

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

BULLETIN 1502

APRIL 2, 1963

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STATE OF NEW JERSEY
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APRIL 2, 1963

1. APPELLATE DECISIONS - ALABURDA v. CLIFTON.

ANTHONY ALABURDA, t/a ANTHONY'S,)	
)	
Appellant,)	
)	
v.)	ON APPEAL
)	CONCLUSIONS
)	AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC)	
BEVERAGE CONTROL OF THE CITY)	
OF CLIFTON,)	
)	
Respondent.)	

Joseph M. Keegan, Esq., Attorney for Appellant.
Sam Monchak, Esq., By Nicholas G. Mandak, Esq., Attorney for Respondent.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby on November 8, 1962, it suspended appellant's license for premises 2-4 Pleasant Avenue, Clifton, for a period of twenty-five days effective November 15, 1962, after finding him guilty on a charge alleging that on August 9, 1962, he allowed, permitted and suffered gambling, viz., the making and accepting of horse race and numbers bets in and upon the licensed premises, in violation of Rule 7 of State Regulation No. 20. The rule in question reads as follows:

'No licensee shall engage in or allow, permit or suffer any pool-selling, book-making or any playing for money at faro, roulette, rouge et noir or any unlawful game or gambling of any kind, or any device or apparatus designed for any such purpose, or any machine or device commonly known as a bagatelle or pin ball machine, in or upon the licensed premises; provided, however, that bingo and raffles may be permitted in or upon the licensed premises to the same extent as is set forth in Rule 6 hereof.'

"Appellant in his petition of appeal alleges that the action of respondent was erroneous 'in that it was arbitrary, capricious and against the weight of evidence.'

"Respondent in its answer denies the said allegations and asserts that its action was grounded upon proper and sufficient evidence presented in support of the said charge.

"The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, and appellant suggested at the opening that his defense would be based upon the fact that no violation did in fact occur on the date alleged.

"Evidence in support of the charge came from Lt. Philip Calderaro, Sgt. John C. DeGroot and Detective James I. Bisset of the Clifton Police Department, all of whom had had many years of experience as members of the gambling squad, charged with the detection and investigation of all forms of gambling activities, including the operation of illegal betting facilities.

"Philip Calderaro testified that, as a result of specific complaints regarding alleged gambling activities at the subject premises, he obtained a search warrant and, in company with Sergeant DeGroot and two other detectives, entered the said premises on August 9, 1962. He proceeded to the rear of the premises and spoke to Mrs. Alaburda (the wife of the appellant herein). After a conversation with her, he examined her pocketbook which was on a table in the rear room, and seized certain slips of paper which he identified as numbers and horse-racing bets, and they were marked in evidence. One of these papers indicated a total play of \$10, to which a ten-dollar bill was attached.

"Mrs. Alaburda denied that these represented number bets and argued that they were in fact certain telephone numbers. However, on the basis of this witness' experience, he was able to state with authority that two of the slips contained numbers bets with the amounts recorded thereon, and the third slip was a horse race betting slip. The horse betting slip recorded a \$2 daily double and a one-two reverse bet. The Lieutenant described in great detail the specifics and characteristics of the numbers betting method as reflected by the slips, and also stated that his check of the New York Daily News indicated that the two horses named on the slips were running on that day at the Saratoga Race Track. A copy of that newspaper was produced in evidence.

"The witness further testified that at approximately 4:30 p.m. on August 9, 1962, the appellant came into the Detective Bureau and had a conversation with this witness and the other police officers. At first he denied any knowledge of betting activity at his licensed premises but then admitted that on the night before, namely, August 8, 1962, while tending bar, he accepted certain bets and placed them in his wife's purse without her knowledge or consent. He further admitted that he had been accepting both numbers and horse race bets for the past three or four months. He then refused to answer any other questions and refused to sign any formal written statement.

"Upon cross examination the Lieutenant admitted that no charges were made against Mrs. Alaburda because he was satisfied that the sole responsibility for the violations complained of was her husband's. He was also unable to identify the handwriting on the slips as being the handwriting of the appellant. It was explained that, while the numbers slips did not contain a specific date, the method used is to play a particular number for as long a period of time as the bettor desires to play the same; thus, no date is placed on the specific slip. He identified four slips and the total sum of \$25 which were contained in the envelope seized from the pocketbook on that date.

"John C. DeGroot, a detective sergeant of the Clifton Police Department, essentially corroborated the testimony of Lieutenant Calderaro and added the following: He initialed the various slips seized from Mrs. Alaburda's pocketbook, and related in further detail the conversation with the appellant at police headquarters on the afternoon of August 9.

"He stated that the appellant confessed that he had been drinking on the night before and had accepted the bets, which he then placed in his wife's pocketbook without her knowledge. When the police informed the appellant that charges were contemplated against his wife, he stated 'I'll take the rap for it' and then explained the circumstances relating to the presence of the betting slips, as described herein.

"James I. Bisset, a detective assigned to the gambling squad, participated in the investigation of these premises on the date in question and testified with respect to his search of the premises. This witness stated that he found a slip torn into four pieces in the bowl of the men's room. When he reassembled this slip by gluing the pieces on a larger sheet of paper, he ascertained that the writing thereon indicated two two-dollar daily double horse race bets on horses running that day in the first race at the Saratoga Race Track. His search behind the bar revealed several writing pads which contained the same label and sheets as the paper used to record the bets.

"The appellant's attorney then stated to the Hearer that he hesitated to place the appellant on the stand because of certain criminal charges now pending which grew out of this transaction and upon which he had not yet been tried. It was pointed out that this action is a disciplinary action, civil in nature, and is one against a license and not against an individual. Kravis v. Hock, 137 N.J.L. 252.

"The appellant thereupon testified that he did not engage in any manner in gambling activities and denied that he told the police officers that he had engaged in such activities for three or four months.

"On cross examination he also denied that he had confessed to taking horse race bets or numbers bets and placing them in his wife's purse. His explanation was that, when he went to police headquarters on the afternoon of August 9, he asked the officers what his wife was doing there and, when told about the material found in her pocketbook, he denied any knowledge of such material. They then stated that Mrs. Alaburda was going to be held on charges and he said 'I don't know what to do. I says, look, you can let my wife go home, yes. I will go, I will take the rap, say what you want, do what you want, but I am not signing nothing.' He admitted that his wife opens the tavern at 9 a.m. each morning and is in charge thereof until the bartender arrives at about 10 a.m. She also does the cooking for lunnh and frequently for dinner at the premises and her meals are served to patrons therein.

"During the course of the trial objection was made by counsel for the appellant to the admission of evidence relating to the slips because the sufficiency and legality of the search warrant were not clearly established. I thereupon pointed out that R.S. 33:1-35 provides that no search warrant is required by any officer in the search of licensed premises. This section reads in pertinent part as follows:

'Every applicant for a license, and every licensee, and every director, officer, agent and employee of every licensee, shall, on demand, exhibit to the director or other issuing authority, as the case may be, or to his or its deputies or investigators, or inspectors or agents all of the

matters and things which the director of the division or other issuing authority, as the case may be, is hereby authorized or empowered to investigate, inspect or examine, and to facilitate, as far as may be in their power so to do, in any such investigation, examination or inspection, and they shall not in any way hinder or delay or cause the hindrance or delay of same, in any manner whatsoever. Investigations, inspections and searches of licensed premises may be made without search warrant by the director, his deputies, inspectors or investigators, by each other issuing authority and by any officer. (Underlining added)

"Officer" is defined in R.S. 33:1-1(p) to include officers of local police departments.

"I referred for further clarification of this section to Bulletin 996, Item 2, prescribing the form of application for retail alcoholic beverage license, wherein, by paragraph 49, immediately preceding the applicant's signature, the applicant consents that the licensed premises and all portions of the building containing the same (including all rooms, cellars, etc. enumerated therein) may be inspected and searched without warrant at all hours by the Director of this Division, the Director of the Division of Taxation, their authorized agents, and all other officers. Thus, by the authority of R.S. 33:1-35, the objection of appellant was overruled. It is clear that the warrant which the police officers had in their possession was gratuitous and unnecessary for their lawful search of these premises and that any alleged defect therein is immaterial.

"Having evaluated the evidence in support of the respondent's case, I am persuaded that the respondent has proved its case by a fair preponderance of the credible evidence and, indeed, by substantial evidence. The testimony of the police officers appears to me to be forthright, direct and entirely believable. The officers, who have had admittedly many years of experience in the investigation of gambling activities, identified the presence of betting slips on the licensed premises, which reflected activity on that day.

"I can understand the concern of the appellant for the welfare of his wife. However, I do not believe that he would have been willing 'to take the rap' unless he had a consciousness of guilt. This type of melodramatic action is inconsistent with innocence. I am also impressed with the fact that he refused to make a written statement at police headquarters. His lack of forthrightness and his failure to give a true picture of what occurred make his entire testimony suspect. Also, his testimony appears to be contradictory since at first he denied making any statement at police headquarters; then, upon my personal examination, he admitted making the verbal statements as heretofore testified to by the police officers.

"I am, of course, not persuaded that appellant's wife was without guilty knowledge. The testimony of the officers was that, when these 'slips' were found in her pocketbook, she insisted that they represented telephone numbers. This was patently false, and the suspicion is aroused as to her veracity and actual knowledge.

"Was the appellant trying to protect his wife when he confessed to the officers? I think not. He clearly described his illegal activities on the night before and for three or four months prior thereto, and was certainly chief, if not the sole, transgressor on the date alleged.

'The choice of accepting or rejecting the testimony of witnesses rests, therefore, with the administrative agency.***' Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501 (App.Div. 1956).

"The general principle in these proceedings is that no testimony need be believed but that the Hearer has a right to credit as much or as little as he finds reliable. 7 Wigmore, Evidence, sec. 2100 (3d Ed. 1940).

"I accept as credible the testimony of the police officers and give little weight to the testimony of the appellant in considering the issue in this case.

"I, therefore, conclude that the respondent has established the truth of the charge preferred against the appellant by the substantial weight of the credible evidence, and recommend that the action of the respondent be affirmed and the appeal herein be dismissed. Motacki v. Clifton, Bulletin 1304, Item 2; Porton v. Roselle, Bulletin 974, Item 3; Plasky v. Camden, Bulletin 985, Item 1."

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's Report and written argument thereto were filed with me by the attorney for the appellant and answering argument was filed by the attorney for respondent.

Having carefully considered the record herein, the exhibits, the Hearer's Report, the exceptions and written argument thereto and the answering argument, I concur in the conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 18th day of February 1963,

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 twenty-five day suspension heretofore imposed by the respondent and stayed during the pendency of this appeal be restored and reinstated against license C-19 held by Anthony Alaburda, t/a Anthony's, for premises 2-4 Pleasant Avenue, Clifton, to commence at 3:00 a.m. Monday, February 25, 1963, and to terminate at 3:00 a.m. Friday, March 22, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

2. APPELLATE DECISIONS - CLARK TOWERS, INC. v. CLARK TOWNSHIP.

CLARK TOWERS, INC.)

Appellant,)

v.)

ON APPEAL
ORDER

MUNICIPAL COUNCIL OF THE)
TOWNSHIP OF CLARK,)

Respondent.

Jack J. Camillo, Esq., Attorney for Appellant.
Irvine B. Johnstone, Jr., Esq., Attorney for Respondent.

BY THE ACTING DIRECTOR:

Appellant appeals as from denial of its application for transfer of plenary retail consumption license issued to Freda Cameron and Gertrude Cameron for premises 104 Bartell Place to appellant for premises on Central Avenue near the Garden State Parkway.

By letter dated February 19, 1963, appellant advised that the application having been granted subject to certain special conditions after the filing of the petition of appeal, it was withdrawing the appeal. No reason appearing to the contrary,

It is, on this 20th day of February 1963,

ORDERED that the appeal herein be and the same is hereby dismissed.

EMERSON A. TSCHUPP
ACTING DIRECTOR

3. DISCIPLINARY PROCEEDINGS - GAMBLING (HORSE RACE BETS) - FALSE STATEMENT IN APPLICATION FOR LICENSE - AGGRAVATING CIRCUMSTANCES - LICENSE SUSPENDED FOR 45 DAYS.

In the Matter of Disciplinary Proceedings against FRANK TUMULTY t/a T-TAVERN 427 George Street New Brunswick, N. J.

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-66, issued by the Board of Commissioners of the City of New Brunswick.

Alex Eber, Esq., Attorney for Licensee (Harry Castelbaum, Esq., of counsel) Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

"Licensee pleaded not guilty to the following charges:

- '1. On July 18, 1962, and on divers days prior thereto, you allowed, permitted and suffered gambling, viz., the making and accepting of horse race bets in and upon your licensed premises; in violation of Rule 7 of State Regulation No. 20.
'2. In your application filed with the Board of Commisioners of the City of New Brunswick dated June 8, 1962, and upon which you obtained your current plenary retail consumption license, you falsely stated "No" in answer to Question 41 which asks: "Have you or has any person mentioned in this application ever had any interest, directly or indirectly, in any alcoholic beverage license or permit in New Jersey or any other state which was surrendered, suspended, revoked or cancelled?", whereas in truth and fact plenary retail consumption licenses held by you had been suspended on three occasions, viz., by the Board of Commissioners of New Brunswick for 2 days, effective March 27, 1939, for a local "hours" violation, by this Division for 5 days effective March 15, 1943 for fraud in license application and by this Division for 15 days, effective October 11, 1954, for sales to minors; said false answer, statement, evasion and suppression being in violation of R.S. 33:1-25.'

"However, at the time of the hearing, counsel for the licensee stated that the licensee desired to retract his former plea of not guilty to the second charge and enter a plea of non vult thereto. He was permitted to do so at his request, and also to set forth for the record an explanation in mitigation

thereof, which will be adverted to hereinafter. Therefore, this hearing was concerned solely with evidence relating to the first charge as set forth hereinabove.

"To substantiate the charge, the Division called as its witnesses ABC Agent C and officers of the Middlesex County Prosecutor's office who participated in the investigation.

"Agent C testified substantially to the following effect: He was specifically assigned to accompany and assist county detectives and local police in a raid of the above designated licensed premises because of alleged gambling activities which had taken place and were taking place therein; and on July 18, 1962, at approximately 1:20 p.m., in the company of the said law enforcement officers he arrived at the subject licensed premises.

"Immediately upon his entering the tavern he jumped over the bar and instructed the bartender (later identified as James LaRosa), who was then seated on a stool, to remain seated. While this was taking place, the detectives proceeded to a closed door located along the left-hand wall of the barroom. Ascertaining that the door leading to another room in the rear of the premises was locked from the inside and had no door knob or means of ingress from the side of the barroom, the said detectives hammered a hole into the same to gain entry.

"While this agent was behind the bar he noticed two buzzers underneath the bar and at each end of the bar, and he ascertained that these buzzers, in operation, sounded in the storage room to which the prosecutor's detectives were then obtaining access. The licensee was not in the premises at the time and, upon questioning the bartender, this witness learned that the licensee had been in the tavern and, indeed, in the storage room approximately ten minutes prior to the arrival of the officers. That was the last he saw of him since the door to the storage room was locked.

"Agent C then discovered two Armstrong Daily scratch sheets dated July 1962, one of which was found on the floor behind the bar and the other was situated near the bar next to one of the buzzers. This agent then proceeded to the storage room which he described as a room 5 ft. x 7 ft. which contained another door which led to the hallway at 429 George Street, New Brunswick (the building directly next to the licensed premises).

"Located in the storeroom were a makeshift bench and desk, along with shelves containing bottles of wine and other articles not relevant to their investigation. However, it was ascertained that a telephone in the said storage room bore an unlisted telephone number. There was also a Bulova transistor radio, several cards or papers with the licensee's name thereon, two pads, four pens and other paraphernalia. There was also a disconnected phone on the shelf.

"Agent C thereafter revisited the tavern on July 19 with Inspector S of this Division, and attempted to question the licensee regarding alleged gambling activity in the tavern. Licensee, however, refused to make any statement. He did, however, admit that he was the only one who had access to the said storage room and that it can only be opened from the inside. He further admitted that he had been there on July 18 but could not recall exactly when he left the premises on that date.

"On cross examination the agent made available the written report which he submitted to this Division at the conclusion of his investigation for examination by counsel, and there was no material deviation in the testimony of this agent from the facts as set forth in this statement. He admitted that during the hour-and-forty minutes on July 18 there was no gambling activity other than the telephone calls and conversations relating thereto, as testified to by the succeeding witnesses.

"At this point a motion was made by counsel for the licensee 'to expunge' the testimony of this agent relating to his conversation with the bartender on the ground that the licensee was not bound by conversations made by his agents, servants or employees not within his presence. The Hearer at this point overruled said motion and pointed out that these are civil proceedings and not criminal in nature. Thus the rules of criminal law do not basically apply to these proceedings. Kravis v. Hock, 137 N.J.L. 252.

"It was further pointed out that Rule 33 of State Regulation No. 20 provides as follows:

'In disciplinary proceedings brought pursuant to the Alcoholic Beverage Law, it shall be sufficient, in order to establish the guilt of the licensee, to show that the violation was committed by an agent, servant or employee of the licensee. The fact that the licensee did not participate in the violation or that his agent, servant or employee acted contrary to instructions given to him by the licensee or that the violation did not occur in the licensee's presence shall constitute no defense to the charges preferred in such disciplinary proceedings.'

In this connection it is pointed out that this Division has consistently ruled that all conversations with employees and agents are admissible in disciplinary proceedings in order to effectuate the control vested in the Director by the Legislature. Counsel was referred to the ruling in Essex Holding Co. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947) which sustained the principle of admissibility of such evidence. Responsibility is imposed on the licensee for prohibited conduct by those occupying his premises with his authority, regardless of his knowledge. Cf. Gustamacchio v. Brennan, 128 Conn. 356; 23 Atl.Rep. 2nd 140. The rationale behind the principle is that the control of liquor traffic 'is a subject by itself, to the treatment of which all the analogies of law appropriate to other topics cannot be applied.' Paul v. Gloucester County, 50 N.J.L. 585; Hudson Bergen etc. v. Driscoll etc., 135 N.J.L. 502.

"Joseph A. Cereghino, a county detective employed in the Middlesex County Prosecutor's office, testified as follows: On July 18, 1962, at 1:20 p.m., in the company of two other detectives, he arrived at the premises and obtained access to the storage room in the manner described hereinabove. On the desk in the storage room he seized, among other things, a small slip of paper on which was written 'Received from Frank Tumulty \$43.', signed by S. J. Bonine, and another stub on which was written 'Contribution received from T-Tavern \$10, 6/20/62, solicitor Bonine.' He noted the unlisted number of the telephone and later learned that this was in the name of the licensee. He also ascertained that

the buzzer system was in operation and that the rear door of this room was open, indicating to him that the room was recently occupied by someone.

"He then testified as to a number of telephone calls which came in on the telephone and which were answered by him. At this point a motion was made by counsel for the licensee to enjoin the receipt of any testimony relating to such telephone conversations. This motion was denied for reasons which I shall state in my discussion of the legal principles involved herein at the conclusion of the summary of the testimony.

"This witness testified that there were approximately fifteen telephone calls, and that five callers placed a total of nineteen horse race bets. Four callers asked for Frank and then stated that they would call back (or words to that effect) and six callers hung up immediately when they apparently did not recognize the voice on this end. The detective further asserted that he checked the Armstrong scratch sheet for that date and determined that each of the horses was running on a different track on that day. A full recital of the specific bets and the manner in which they were placed would appear to be unnecessary.

"On cross examination this witness testified that he had been regularly assigned to the gambling squad of the Prosecutor's office since 1954 and was fully familiar with methods and indicia of horse race betting. He did note that, while there was a public telephone on these premises, all of the calls relating to betting and the placing of bets came through the unlisted telephone.

"With respect to the ingress to the storage room, this witness reiterated that the door leading from the barroom to the storage room was a double door bolted from the inside, and that it took four to five minutes to break into that room.

"Robert P. Vigilante, the identification officer in the Middlesex County Prosecutor's office also participated in the investigation of the subject premises on July 18, 1962, and testified as follows: He has been an investigator, assigned primarily to gambling activities or raids conducted by the Prosecutor's office, for the past six years. He took the numerous photographs of the premises which were admitted into evidence. As soon as he entered the tavern he went behind the bar and spoke to the bartender with respect to the buzzer system which was previously described by the other witnesses. LaRosa (the bartender) admitted to him that, when a person came in and asked for the licensee, he would 'hit the buzzer and Mr. Tumulty would come out.'

"The witness also stated that he heard the telephone ring about fourteen or fifteen times and he answered the phone on those occasions and took the various messages and bets over the telephone. These were described in considerable detail. It is significant to note that on each of those occasions persons asked for Frank (first name of the licensee). The bets that were taken by him were compared with the Armstrong Daily, the scratch sheet used by bettors, and that he found that the horses mentioned were actually running on that day. Both Armstrong sheets, which were found underneath the bar and on the floor, were admitted into evidence.

"The bartender later gave a statement at police headquarters in the presence of the above named witnesses, in which he admitted that bookmaking on a large scale had taken place

at the subject premises; that the licensee was an active participant; that no one was admitted into the storage room except for the licensee, pursuant to his specific instructions; that bookmaking had taken place over a long period of time.

"The licensee, who was present during this hearing, did not testify, nor were any witnesses produced in his behalf.

"A motion had been made prior to the admission of testimony relating to the telephone conversations to exclude such conversations from the evidence and to strike any testimony relating thereto. In support of this motion, counsel for the licensee submitted a memorandum of law which I have carefully examined. In the said memorandum counsel cites several cases in support of his argument that 'Such evidence is received with great caution, and then only when as a prerequisite the foundation for such admissibility consists of evidence that gambling paraphernalia was found in the establishment,' citing State v. Meola, 6 N.J. Super. 214; State v. O'Donnell, 8 N.J. Super. 13; State v. Tamburello, 69 N.J. Super. 166.

"As I remarked at the time of the hearing, in all of these cases I was impressed with the feeling of the court that, while such evidence should be admitted with caution, the surrounding circumstances must be taken into consideration; that, basically, the materiality of such conversations are matters confided to the jury, in this case, of course, to the Hearer and the Director. The case of State v. Tamburello, *supra*, dealt with wiretapping which, of course, has no pertinency to the matter sub judice; but in that case the court stated:

'*** we believe that the non-mechanical monitoring of such conversations cannot be classified as coming within the terms of the statute.'

"Justice Weintraub, in State v. Ginida, 27 N.J. at p. 369, subscribes to that viewpoint in holding that the statute has not been violated. A careful reading of State v. O'Donnell, *supra*, which counsel refers to as the leading case on the subject, stands for the general proposition that such evidence must be admitted circumspectly.

"The court held in that case that there was sufficient evidence to establish a prima facie case against the defendant O'Donnell. Said the court:

'The proofs at the end of the State's case clearly establish a factual question for the jury. Paraphernalia of bookmaking was found at the time of the raid and telephone calls placing bets were received by the officers. All of these circumstances support the criminal charge. When there is such testimony in the case, the jury, and not the court, must settle the question of the defendant's guilt or innocence. State v. Plough, 88 N.J.L. 425.'

"I, therefore, concluded and I find that in the case sub judice the fact that there was an unlisted phone; that there was a disconnected phone; the general physical circumstances as described by the police officers, including the Armstrong sheets, the number of pads and papers near the phone; the buzzer system; the heavily bolted door which could only be opened from within the storage room, and the several other slips, receipts and stubs indicating active betting activity; the telephone calls coming

in on the unlisted number as distinguished from the public telephone located in the premises; all spell out a prima facie situation which would support the admissibility of the telephone conversations. Therefore, I recommend that this motion be denied.

"Having considered the evidence adduced herein, I find that the licensee allowed, permitted and suffered gambling, viz., the making and accepting of horse race bets in and upon the licensed premises in violation of Rule 7 of State Regulation No. 20, and I conclude that the Division has established the truth of this charge by a fair and, indeed, overwhelming preponderance of the believable evidence.

"Licensee has a prior adjudicated record. Effective March 27, 1939, his license was suspended by the local Board of Commissioners for two days for an 'hours' violation; effective March 15, 1943, his license was suspended by this Division for five days for fraud in a license application (concealing conviction of crime) (Bulletin 558, Item 2); and effective October 11, 1954, his license was suspended by this Division for fifteen days for sale to minors (Bulletin 1035, Item 12). Since the prior similar and dissimilar violations occurred respectively more than ten and five years ago, they should not be considered in fixing the penalty herein.

"With respect to the second charge, of which the licensee has pleaded non vult at the hearing, counsel has energetically argued in mitigation of the penalty that there was no design to mislead the issuing authority because these matters had been disclosed in prior applications. He also states that there were no answers with respect to the question, so obviously there was no intention of falsification. As to this, it should be noted that the statute interdicts also evasion and suppression of material facts in the application for license.

"In view of all of the facts and circumstances appearing herein, and particularly in view of the large scale commercialized gambling operations which took place on these premises, I recommend that the licensee be adjudged guilty on the first charge and that an order be entered suspending his said license for a period of thirty-five days (Re Bacsko, Bulletin 1435, Item 1), to which should be added an additional suspension of ten days on the second charge (Re The Ulster Club of New Jersey, Inc., Bulletin 1477, Item 11), making a total suspension of forty-five days, without remission for the plea entered to the first charge in view of trial had on the first charge. Re Lachnicht, Bulletin 1436, Item 3."

Pursuant to Rule 6 of State Regulation No. 16, written exceptions to the Hearer's Report were filed with me by the attorneys for the licensee and by the attorney appearing for the Division, who also included answering argument to the exceptions filed by the attorneys for the licensee. In the main, the attorneys for the licensee excepted on the grounds that the recommendation of a finding of guilt on Charge 1 was contrary to the weight of the evidence and, in particular, that the Hearer, in his Report, made reference to a written statement of a witness which was not part of the case record, whereas the attorney appearing for the Division argued that the recommendation as to the finding of guilt on Charge 1 was proper; and both attorneys excepted on the further grounds as to extent of penalty with the attorneys for the licensee stating that the recommended penalty as to both charges was excessive and the attorney appearing for the Division arguing that it was inadequate.

I have carefully examined the record herein, including the transcript of the testimony, the exhibits, the Hearer's Report the written exceptions and the arguments pro and con. While I do not find in the transcript of testimony any record of the introduction into evidence of any written statement of the witness in question, and while it may, therefore, be said that the Hearer should not have referred to any such statement in his review and recommendation of finding of guilt on Charge 1, nevertheless, I find that the evidence actually produced by the prosecution, as stated by the Hearer, established the truth of this charge by a fair and, indeed, overwhelming preponderance of the believable evidence. In that status, it is clear that any reference to the statement by the hearer did not and could not prejudice the licensee in any degree whatsoever. Surplusage does not vitiate. I therefore concur with the Hearer in his recommendation of finding of guilt on Charge 1 and further concur in his recommendation as to the extent of penalty on both charges.

While the attorneys for the licensee urge that lesser penalties have been imposed in somewhat similar cases, it is pointed out that the quantum of penalty, upon a finding of guilt in a disciplinary proceeding, is within the fair discretion of the Director, depending upon the offense, the offender, surrounding circumstances, deterrence to others, the impact on the liquor business, the needs of the time and that, in the nature of things, penalties can only be identical by accident. No licensee has a vested right to be penalized only to the extent of the least penalty imposed in what is deemed to be a comparable case. Cf. DeFebb v. Davis (N.J. App.Div., decided October 24, 1962, not officially reported) reprinted in Bulletin 1482, Item 1; also Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (N.J. App.Div., decided December 4, 1962, not officially reported) reprinted in Bulletin 1491, Item 2. Furthermore, there is serious doubt whether the matter considered in mitigation in the cited comparable cases should so be considered, since the public impact of the violation is the same in all similar cases.

In view of the aforesaid, I shall, as recommended by the Hearer, suspend the license for a total of forty-five days.

Accordingly, it is, on this 19th day of February, 1963,

ORDERED that Plenary Retail Consumption License C-66, issued by the Board of Commissioners of the City of New Brunswick to Frank Tumulty, t/a T-Tavern, for premises 427 George Street, New Brunswick, be and the same is hereby suspended for forty-five (45) days, commencing at 2:00 a.m. Tuesday, February 26, 1963, and terminating at 2:00 a.m. Friday, April 12, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 AND MUNICIPAL HOURS ORDINANCE - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 35 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

FRANK PAULL)
t/a CENTURY BAR)
28 Haddon Avenue)
Camden, N. J.)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-135, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden.)

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

BY THE ACTING DIRECTOR:

Licensee pleads guilty to charges alleging that on January 30, 1963, (1) between 6:15 and 6:40 a.m., he sold drinks of alcoholic beverages during prohibited hours, in violation of local ordinance, and (2) at 6:40 a.m., he sold a pint bottle of whiskey for off-premises consumption, in violation of Rule 1 of State Regulation No. 38.

Licensee has a previous record of suspension of license by the Director for fifteen days, effective September 25, 1961, for possession of alcoholic beverages in containers not truly labeled. Re Paull, Bulletin 1416, Item 12.

The prior record considered, the license will be suspended for thirty-five days, with remission of five days for the plea entered, leaving a net suspension of thirty days. Cf. Re Senatore, Bulletin 1400, Item 6.

Accordingly, it is, on this 19th day of February, 1963,

ORDERED that Plenary Retail Consumption License C-135, issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden to Frank Paull, t/a Century Bar, for premises 28 Haddon Avenue, Camden, be and the same is hereby suspended for thirty (30) days, commencing at 2:00 a.m. Tuesday, February 26, 1963, and terminating at 2:00 a.m. Thursday, March 28, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

5. DISCIPLINARY PROCEEDINGS - SALE DURING HOURS PROHIBITED BY LOCAL ORDINANCE - FAILURE TO AFFORD VIEW - LICENSE SUSPENDED 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

AVENUE HOUSE TAVERN, INC.
779 Newark Avenue
Jersey City 6, N. J.

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-27, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.

Licensee, by Richard P. Deegan, President, Pro se.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads non vult to charges alleging that on Sunday, January 13, 1963, before 1 p.m., it (1) and (2) sold drinks of alcoholic beverages, and (3) failed to afford view of the interior of the licensed premises during prohibited hours, in violation of local ordinance.

Absent prior record, the license will be suspended for twenty days, with remission of five days for the plea entered, leaving a net suspension of fifteen days. Re Elliott, Bulletin 1478, Item 2.

Accordingly, it is, on this 18th day of February 1963,

ORDERED that Plenary Retail Consumption License C-27, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Avenue House Tavern, Inc., for premises 779 Newark Avenue, Jersey City, be and the same is hereby suspended for fifteen (15) days, commencing at 2 a.m. Monday, February 25, 1963, and terminating at 2 a.m. Tuesday, March 12, 1963.

EMERSON A. TSCHUPP
ACTING DIRECTOR

6. STATE LICENSES - NEW APPLICATIONS FILED.

Tastee Beverage, Inc.

1112 Seventh Avenue

Neptune, N. J.

Application filed March 27, 1963 for person-to-person, place-to-place transfer of State Beverage Distributor's License SBD-49 from Carl Brodsky, t/a Nectar Bottling Works, 212-214 Webster Avenue, Jersey City, N. J.

Ashley, Ltd.

220 West Jersey Street

Elizabeth, N. J.

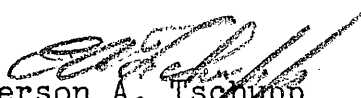
Application filed March 28, 1963 for place-to-place transfer of Plenary Wholesale License W-26 from 447 Central Avenue, Orange, N. J.

Shore Point Distributing Co. of Ocean Inc.

1251-1261 Lakehurst Road

Toms River, N. J.

Application filed March 28, 1963 for person-to-person, place-to-place transfer of State Beverage Distributor's License SBD-43 from Anthony J. Merlo and Nicholas Merlo, t/a J. & K. Distributors, 190 12th Street, Hammonton, N. J.



Emerson A. Tschupp
Acting Director