpitude is involved, if the violation is in any way connected with the operation of an unlawful still, it has been determined that a single conviction for possession or sale of alcoholic beverages in violation of the Control Act does not involve moral turpitude. Re Case No. 188, Bulletin 212, Item 2; Re Case No. 241, Bulletin 290, Item 8; Re Case No. 366, Bulletin 445, Item 10; Re Case No. 367, Bulletin 447, Item 7; Re Case No. 375, Bulletin 465, Item 8. In my opinion the conviction considered herein does not involve moral turpitude.

It follows that applicant is not disqualified by statute from holding a license and it is recommended that he be so advised. However, a copy of this ruling should be sent to the issuing authority of the municipality in which applicant resides. There is a serious question as to whether or not applicant is a fit person to hold a liquor license. That question should be determined by the local issuing authority if and when he applies for a liquor license.

Edward J. Dorton,
Deputy Commissioner
and Counsel.

APPROVED:
ALFRED E. DRISCOLL,
Commissioner.

3. DISCIPLINARY PROCEEDINGS - EMPLOYING AND PERMITTING THOSE HAVING KNOWN CRIMINAL RECORDS ON THE LICENSED PREMISES - HEREIN OF THE WIFE - PERMITTING LEWD AND FILTHY STORIES BY ENTERTAINERS CONSTITUTES IMMORAL ACTIVITY - SALES AFTER HOURS - 30 DAYS' SUSPENSION.

In the Matter of Disciplinary Proceedings against

JAMES R. McCLYMENT,
549 S. Broadway,
Gloucester City, N. J.,

Holder of Plenary Retail Consumption License C-11, issued by the Common Council of Gloucester City,

THEODORE TRINKELLA,
239 S. Quince Street,
Philadelphia, Pa.,

Holder of Employment Permit No. 4048, issued by the State Commissioner of Alcoholic Beverage Control,

Alfred B. Cuneo,
239 S. Quince Street,
Philadelphia, Pa.,

Holder of Employment Permit No. 6835, issued by the State Commissioner of Alcoholic Beverage Control.

CONCLUSIONS AND ORDER

Frank M. Lario, Esq., Attorney for defendant-licensee.
No appearance for defendant-permittees.
Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER: (Orally)

This matter comes before me upon charges preferred by the Department of Alcoholic Beverage Control and served upon the defendant-licensee alleging: (1) He employed female impersonators, in violation of Rule 4 of State Regulations No. 20; (2) he permitted lewdness and immoral activity and suffered his licensed premises to be conducted in such a manner as to become a nuisance, in violation of Rule 5 of State Regulations No. 20; (3) he knowingly employed non-residents without permits, in violation of Rule 1 of State Regulations No. 11; (4) he knowingly employed Edna McClyment, a person who would fail to qualify as a licensee by reason of her convictions of a crime involving moral turpitude, in violation of R. S. 33:1-26; (5) he permitted said Edna McClyment, a known criminal and person of ill-repute, on his licensed premises, in violation of Rule 4 of State Regulations No. 20; (6) he sold alcoholic beverages after 2:00 A.M. on Sunday, September 7, 1941, in violation of Section 3 of an ordinance concerning alcoholic beverages adopted February 3, 1938 by the Mayor and Common Council of the City of Gloucester City; and (7) he permitted females employed on the licensed premises to accept beverages at the expense of customers, in violation of Rule 22 of State Regulations No. 20.

In addition, there is before me charges brought by the Department against the defendant-permittees, served on them by registered mail, alleging that they were employed as female impersonators by the defendant-licensee.

At the hearing on these charges begun on December 19, 1941 and continued on January 14, 1942, the defendant-licensee appeared and entered a plea of non vult to the sixth charge and not guilty as to all other charges. The defendant-permittees, Theodore Trinkella and Alfred B. Cuneo, failed to appear, although it appears from the record that the registered letters containing copies of the charges, addressed to them at the addresses given by them at the time they applied for employment permits, were received. It also appears from statements made by counsel that there has been some correspondence with one or both of the permittees in question, advising them of the hearing in their cases.

With respect to the charge against Theodore Trinkella and Alfred B. Cuneo, I am going to revoke their employment permits because of their failure to appear in answer to the charges and defend themselves. Because of the state of the proof in the case of James R. McClyment with respect to the charge of female impersonation, which leaves me in some doubt, I will permit the defendant-permittees to appear before the Department and reapply for employment permits. At that time, they will be given an opportunity to explain their activities and their failure to appear at the hearing. In the meantime, their permits will stand revoked.

The hearing on the charges against the defendant-licensee, James R. McClyment, has consumed one full day and a portion of a second day. With the permission of counsel, there has been entered on the record a stipulation that Mr. and Mrs. McClyment have entered into an agreement to sell their premises and have made arrangements to purchase an entirely different type of business, and will go out of the liquor business entirely. Counsel for the defendant-licensee has moved for, and I have granted his motion to withdraw the plea of not guilty to Charges 1, 2, 3, 4, 5 and 7, and in lieu thereof, to enter a plea of nolo contendere.

With respect to the entire case against James R. McClyment, I have this to say: If rumor were fact I would be inclined to find the defendant-licensee guilty on all of the charges. However, notwithstanding the fact that I am the head of an administrative agency, I am, none the less, bound by some of the rules of evidence, at least those the purpose of which is to afford the defendant that protection to which he is undoubtedly entitled under the American system.

I am in some doubt as to whether or not the State has sustained the burden of proof with respect to the first charge, namely, that of employing known female impersonators. The testimony indicates that some of these employees came dangerously close, in their type and by their actions, to being female impersonators, but there is still some doubt. The licensee should be extremely careful to avoid even the appearance of employing those who have been found objectionable either by the Department or by the public at large.

With respect to the second charge, again there is some doubt in my mind with regard to the question of female impersonation. I don't believe the State has proven there was immoral activity in the usual sense of the word on the licensed premises, although the State's proof does indicate that there were stories told that were highly improper, contrary to public morals and to the code of ethics we expect licensees to live up to. Here again, it should be noted that the

licensee has denied, through his counsel, that these stories were told in such a manner that the general public could hear them, and, in fact, my recollection of the testimony is that the licensee denied entirely that the stories had been told. However, I know of no reason why I should doubt the veracity of the State's witnesses. The narrating of lewd and filthy stories by entertainers itself is sufficient to constitute a lewd and immoral activity on the part of the licensee within the meaning of the charge and in violation of Rule 5 of State Regulations No. 20. Stories of the type described by the State's witnesses in their testimony are definitely out of order and the responsibility is on the licensee to see that the telling of such filthy stories does not occur on his premises. If he is unwilling or unable to assume this responsibility, he should get out of the liquor business.

With respect to the third charge, knowingly employing entertainers who were disqualified because of their non-residence and who did not hold employment permits, here too the testimony is in conflict. The statements offered in evidence by the State indicate that some of these folks who were employed upon the occasion of the A. B. C. men's visit were in fact non-residents. The licensee signed such a statement. On the other hand, the licensee subsequently testified that he inquired of the entertainers as to their residence, and in every instance they gave a New Jersey residence. I am of the opinion, however, that at least some of these employees were disqualified by virtue of being non-residents.

With respect to the employment of Mrs. McClyment, which is charged as being a violation of the Act, I have noted that the licensed premises are also the home of Mr. and Mrs. McClyment. I have been advised by counsel representing the defendant that on one occasion, Mrs. McClyment asked the former Commissioner for his opinion with respect to her presence on the licensed premises. Assuming this to be the case, it is, none the less, my opinion that Mrs. McClyment should not have frequented that portion of the licensed premises which was used for the sale and service of alcoholic beverages. I reach this conclusion because of her prior record, which was known, of course, to herself and known also to the licensee because of previous charges which were preferred against him by the local board. We cannot permit those with known criminal records to be present on licensed premises, and where the relationship happens to be that of husband and wife, it is just unfortunate. Here again, we have to remember that those who are in the liquor business are in a privileged business and that they must obey regulations and statutes which do not generally apply in industry and business as a whole, and they will, therefore, have to adjust their private lives in order to first obey the law.

With regard to Charge 6, that of serving after hours, there was an original plea of <u>non vult</u> and there is no question with regard to the fact that such sale did occur.

Charge 7 has given me some trouble. The State has offered proof that an employee of the licensee declared herself in on a party after the closing hour and was served or at least drank a glass of beer, payment of which was made by guests; that Mrs. McClyment had a glass of Coca-Cola, paid for by a guest. These constitute a violation of the regulation.

All in all, in taking into consideration the previous record of the licensee and in taking into consideration the licensee's assurance to me that he is going out of the liquor business, which is compulsory, I am, none the less, going to suspend the licensee's

license for thirty (30) days, with the privilege to whosoever may purchase the business and upon securing the transfer of the license to apply for the lifting of the suspension at the conclusion of three (3) weeks. Application may be made prior to the expiration of the three-week period upon a showing that a bona fide sale has been concluded and that there is no relationship between the new owner of the premises and the former owner. I will expect the defendant-licensee not to go back into the liquor business without first applying to the Department for permission so to do.

I want it distinctly understood, for the benefit of the defendant, that I do not consider the State to have carried the burden of proof in all of these charges; that under the plea he is not to be considered guilty of each and every one of the charges, although there has been sufficient guilt proven to warrant the suspension imposed.

An Order will be entered in accordance with the opinion I have just given. I will make the Order effective at the closing of business Saturday, January 17, 1942.

Accordingly, it is, on this 16th day of January, 1942,

ORDERED, that Plenary Retail Consumption License C-11, heretofore issued to James R. McClyment, be and the same is hereby suspended for a period of thirty (30) days, effective Sunday, January 18, 1942, at 2:00 A. M. Leave is hereby given to apply to me for an order lifting said suspension upon presenting proof that the licensed business of James R. McClyment has been sold to a bona fide purchaser or purchasers; that the license of James R. McClyment, which is hereby suspended, has been transferred by the Common Council of the City of Gloucester City, in the exercise of its own sound discretion, to a bona fide purchaser or purchasers; and that neither the said James R. McClyment nor Edna McClyment, his wife, have any interest or connection, directly or indirectly, in said license or licensed business, but in no event will an order lifting the suspension be entered herein until the expiration of at least twenty-one days from the effective date hereof; and

It is further ORDERED, that no liquor license be granted in this State to either the said James R. McClyment or Edna McClyment, his wife, unless and until approval first be obtained from the State Commissioner of Alcoholic Beverage Control; and

It is further ORDERED, that Employment Permit No. 4048, heretofore issued to Theodore Trinkella by the State Commissioner of Alcoholic Beverage Control, be and the same is hereby revoked, effective immediately. Leave is hereby given to said Theodore Trinkella to apply to me for an opportunity to be heard on the charges herein and for a reinstatement of his Employment Permit upon presentation of satisfactory justification for his failure to appear in answer thereto; and

It is further ORDERED, that Employment Permit No. 6835, heretofore issued to Alfred B. Cuneo by the State Commissioner of Alcoholic Beverage Control, be and the same is hereby revoked, effective immediately. Leave is hereby given to said Alfred B. Cuneo to apply to me for an opportunity to be heard on the charges herein and for a reinstatement of his Employment Permit upon presentation of satisfactory justification for his failure to appear in answer thereto.

ALFRED E. DRISCOLL,
Commissioner.

4. ELIGIBILITY - LARCENY ORDINARILY INVOLVES MORAL TURPITUDE - PETITIONER UNDER 21 YEARS OF AGE - APPLICATION DENIED.

January 16, 1942

Case No. 403

Applicant, now about 19 years of age, has applied for a permit to be employed by a liquor licensee in this State and has disclosed that in 1940 he was convicted of larceny of automobiles, sentenced to a reformatory, released after serving about ten months and is now on parole. He was about seventeen years of age when he committed the crime and has no other criminal record.

His version of what occurred is that he was one of a group of five school boys who, over a period of five or six months, stole five or six cars and stripped them of parts in order to get money for gas, movies, and, in his case, to keep up his end in school. He swears that previous to the offense he was a "stay-at-home" boy and was misled by association with his cousin, who knew the rest of the boys.

Larceny of this character ordinarily involves moral turpitude. In determining whether this case is an exception, the fact that the applicant was under 18 years of age when he committed the offense, while a pertinent factor, in itself does not remove that element from the case. Were it a mere boyish prank, a single thoughtless offense, the element of moral turpitude possibly would not be involved. See Case No. 261, Bulletin 305, Item 13, which involved only one theft by a boy and his companions, who took an automobile for a "joy-ride" and later stripped the car of some equipment. Also cf. Case No. 172, Bulletin 375, Item 6. In contrast, in this case we have a series of thefts recently committed by petitioner with full knowledge that he was doing wrong, and hence we have a crime involving moral turpitude.

In addition, applicant is under twenty-one years of age and cannot in any event be employed by a liquor licensee unless he obtains a permit which the Commissioner is authorized to grant in his discretion. It would appear undesirable to permit applicant to become associated with the alcoholic beverage industry at this time. On the contrary, it would appear easier for him to find the straight road in some other industry where he would be less likely to be handicapped by his previous record.

It is therefore recommended that applicant be advised that he is not eligible for employment by a liquor licensee in this State and that his application for an employment permit at this time is denied.

Harry Castelbaum,
Attorney.

APPROVED:
ALFRED E. DRISCOLL,
Commissioner.

5. DISCIPLINARY PROCEEDINGS - PETITION TO REOPEN ALLOWED.

In the Matter of Disciplinary Proceedings against MARTINS, INC., 27 Church Street, Paterson, N. J., Holder of Plenary Retail Consumption License C-126, issued by the Board of Alcoholic Beverage Control of the City of Paterson.	ON PETITION TO REOPEN ORDER

Salvatore D. Viviano, Esq., Attorney for Petitioner.

BY THE COMMISSIONER:

On January 13, 1942, after finding the defendant guilty of possessing illicit alcoholic beverages and bottling an alcoholic beverage for sale and resale, I suspended its license for fifteen days commencing January 19, 1942, at 3:00 A. M. Re Martins, Inc., Bulletin 490, Item 9.

Petitioner has presented to me today a petition duly verified by Michael S. Spinella, its President, praying for a reopening of said proceedings with a stay of the suspension order, with leave to petitioner to present testimony in its defense at a date to be determined.

The petition sets forth that the officers of the company are:

Michael S. Spinella, President;
Mildred Lasky, Vice-President;
Eleanor Spinella, Secretary and Treasurer.

It further sets forth that one Michael Spinella, who appeared at the hearing previously held herein and represented himself to be the Vice-President of the corporation, was an employee "without authority to bind the company and to represent the company at a hearing held before your Department in the above entitled matter of disciplinary proceedings against your petitioner. That said employee, petitioner is now informed, attended such hearing without the knowledge of your petitioner or its Board of Directors and in fact your petitioner had no knowledge of said proceedings until January 14, 1942."

The petition further sets forth that petitioner has not been afforded an opportunity to properly present testimony in defense of the charges preferred against it and alleges that if the proceedings are reopened it will be able to present credible testimony which will establish that the two bottles were probably tampered with by some disgruntled employee with intent to injure petitioner in its business.

At the present time I entertain some doubt as to whether the proffered testimony would affect the result heretofore reached in these proceedings. However, in view of the statement in the petition that Michael Spinella (a cousin of Michael S. Spinella) was not an

officer of the corporation and not authorized to appear at the previous hearing, and in view of the fact that no testimony was presented on behalf of the defendant at said hearing except the testimony of Michael Spinella, I shall afford defendant an opportunity to present further evidence in this proceeding. A supplemental hearing will be scheduled solely for the purpose of permitting defendant to introduce additional evidence in its behalf. The case will be reconsidered upon the transcript of the evidence previously taken herein and the additional evidence submitted by defendant at the supplemental hearing, without recalling the witnesses who previously testified on behalf of the Department. The petition is granted subject to the conditions set forth herein.

Accordingly, it is, on this 16th day of January, 1942,

ORDERED, that the proceedings herein be and the same are hereby reopened with leave to defendant to present further testimony at a supplemental hearing, to be held herein, at the offices of this Department, Seventh Floor, 1060 Broad Street, Newark, on Thursday, the 5th day of February, 1942, at 10:00 A. M.; and it is further

ORDERED, that the suspension heretofore imposed be stayed until the further order of the Commissioner.

ALFRED E. DRISCOLL,
Commissioner.

6. DISCIPLINARY PROCEEDINGS - SALES BY CLUB LICENSEE TO PERSONS NOT MEMBERS OR GUESTS - 5 DAYS' SUSPENSION, LESS 2 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against TRENTON LODGE NO. 164, LOYAL ORDER OF MOOSE, 403 E. State Street, Trenton, N. J., Holder of Club License CB-17, issued by the New Jersey State Commissioner of Alcoholic Beverage Control.	CONCLUSIONS AND ORDER

G. George Addonizio, Esq., Attorney for Department of Alcoholic Beverage Control.
Adolph F. Kunca, Esq., Attorney for Defendant-Licensee.

BY THE COMMISSIONER:

The defendant club licensee has pleaded nolo contendere to a charge of having sold alcoholic beverages to non-members of the club, in violation of Rule 5 of State Regulations No. 7. Since the license was issued by the State Commissioner of Alcoholic Beverage Control, pursuant to R. S. 33:1-20, the instant proceedings were instituted at this Department.

It appears that on September 26, 1941, while the licensee was host to a large assemblage of its members convened from throughout the State, two Departmental investigators, neither members of the club nor bona fide guests of any such members, gained admittance

to the licensed premises and were there sold several drinks of alcoholic beverages. The licensee offers in extenuation the fact that the violation would not have occurred but for the unusually large number of persons present on the occasion in question with resultant difficulty in checking the status of all such persons.

This is the licensee's first violation of record.

Under the circumstances, the minimum penalty of five days for this type of violation, with remission of two days because of the plea, will be imposed. Cf. Re William A. Rucki Ass'n, Bulletin 472, Item 10.

Accordingly, it is, on this 19th day of January, 1942,

ORDERED, that Club License CB-17, heretofore issued to Trenton Lodge No. 164, Loyal Order of Moose, by the New Jersey State Commissioner of Alcoholic Beverage Control, for premises at 403 E. State Street, Trenton, be and the same is hereby suspended for a period of three (3) days, commencing January 21, 1942, at 2:00 A. M. and concluding January 24, 1942, at 2:00 A. M.

ALFRED E. DRISCOLL,
Commissioner.

7. ELIGIBILITY - CONVICTION OF PETTY LARCENY DOES NOT PER SE INVOLVE MORAL TURPITUDE - APPLICANT HELD NOT DISQUALIFIED.

January 21, 1942

Case No. 406

Applicant seeks a ruling as to whether his conviction of petty larceny is a crime involving moral turpitude, and hence disqualifies him, under R. S. 33:1-25, 26, from working as porter for a licensee of this State.

Petty larceny is not a crime which per se involves moral turpitude. It depends upon the particular facts in each case. Re Case No. 213, Bulletin 232, Item 6; Re Case No. 157, Bulletin 467, Item 4.

The record of the police court where applicant was convicted, in September 1935, is meagre as to the background of the case. It merely shows that he was convicted of petty larceny and sentenced to 30 days' imprisonment. The affidavit of the complaining witness charges that the applicant stole lumber valued at $45.00. Evidently the value set forth in the complaint was considered excessive since the court found him guilty of petty larceny, which covers theft of property not over the value of $20.00.

Applicant's version of what occurred is that there was some second-hand lumber stored next to his residence; that he threw some of the lumber over the fence, intending to use it for firewood; that the owner of the lumber took it back and caused his arrest. Accepting applicant's sworn testimony as true, I believe that the offense was not so serious in character as to involve moral turpitude. Applicant's record since September 1935 appears to be clear.

It is, therefore, recommended that applicant be advised that the conviction referred to does not disqualify him from being employed by a liquor licensee in this State.

APPROVED:
ALFRED E. DRISCOLL,
Commissioner.

Harry Castelbaum,
Attorney.

8. ALIENS - DECLARATIONS OF A STATE OF WAR BY THE AXIS COUNTRIES ABROGATED RECIPROCAL TRADE TREATIES BETWEEN THE UNITED STATES, GERMANY AND HUNGARY - HEREIN OF THE RULES CONCERNING ENEMY ALIEN NATIONALS.

NOTICE TO ALL MUNICIPAL ISSUING AUTHORITIES.

RE: ALIENS, PARTICULARLY GERMANS (INCLUDING AUSTRIANS) AND HUNGARIANS.

The New Jersey Alcoholic Beverage Law disqualifies aliens from obtaining a liquor license or working (except on a limited permit) for any liquor licensee in this State. See R. S. 33:1-25, 26.

However, this Department has ruled that aliens of foreign countries having a reciprocal trade treaty with our Federal Government are exempt from this ban and hence are eligible, if complying with the other qualifications in the State law, to obtain a liquor license or work in any capacity for a liquor licensee. See Re Guskind, Bulletin 130, Item 5.

Heretofore, aliens of Germany (including Austria) and Hungary have been among those who came within this exemption. However, the recent declarations of war upon us by those countries have, in my opinion, necessarily abrogated their reciprocal trade treaties with the United States. See Karnuth v. United States ex rel. Albro (1929), 279 U. S. 231.

The result is that German (including Austrian) and Hungarian nationals are no longer exempt from the statutory ban against aliens. Hence, these nationals are now fully barred from obtaining any further liquor license of any kind (including a solicitor's permit), whether renewal or otherwise. Similarly, they are now fully barred from working for, or continuing in the employ of, any liquor licensee, the one exception being that, on obtaining a special permit from this Department, they may work at jobs other than the serving, selling, mixing, manufacturing or bottling of alcoholic beverages.

The statute is peremptory and allows of no other alternative in these regards.

However, the State law does not require that the now existing licenses of these aliens, valid when issued, necessarily fall with the treaties. In 1939, when the Italian treaty lapsed, this Department ruled that Italian aliens could retain the licenses which they then held for the balance of their term. See Re Woertendyke, Bulletin 304, Item 8. The Department took a similar position when the Japanese treaty expired in 1940.

In fairness, I can see no substantial reason for not adopting the same position in this case. I do not, at least for the present, perceive any peril, direct or remote, to this country's safety or war effort by allowing the current licenses of German (including Austrian) and Hungarian aliens to finish out their normal term - i.e., through June 30, 1942. It would be unduly harsh to these aliens, many of whom may be resident many years in this country and fully loyal to their adopted land, simply to cut off their existing licenses in "mid-stream" without substantial cause. I am in whole-hearted agreement with the President's recent utterances that we should not persecute aliens of enemy countries but should allow the proper agencies of government to detect and bring to justice those who are "suspect."

Hence, I rule that the existing licenses of these German (including Austrian) and Hungarian aliens may continue for the balance of their term, but on the strict proviso that this Department reserves its full right to take the necessary measures to bring about cancellation of all such licenses in the future if the public interest so requires, or cancellation of the license of any particular alien engaging in any activity disloyal to the country. Likewise, these current licenses may be transferred to properly qualified persons, thus giving their holders a fair opportunity of selling their businesses and avoiding loss of their investments. However, such transfer must be wholly bona fide and the transferee in no way a "front" for the disqualified alien. If any such "front" is discovered, the license will be peremptorily revoked outright and the matter immediately referred to the County Prosecutor for criminal action.

As to corporations, it must be noted that, under the Alcoholic Beverage Law, no corporation (except a bona fide hotel) may obtain a retail liquor license if any holder of more than ten per cent of the stock would be disqualified from obtaining a license in his own name. See R. S. 33:1-12.1. In view of this provision, no such corporation, where the holder of more than ten per cent of the stock is a German (including Austrian) or Hungarian alien, may hereafter obtain any retail license. As to the present licenses of such corporations, they may, subject to the same conditions mentioned above, continue for the remainder of their term, and either they or the aliens' stockholdings may be transferred, in a bona fide transaction, to a qualified person or corporation.

ALFRED E. DRISCOLL,
Commissioner.

Dated: January 21, 1942.

9. DISQUALIFICATION - APPLICATION TO LIFT - COMMERCIAL ACTIVITY (OPERATION OF A STILL) IN ILLICIT LIQUOR SINCE REPEAL INVOLVES MORAL TURPITUDE - SUPPRESSION OF MATERIAL FACTS BY PETITIONER - APPLICATION DENIED.

In the Matter of an Application to remove Disqualification because of a Conviction, Pursuant to R. S. 33:1-31.2.

Case No. 188

CONCLUSIONS AND ORDER

BY THE COMMISSIONER:

In April 1936 petitioner pleaded guilty to the crime of possession of illicit alcoholic beverages and was sentenced to a six months' jail term which he served in full.

At the hearing, petitioner at first denied that he had manufactured any of the bootleg liquor found at his home. When confronted, however, with a written statement signed by him at the time of his arrest, he confessed that for a period of some six months between April and October 1935 he, in conjunction with two others, operated a still and that he personally "turned out" about thirty gallons each night during that period.

Such commercial activity in illicit liquor since Repeal constitutes moral turpitude within the meaning of the Alcoholic Beverage Law. Re Case No. 267, Bulletin 313, Item 1; Re Case No. 162, Bulletin 477, Item 6.

Petitioner's testimony is not only replete with evasions and suppressions of material facts but, as heretofore indicated, he lied about his connection with the operation of the illicit still. This is sufficient justification to refuse petitioner the relief sought. Re Case No. 27, Bulletin 268, Item 5; Re Case No. 82, Bulletin 390, Item 11; Re Case No. 166, Bulletin 481, Item 3. In addition, however, the evidence presented by him and his witnesses fails to convince me that he has been leading a law-abiding life for the past five years and that his association with the alcoholic beverage industry will not be contrary to public interest. See R. S. 33:1-31.2.

The petition is denied.

Under the circumstances, it is unnecessary to pass upon the crimes of possession of lottery tickets, of which petitioner had been twice convicted prior to 1935.

Dated: January 21, 1942.

Alfred E. Driscoll
Commissioner.