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

BULLETIN 1554 March 30, 1964

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ITEM

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

BULLETIN 1554 March 30, 1964

1. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALERS - SUPPLEMENTAL CONCLUSIONS ON REMAND.

FLEMING & McCAIG, INC. a corporation, Petitioner, v. JAMES M. McCUNN & CO., INC., a corporation, Respondent.	)	ON PETITION SUPPLEMENTAL CONCLUSIONS

Max Mehler, Esq., Attorney for Petitioner.
Harrison & Jacobs, Esqs., by Joseph M. Jacobs, Esq., Attorneys for Respondent.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Supplemental Report:

Hearer's Report

This matter was considered upon remand by the Superior Court of New Jersey, Appellate Division (James M. McCunn & Co., Inc. v. Fleming and McCaig, Inc., 81 N.J. Super. 97, at p. 105-106, reprinted in Bulletin 1541, Item 1), to the Director for specific determination of the following:

> (1) Was the 8,000 case quota for the fiscal period from April 1, 1961 to March 31, 1962 (which the court determined was an objective criterion in the sense that it was understood that the petitioner (McCaig) would dispose of substantially all of it during this period) unreasonable or excessive so as to make it arbitrary;
>
> (2) Was McCaig's failure substantially to deplete its 8,000 case purchase together with its resultant inability to make a new commitment justification for respondent McCunn's decision to drop petitioner as its prime distributor;
>
> (3) In the above connection, was the 8,000 case quota for the said period reasonable in the light of past sales or depletion experience, or any other relevant business considerations.

After the original hearing in this case it was determined that respondent McCunn had not established such objective criteria which would justify its refusal to continue petitioner as a distributor. The Hearer recommended that "Under all the facts and circumstances herein ... an order be entered determining that the action of the respondent is arbitrary and discriminatory, and directing respondent to sell to the petitioner alcoholic beverages on terms usually and normally required by the respondent and that, in the event respondent refuses to comply

with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.4." Fleming & McCaig, Inc. v. James M. McCunn & Co., Inc., Bulletin 1506, Item 1, at p. 11. Accordingly, an order was entered on March 12, 1963, requiring that the respondent sell and continue to sell to the petitioner alcoholic beverages on terms usually and normally required by the respondent. In the remand order of the Superior Court, Appellate Division, cited hereinabove, it was further directed that the findings and conclusions, based upon the order of remand, be made and filed with that court within ninety days, and in the meantime "the order of March 12, 1963 is to remain in full force and effect."

I

Before making express determinations with respect to the questions raised in the Opinion and Remand Order, it might be well to restate my position with respect to the transaction between McCaig (the wholesaler) and McCunn (importer and distributor) which finally resulted in its refusal and failure to continue the petitioner as a prime distributor. At no time was it suggested that McCaig was entitled as a matter of right to remain as the prime distributor; only that it was entitled to remain as a wholesaler of McCunn products under the peculiar facts and circumstances of this case. It was also not asserted in the Hearer's Report that the 8,000 case quota which was imposed upon McCaig by McCunn was not an objective criterion. I concluded, however, that a quota imposed upon McCaig was not a valid objective criterion and, therefore, was not such objective criterion as would justify McCunn's refusal to continue McCaig as a distributor of its nationally advertised brands of alcoholic liquors.

The reason for this is that the setting up of a goal or a quota by the importer which is imposed upon the wholesaler would put the wholesaler at the mercy of the importer or distiller and create the very situation which is frowned upon in the alcoholic beverage field. As I pointed out in the Hearer's Report, this might be acceptable business procedure in any other industry. Cf. Great Atlantic and Pacific Tea Co. v. Cream of Wheat Company, 227 Fed. 46 (2 Circuit 1915). However, in the alcoholic beverage field this procedure is invalid. It must bow to the heavy and persuasive hand of the police power -- if the legislature wills it. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 384 (1956); Eskridge v. Division of Alcoholic Beverage Control, 30 N.J. Super. 472 (App.Div. 1954). Thus the court, in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co. et al., 28 N.J. 444, at p. 455, stated:

> "The ultimate goal sought to be attained by the statute in question, as in the entire scheme of liquor legislation, is the protection of the public through the promotion of temperance and elimination of the racketeer and bootlegger. N.J.S.A. 33:1-3. In order to accomplish this purpose the statute seeks to achieve as far as necessary the independence of wholesalers from distillers. A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the supply at will. For the purpose of strengthening the wholesaler's resistance if confronted with a distiller's wish to over-stimulate sales and

> thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, e.g., tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler. To effectuate this end, both the statute and the authority delegated by it to the director will be liberally construed."

Justice Heher, in his concurring opinion in Canada Dry, supra, sets forth the specific evil with particular clarity in the following language:

> "Here, the distiller avows a purpose 'to achieve a greater share of its potential' in New Jersey, that is to say, to carry on its business through wholesalers who will 'push' the sale of its products, and thus to place its sales operation on the level of ordinary business pursuits, a conception alien to the statutory scheme - 'company policy' as against state policy."

Therefore, the imposition of a quota by the importer upon the wholesaler, as was clearly indicated in this case, is contrary to the spirit and purpose of the Alcoholic Beverage Law if the failure of the wholesaler to meet such quotas permits the importer to discontinue the wholesaler at will. "For the purpose of strengthening the wholesaler's resistance if confronted with a distiller's wish to over-stimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts..., the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler." Canada Dry, supra; R.S. 33:1-93.1-5.

John Barry (the prime distributor of McCunn's products, who sold his franchise to McCaig in 1961), in testifying with respect to the 8,000 case quota was asked the following questions:

> "Q So that you were discussing your program for purchase for the fiscal year April 1, 1960 to March 31, 1961?
>
> A That's right.
>
> Q And this discussion obviously was taken place prior to April 1, 1960?
>
> A Yes.
>
> Q Now, did your experience of previous sales made by your organization justify the 8,000?
>
> A No.
>
> Q Did you express yourself to Mr. Marsloe (president of McCunn)?
>
> A Well, I would say that he knew the record of previous years sales but he felt in order for me to retain the franchise that I had to purchase the 8600 cases. That was what was expected of me.
>
> Q Otherwise you would lose the franchise?

A Well, it may not have been said in those many words. It was said, 'This is what we expect from the State of New Jersey.'

Q So you entered into this agreement for the 8600?

A. Yes, the purbhase order for the 8600."

It is thus clear that Barry and McCaig were put in a position where they had to accept the quota imposed by McCunn or lose their position as wholesaler and distributor of its product. It is also quite clear that there is a distinction between a quota on a performance basis and an order on a commitment basis. In my Report I stated that:

"Respondent has raised the additional point that its method of operation has been to require an annual commitment in order that it may carry on its business in a practical manner. The testimony of Marsloe shows that this is a two man operation and that, unless business were done in that way, it could not carry on its business profitably on a national basis.... Since fairness is the touchstone of the administrative process, it might well be that an annual commitment may be a reasonable requirement, provided it does not impose any arbitrary standard. This was particularly raised in this case where the petitioners claim that the amount which they were required to commit themselves to during the 1961-62 fiscal period was far in excess of any prior commitment and beyond their reasonable expectation of resale."

By this was meant that, as a practical matter, the distiller or importer may request the wholesaler to indicate to it the quantity that it may need for its purposes for the ensuing year so that the distiller may be in a position to supply its needs during that period. In a small company which obtains its supplies by foreign shipment it is understandable that such cooperation may be expected, although there is nothing in the imperative language of the statute to require the same. But the commitment or pledge of the wholesaler must be a voluntary one made upon an order basis, and not upon a quota imposed from without by the distiller or importer.

As I also pointed out in the Report, McCunn sought to stimulate sales of its products and, as counsel for respondent stated in his main brief:

"A supplier is entitled to maintain and indeed attempt to increase the acceptance of his brand in the New Jersey Market...."

And further:

"...supplier has a right to change distributors, and the result may well be a restoration of the 8000 cases a year level or even an increase to 10,000 cases a year.... What was involved was a woeful incompetence resulting in under-stimulation of sales by a wholesaler...."

I concluded that

"In the field of alcoholic liquor control these arguments are ineffective and invalid."

Therefore it is my determination that the quota of 8,000 cases, used by McCunn herein as its objective criterion, was in fact an invalid objective criterion, e.g., inimical to the meaning and purpose of the statute, and therefore constituted arbitrary and discriminatory action on its part.

II

Assuming, arguendo, that an acceptable criterion has been employed by McCunn (namely, the imposition of a quota or sales goal), the question raised by the Order of Remand is whether that criterion was unreasonable or excessive under the circumstances herein so as to make it arbitrary. Such determination requires an examination and analysis of the history of sales to John Barry and McCaig by McCunn in the years immediately preceding 1962. As was pointed out in my Hearer's Report adopted by the Director (Bulletin 1506, Item 1), Barry prior to 1961 was the prime distributor of McCunn's products and his distribution was made and effective through McCaig's organization as a jobber for Barry. Barry had approximately 200 customers, whereas McCaig serviced approximately 4,400 customers. The testimony indicates that in 1958 Fleming and McCaig sold a total of 2,182 cases of John Begg Scotch and Barry testified that in that year he sold a total of 3,114 cases of John Begg Scotch to retailers in addition to some to wholesalers.

In 1959 McCaig sold a total of 2,975 cases and Barry sold a total of 2,980 cases, making a total sold by both Barry and McCaig of 5,955 cases for the calendar year 1959-to 1960. For the fiscal year 1960 to 1961 Barry was required to purchase a total of 8,600 cases consisting of 8,000 cases of John Begg Scotch (Blue Cap) and 600 cases of John Begg Scotch (Gold Cap). The evidence shows that, when Barry purchased these amounts, he intended that half of these should go to McCaig and the other half should be disposed of by him. The total sales for the year 1960 were: McCaig 3,575 cases and Barry 2,640 cases, making a total of 6,215 cases. The quantity, therefore, shown for the period from April 1, 1960 to March 31, 1961 was not supplemented by any further purchase by Barry after March 31, 1961. Barry testified as follows with respect to his sales efforts and quantity on hand on July 1, 1961:

"Q What effort, if any, had you made to stock your customers with their needs for the ensuing months?

A Well, of course, anticipating I was going out of business as of July 1, naturally the contacts I made myself I asked them if they could I'd appreciate it if they financially could purchase two or three months supply.

Q And were you able to dispose as much --

A Let me say I was fairly successful.

Q So that as of the time you sold your business to Fleming & McCaig the customers you turned over were pretty well stocked?

A I would say they were.

Q Now, you entered into this agreement to purchase 8,000 cases of blue cap, that is 4,000 for yourself and 4,000 for Fleming & McCaig in 1959 for the ensuing year '60 to '61?

A That's right.

Q Did you again in 1960 enter into an additional agreement with McCunn & Co. for further supplies for the following year '61-62?

A No, I did not enter into any arrangements with them.

Q So that the 8,000 or your own 4,000, out of that was all that you had purchased up to the time of your going out of business?

A That's right.

Q So that the figures you gave for 1960 as well as the six months of '61 would be chargeable against all that 4,000 you got for the year 1960?

A That's right.

Q And still you had at the end of your six months in '61 1200 cases left?

A 1200 cases.

Q Putting it another way, your 4,000 cases that you purchased effective as of April 1, 1961 carried you for how many months?

A 1960 I think you are referring to.

Q '60.

A I didn't purchase anything in '61.

Q So it carried you about 15 or 16 months?

A It carried me the 15 months, that's right."

The evidence further shows, and I find as a fact, that on March 1, 1962, McCaig had an inventory of 5,200 cases of Begg Scotch and 1,000 cases of Tanqueray gin. I also find that, on the basis of the testimony, when McCaig took over the accounts of Barry, it found that a number of these accounts were lost to McCaig, because they refused to continue as customers of McCaig. Therefore, McCaig, with the substantial inventory on hand, was justified in refusing to commit itself to a similar quota imposed by McCunn for the 1962 fiscal year. It is also clear, and I find as a fact, that, under the facts and circumstances of this case, the refusal to sell to McCaig after March 31, 1962, any amount of alcoholic beverages was unreasonable and arbitrary.

I am also persuaded and determine that, because of the earlier activity of Barry in stocking up his customers in the months prior to his retirement, McCaig did not have a reasonable opportunity to demonstrate its ability to sell the amounts sought to be imposed as a quota by McCunn.

Finally, on the basis of the figures for the past sales and depletion periodically by both Barry and McCaig, the figure of 8,000 cases is considerably higher than that theretofore sold by McCaig and unrealistic and is, therefore, arbitrary and unreasonable.

III

The position of McCaig in its petition has consistently been that it does not insist that it be the prime or sole distributor of McCunn's products. It has also asserted that it is entitled to some special consideration (to continue as a distributor) because it was not "another fellow coming down the pike." In this connection it produced evidence showing that, when it purchased Barry's accounts and indebted itself to the sum of $15,000, it did so with the knowledge and concurrence of McCunn. It is also demonstrated that it had developed a long relationship with McCunn's products, as a result of years of effort, time and money expended in developing a market for the said products. Therefore, under these circumstances McCunn was not justified in refusing to sell to McCaig based upon the relationship, their experience with each other, the excessive quota imposed by McCunn and the inventory which McCaig then had on hand as of March 31, 1962.

One additional point was referred to in this connection in the Hearer's Report. It was noted that the Joseph H. Reinfeld Company, which was substituted as a distributor for McCunn, holds a thirty-five per cent. interest in McCunn, and I stated that "this may have influenced the selection of the Reinfeld Company, and the Majestic Company which is a wholly owned subsidiary of the Reinfeld Company, in making such change." This view was predicated upon the following situation: McCaig is a wholly owned subsidiary of Galsworthy, Inc. Galsworthy and Reinfeld are two of the largest wholesalers in the State of New Jersey and, as is well known, are in sharp competition. A proper inference may be drawn that Reinfeld exercised a decisive influence upon McCunn in its decision to terminate the distributorship of McCaig. This was indicated by the testimony of Anthony J. Marsloe (McCunn's president) when he testified on cross examination as follows:

"Q From March 2, 1962 to late May, 1962 when you say you gave notice to Fleming & McCaig that they would no longer be considered as your prime distributors, did you have any sort of a conversation with anybody looking for another distributor?

A Yes, I had conversations.

Q With whom?

A My associates.

Q And anybody else?

A My associates.

Q And anybody else?

A My associates including Joseph H. Reinfeld who holds an interest in my company.

Q So what was the conversation with Joseph H. Reinfeld prior to May 24, 1962?

A I explained the predicament that I was in, that I was now in position in the State of New Jersey where I had no agreement. I had no distributor and yet I had to

satisfy my supplier as well as attempt to survive as a firm called James M. McCunn & Co. and this New Jersey was an important market.

Q And your associate Joseph Reinfeld was also the Joseph Reinfeld Company of New Jersey, the distributor?

A. One and the same."

Marsloe was then asked:

"Q So your present agreement with Reinfeld and Majestic and Baxter does not provide for a minimum total annual purchase. Am I correct?

A At this time it does not."

So that, aside from the fact that an annual quota was sought to be imposed upon McCaig, no such commitment was sought of the Reinfeld Company. It is, therefore, clear, and I so find, that the decision of McCunn to discontinue the distributorship to McCaig and invest it in the Reinfeld Company was not based upon terms usually and normally required by the importer since the criterion applied to McCaig was not similarly applied or sought to be applied to the Reinfeld Company.

IV

In conclusion, the basic issue was framed in the Conclusions and Order in the following language:

"The sole issue to be determined herein is whether the respondent (McCunn) arbitrarily and unjustifiably discriminated in its refusal to honor petitioner's (McCaig's) normal orders, in violation of the statute hereinabove referred to."

The statute (R.S. 33:1-93.1-5) states in part as follows:

2. "In the event any distiller, importer, or rectifier shall refuse to sell to any individual wholesaler any amount of alcoholic liquor, or comply with the provisions of this act, ..." the Director (at a hearing, upon petition) shall determine whether such refusal to sell is arbitrary.

3. "If the (director) ... is satisfied with the ability of the wholesaler to pay for such merchandise as ordered, he shall order the distiller, importer, or rectifier to complete said sale of alcoholic liquor to the wholesaler."

The financial ability of the wholesaler (McCaig) herein has been conceded.

Thus McCunn had the burden of establishing that its refusal to complete said sale was not arbitrary. My evaluation of the testimony and proofs satisfies me, and I find, that the burden has not been met.

V

Although implicit in the foregoing, in recapitulation and summary I make the following express findings of fact:

1. An invalid objective criterion used by McCunn as its basis for dropping McCaig as a wholesaler was arbitrary and discriminatory.

2. McCaig's failure substantially to deplete its 8,000 case purchase together with its resultant inability to make a new commitment, was not its fault and, therefore, McCunn's decision to drop McCaig as a distributor of its nationally advertised brands of alcoholic beverages was unjustified.

3. The 8,000 case figure was unreasonable in the light of past sales and depletion experiences which reflect the following:

(a) Total sales to Barry:
1959-60 fiscal year - 7,330 cases of John Begg Scotch
1960-61 fiscal year - 8,655 cases of John Begg Scotch

(b) As a jobber for Barry in 1958, McCaig sold 2,182 cases of John Begg Scotch

As a jobber for Barry in 1959, McCaig sold 2,975 cases of John Begg Scotch. Barry sold 2,980 cases of John Begg Scotch for a total of 5,950 cases.

As a jobber for Barry in the 1960 fiscal year, McCaig sold 3,575 cases of John Begg Scotch, and Barry sold 2,640 cases, for a total of 6,215 cases of John Begg Scotch.

In the 1961 calendar year McCaig sold 4,150 cases of John Begg Scotch and Barry sold 1,400 cases of John Begg Scotch to June 30, 1961, making a total of 5,550 cases for said period.

Thus the 8,000 case figure was more than a thirty per cent. increase over and above the best depletion figure theretofore attained.

4. I further find that the performance by McCaig was adversely affected by the unexpected loss of many of the Barry accounts, as well as insufficient time to demonstrate its ability to handle the distributorship. The above factors lead me to the conclusion that the 8,000 case figure was unreasonable.

5. I also find that the annual quota sought to be applied to McCaig was not applied to Reinfeld and Majestic whose purchases were accepted on an order basis without a fixed annual commitment.

Accordingly, I recommend reaffirmance of the order heretofore entered, determining that such refusal by McCunn was arbitrary and discriminatory, and that McCunn should therefore be directed to sell to McCaig alcoholic beverages on terms usually and normally required by McCunn and that, upon its refusal to comply with the terms of such order, a further order be entered in accordance with the provisions of R.S. 33:1-93.4.

Supplemental Conclusions

Written exceptions to the Hearer's Report and written argument thereto were filed with me by the attorneys for the respondent.

I have given careful consideration to the order of remand, the evidence and exhibits, the Hearer's Report and the exceptions and written arguments thereto. I concur in the findings and conclusions of the Hearer as to the matters indicated in the order of remand and adopt them as my findings and conclusions herein.

EMERSON A. TSCHUPP
Acting Director

Dated: February 3, 1964.

2. APPELLATE DECISIONS - SILVESTRI v. JERSEY CITY.

VINCENT SILVESTRI, trading as PHIL'S TAVERN,

Appellant,

v.

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

Respondent.

ON APPEAL
CONCLUSIONS
AND ORDER

Anthony P. Peduto, Esq., Attorney for Appellant.
Meyer Pesin, Esq., by Joseph S. E. Verga, Esq., Attorney for Respondent.
James F. McGovern, Jr., Esq., Attorney for Jersey City Tavern Owners' Association et als, Objectors.
Davidson, Miniutti & Nester, Esqs., by Joseph S. Nester, Esq., Attorneys for Hilltop Bar & Restaurant, Inc., an Objector.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is an appeal from the action of respondent whereby it unanimously denied appellant's application for place-to-place transfer of his plenary retail consumption license C-205 from premises 68 Jordan Avenue to premises 526 Mercer Street, Jersey City.

The appellant alleges in his petition of appeal that "a hardship exists and wishes to have the action of the Jersey City action reviewed."

Respondent contends in its answer that, after a hearing on appellant's application, respondent concluded that no hardship existed in the matter.

It appears from the evidence presented herein that the proposed premises, purchased by appellant in October 1961, are located on the northeast corner of Mercer Street and Jordan

Avenue approximately 150 feet from the present premises which are situated on the east side of Jordan Avenue. Motor vehicle traffic on Jordan Avenue is only permitted to proceed in a northerly direction. The proposed premises were operated as a grocery store by appellant, but at the present time the store is vacant. There is presently a premises licensed under a plenary retail consumption license on the southeast corner of Mercer Street and Jordan Avenue, clearly within 750 feet of the proposed licensed premises.

Appellant testified that the neighborhood has changed since he acquired the license in 1944 on Jordan Avenue and, as a result thereof, his liquor business is progressively declining in volume. He stated that there were factories in the immediate vicinity but they have discontinued operation and in their places there are now a gasoline service station and a school playground. Furthermore, appellant said that, because of Jordan Avenue being made a one-way thoroughfare, his present premises are isolated.

During cross examination, when asked the purpose in seeking the transfer of the license, appellant answered "I'm not making a go of it, not making money."

Appellant relies on the so-called "hardship clause" in an ordinance known as No. K-1112, adopted October 5, 1937, as last amended June 1, 1954. Section 4 of said ordinance provides inter alia that no consumption license may be transferred to other premises within 750 feet of premises similarly licensed except that the Board may, in its discretion, transfer a license to other premises within five hundred (500) feet of the licensed premises to be vacated, if the licensee shall be compelled to vacate "for any reason" that in the opinion of the Board was not caused by action on the part of the licensee.

In the case of Bosco et al. v. Jersey City and Smith, Bulletin 1353, Item 1, where the local issuing authority granted a place-to-place transfer of a liquor license based on a reason that the business at the premises wherein the applicant sought to transfer his license had decreased was reversed by the Director on appeal, the Director, among other things, stated:

> "It is perfectly clear that the respondent-licensee's inability to operate the licensed business profitably cannot form the basis of a finding that thereby the licensee was compelled to vacate for any reason not caused by any action on the part of the licensee. The entire design of the distance-between-premises ordinance would be set for naught if the licensee could transfer his license anywhere within 500 feet of his licensed premises merely on the basis that he could do better business at the new location. Under much similar circumstances in a case involving the representation that operation of the licensed business at the former premises was conducted at a loss with the prospect of much better business at the proposed new location, it was said in Cooperstein v. Elizabeth, Bulletin 1098, Item 1:
>
> > "*** 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;

Weiss v. Newark, Bulletin 1079, Item 7. *** A local issuing authority has no jurisdiction to issue or transfer a license in violation of a local ordinance. Moschera v. Plumsted, Bulletin 1075, Item 8; Higgins v. Elizabeth, Bulletin 1081, Item 5; cf. Jersey City Retail Liquor Dealers Assn. et al. v. Jersey City and Dal Roth, Inc., Bulletin 976, Item 4; aff'd. 28 N.J. Super. 246 (Super. Ct., App.Div. 1953).'"

On an appeal to the Superior Court of New Jersey, Appellate Division, 66 N.J. Super. 165, determination of the Director was affirmed. Judge Freund, speaking for the said court, stated:

"It is elementary that concern for the licensee's own financial misfortunes will not be elevated above the public interest. Cf. Hudson Bergen County Retail Liquor Stores Ass'n v. Board of Com'rs of Hoboken, 135 N.J.L. 502,510 (E. & A. 1947). Administrative efforts to accommodate individual licensees must be accomplished within the framework of the existing legislation, construed in terms of the overriding public policy. So viewed, appellant's application and reasons therefor were properly held by the Director to be outside the scope of the relief clause of Section 4 of the ordinance. It would hardly further the salutary principle of keeping 'the door of the escape clause as nearly shut as possible,' Dal Roth, Inc. v. Division of Alcoholic Beverage Control, supra, at pp. 254-255, to provide every economically dissatisfied licensee with a potentially powerful opening wedge."

Under the circumstances appearing herein, I am satisfied that the "hardship clause" aforementioned is not available for the purposes of the appellant. Therefore I recommend that an order be entered affirming the action of respondent in denying the transfer in question and dismissing the appeal.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered all the facts and circumstances herein, I concur in the Hearer's findings and conclusions and adopt his recommendation.

Accordingly, it is, on this 4th day of February 1964,

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

EMERSON A. TSCHUPP
ACTING DIRECTOR

3. APPELLATE DECISIONS - 587 TAVERN CORP. v. JERSEY CITY.

587 TAVERN CORP., t/a 587 CLUB, Appellant, v. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY, Respondent.	)	ON APPEAL CONCLUSIONS AND ORDER

Warren, Chasan, Leyner & Holland, Esqs., by Raymond Chasan, Esq., Attorneys for Appellant.
Meyer Pesin, Esq., by Joseph S.E. Verga, Esq., Attorney for Respondent.

BY THE ACTING DIRECTOR:

Appellant appeals from respondent's action suspending its plenary retail consumption license for premises 587 Ocean Avenue, Jersey City, for fifteen days effective January 2, 1964, and prohibiting the operation of a juke box on the licensed premises. Upon filing of the appeal I entered an order staying the suspension and prohibition pending the determination of the appeal.

During the course of the hearing herein, the testimony of the secretary of the respondent Board disclosed that no written notice of the charges preferred against the appellant-licensee was given as required by R.S. 33:1-31.

Appellant's attorney thereupon made a motion to reverse the action of the respondent, which was consented to by the attorney for the respondent.

The fatal lack of jurisdiction to enter the order of suspension clearly appearing, and the illegality of the collateral order prohibiting the operation of the juke box also clearly appearing (cf. Davdor, Inc. v. Newark, Bulletin 1546, Item 4),

It is, on this 10th day of February 1964,

ORDERED that the action of the respondent in suspending appellant's license and prohibiting the playing of a juke box on the licensed premises be and the same is hereby reversed, effective immediately.

EMERSON A. TSCHUPP
ACTING DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ~~ALCOHOLIC BEVERAGES NOT TRULY LABELED~~ Sale in violation of State Reg. No. 38 -- PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
KATHERINE GACOS 378 Summit Avenue Jersey City 6, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Distribution License D-100, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	)	

Davidson, Miniutti & Nester, Esqs., by Joseph S. Nester, Esq., Attorneys for Licensee.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads non vult to a charge alleging that on December 18, 1963, she sold a four-fifth quart bottle of gin for off-premises consumption during prohibited hours, in violation of Rule 1 of State Regulation No. 38.

Licensee has a previous record of suspension of license by the Director for ten days, effective August 18, 1959, for similar violation. Re Gacos, Bulletin 1298, Item 10.

The prior record considered, the license will be suspended for thirty days, with remission of five days for the plea entered, leaving a net suspension of twenty-five days. Re Mandel & Lichenstein, Bulletin 1536, Item 5.

Accordingly, it is, on this 3d day of February, 1964,

ORDERED that Plenary Retail Distribution License D-100, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Katherine Gacos for premises 378 Summit Avenue, Jersey City, be and the same is hereby suspended for twenty-five (25) days, commencing at 9:00 a.m. Monday, February 10, 1964, and terminating at 9:00 a.m. Friday, March 6, 1964.

EMERSON A. TSCHUPP
ACTING DIRECTOR

5. ACTIVITY REPORT FOR FEBRUARY 1964

ARRESTS:			
Total number of persons arrested			23
Licensees and employees	12		
Bootleggers	11		
SEIZURES:			
Motor vehicles - cars			1
Stills - 50 gallons or under			4
Alcohol - gallons			10.50
Mash - gallons			1850.
Distilled alcoholic beverages - gallons			3.751
Wine - gallons			4.875
Brewed malt alcoholic beverages - gallons			31.206
RETAIL LICENSEES:			
Premises inspected			657
Premises where alcoholic beverages were gauged			433
Bottles gauged			6,289
Premises where violations were found			60
Violations found			76
Reg. #38 sign not posted	17	Other mercantile business	6
Unqualified employees	16	Disposal permit necessary	2
Application copy not available	15	Improper beer taps	1
Prohibited signs	9	Other violations	10
STATE LICENSEES:			
Premises inspected			14
License applications investigated			3
COMPLAINTS:			
Complaints assigned for investigation			313
Investigations completed			330
Investigations pending			190
LABORATORY:			
Analyses made			99
Refills from licensed premises - bottles			36
Bottles from unlicensed premises			17
IDENTIFICATION:			
Criminal fingerprint identifications made			11
Persons fingerprinted for non-criminal purposes			227
Identification contacts made with other enforcement agencies			124
DISCIPLINARY PROCEEDINGS:			
Cases transmitted to municipalities			10
Violations involved			12
Sale during prohibited hours	6	Failure to close prem. dur. proh. hrs.	2
Sale to minors	3	Sale to non-members by club	1
Cases instituted at Division			12
Violations involved			14
Sale during prohibited hours	5	Fraud in application	1
Sale to minors	2	Permitting gambling (playing pool for money) on premises	1
Possessing pinball machine on prem.	1	Fraud and front	1
Conducting business as a nuisance	1	Unqualified employee	1
Substituting drink other than ordered	1		
Cases brought by municipalites on own initiative and reported to Division			20
Violations involved			22
Sale to minors	12	Failure to close premises during prohibited hours	2
Conducting business as a nuisance	5	Sale on Election Day	1
Sale during prohibited hours	2		
HEARINGS HELD AT DIVISION:			
Total number of hearings held			29
Appeals	5	Eligibility	4
Disciplinary proceedings	17	Seizures	3
STATE LICENSES AND PERMITS ISSUED:			
Total number issued			824
Licenses	1	Social Affair Permits	293
Solicitors' Permits	37	Miscellaneous permits	103
Employment permits	188	Transit insignia	152
Disposal permits	37	Transit certificates	12
Wine Permits	1		
OFFICE OF AMUSEMENT GAMES CONTROL:			
Licenses issued	65		
Disciplinary proceedings instituted	2		
Violations involved	2		
Redemption for prizes other than merch.	2		

EMERSON A. TSCHUPP
Acting Director of Alcoholic Beverage Control
Acting Commissioner of Amusement Games Control

Dated: March 5, 1964

6. STATUTORY AUTOMATIC SUSPENSION - SUPPLEMENTAL ORDER LIFTING SUSPENSION.

Auto.Susp. #233 In the Matter of a Petition to Lift the Automatic Suspension of Plenary Retail Distribution License D-36, Issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton to MADISON NARROW FABRICS (A CORP.) t/a LEXINGTON LIQUOR SHOP 432-A Lexington Avenue Clifton, N. J.	ON PETITION SUPPLEMENTAL ORDER

Goldstein & Ballen, Esqs., by Howard L. Ballen, Esq., Attorneys for Petitioner.

BY THE ACTING DIRECTOR:

On October 8, 1963, an order was entered temporarily staying statutory automatic suspension of license of petitioner pending determination of disciplinary proceedings against the licensee.

It now appears from supplemental petition filed herein that in disciplinary proceedings conducted by the municipal issuing authority, the license was suspended for twenty-five days commencing 3:00 a.m. February 3, 1964, and terminating at 3:00 a.m. February 28, 1964, after the licensee was found guilty of a charge alleging sale of alcoholic beverages to the same minor, which sale was the subject of the previous criminal conviction. It appearing that the suspension is adequate, I shall lift the automatic suspension in anticipation of the service of the currently effective municipal suspension. Re Hillman, Bulletin 1512, Item 5.

Accordingly, it is, on this 11th day of February, 1964,

ORDERED that the statutory automatic suspension of said license D-36 be and the same is hereby lifted, effective 3:00 a.m. Friday, February 28, 1964.

EMERSON A. TSCHUPP
ACTING DIRECTOR

7. STATE LICENSES - NEW APPLICATION FILED.

SELLRIGHT BEVERAGE CO., INC.
Southeast Corner Cedar Avenue and Park Boulevard
Wildwood, New Jersey

Application filed March 18, 1964 for place-to-place transfer of State Beverage Distributor's License SBD-188 to include additional space.

Joseph P. Lordi
Director