STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2192 August 8, 1975

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2192 August 8, 1975

1. COURT DECISIONS - MOON STAR, INC. v. JERSEY CITY ET AL. - DIRECTOR AFFIRMED WITH MODIFICATION.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-621-73

MOON STAR, INC.,

Appellant,

v.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY, ROBERT E. BOWER, DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF NEW JERSEY,

Respondents.

Submitted March 4, 1975 - Decided June 19, 1975.

Before Judges Matthews, Fritz and Botter.

On appeal from the Division of Alcoholic Beverage Control.

Mr. Salvatore Perillo, attorney for appellant.

Mr. William F. Hyland, Attorney General, attorney for respondent Division of Alcoholic Beverage Control, submitted a Statement in Lieu of Brief (Mr. David S. Piltzer, Deputy Attorney General, of counsel).

Mr. Dennis L. McGill, Corporation Counsel; Mr. Bernard Abrams, Assistant Corporation counsel, attorneys for respondent City of Jersey City, submitted a Statement in Lieu of Brief.

PER CURIAM

(Appeal from the Director's decision in Moon Star, Inc. v. Jersey City et al, Bulletin 2130, Item 3. Director affirmed with modification. Opinion not approved for publication by the Court Committee on Opinions).

2. COURT DECISIONS - A. N. BUTLER, INC. v. BUTLER - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-761-74

A. N. BUTLER, INC.,

Plaintiff-Appellant,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF BUTLER,

Defendant-Respondent.

Argued June 17, 1975 - Decided July 1, 1975.

Before Judges Carton, Crane and Kole.

On appeal from Division of Alcoholic Beverage Control.

Mr. Michael N. Tobin argued the cause for appellant (Messrs. Shevick, Ravich, Koster, Baumgarten & Tobin, attorneys).

Mr. Harry L. Sears argued the cause for respondent (messrs. Young & Sears, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, filed statement in lieu of brief on behalf of Division of Alcoholic Beverage Control (Mr. David S. Piltzer, Deputy Attorney General, of counsel).

PER CURIAM

(Appeal from the Director's decision in A. N. Butler, Inc. v. Butler, Bulletin 2171, Item 1. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

3. APPELLATE DECISIONS - ROTH v. WASHINGTON ET ALS.

#3859-
Steven Roth,

Appellant,

v.

Township Committee of the Township of Washington,

Respondent.

#3858-
Steven Roth,

Appellant,

v.

Township Committee of the Township of Washington, and Joseph R. Moss, t/a Bottle Shop,

Respondents.

#3860-
Steven Roth,

Appellant,

v.

Township Committee of the Township of Washington, and Delsea Associates,

Respondents.

On Appeal

CONCLUSIONS and ORDER

#3861-
W.C. Three, Inc. a New Jersey Corporation,

Appellant,

v.

Township Committee of the Township of Washington, Joseph R. Moss, and Delsea Associates,

Respondents.

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorney for Appellant Roth
Cresse & Carr, Esqs., by Warren H. Carr, Esq., Attorneys for Appellant W. C. Three, Inc.
Porch and Francis, Esqs., by Robert E. Francis, Esq., Attorneys for Respondent Township
Higgins, Trimble & Master, Esqs., by Joseph J. Master, Esq., Attorneys for Respondent Delsea
Wilinski, Suski, Kille & Scott, Esqs., by Robert Wilinski, Esq., Attorneys for Respondent Moss

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellants appeal from the grant of two new plenary retail distribution licenses to respondents Joseph R. Moss (hereinafter Moss), and Delsea Associates (hereinafter Delsea), on May 23, 1974, by respondent Township Committee of the Township of Washington (hereinafter Committee).

The appellants ground this appeal on two basic contentions: (1) the Committee did not base its selection of Moss and Delsea from among the many applicants for the new distribution licenses on a fair and impartial evaluation of the merits of their respective applications, but, rather, selected each of them because of favoritism, friendships, business association and professional relationships between them and members of the Committee; and (2) the sites of Moss and Delsea had locational disadvantages so that the public would not be best served in those locations as compared to the sites offered by other applicants, including these appellants.

The Committee denied both contentions by answering that the sites proposed by Moss and Delsea offered the better opportunity for service to the public than did those of the remaining applicants, including the appellants; and neither Moss nor Delsea received any consideration beyond those accorded to all applicants.

A de novo appeal was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded all parties to introduce evidence and to cross-examine witnesses.

When the resolutions were adopted by the Committee, its membership consisted of Mayor Burtoft, Committeemen Sheldon Belson, Daniel J. Mangini, James A. Yates and Anthony F. Marsella, all of whom testified at the hearing in this Division. Additionally, testimony was received of John T. McNeill, Township Solicitor, Charlotte Cella, Township Clerk, James Vincent, Township Administrator, Doctor Robert A. Poksay, member of the Board of Health, and appellant Wadsworth Cresse III. Further, respondents John R. Moss and John W. Trimble (a partner of Delsea Associates) also gave testimony.

The totality of the testimony was interlaced between responses respecting the relationship among McNeill, Trimble, Moss and members of the Committee, pertaining to the appellants' allegation of favoritism, and the methods and mechanics employed by the Committee in evaluating all of the applications submitted.

The crucial issue in these appeals revolves about the allegation or impropriety, favoritism, impartiality and conflict-of-interest which, if established, would render the action of the Committee voidable and subject to reversal.

I

With respect to the grant of a plenary retail distribution license to respondent John R. Moss: from the testimony elicited, it was uncontroverted that Moss is the senior partner of a law firm which John T. McNeill, present municipal solicitor and the Mayor, when Moss's application was filed, is a junior partner. Moss has, for many years, owned lands in the Township, one of which was the site for the license. At some time before he filed his application for a license, a building, on another piece of property which he owns, was destroyed by fire and required land clearing work. He then employed a construction firm of which Anthony F. Marsella, one of the Committeemen is the president.

He contemplated the use of the license as a means of providing a business for two of his nephews and, although his application referred to a prospective shopping center to be erected on his lands, he admitted that such plans were the projection of a Philadelphia realtor, rather than his own.

Alluding to the connection between him and the Committee through his associate, John T. McNeill, the Township Solicitor, he insisted that the Township is the independent client of McNeill, and that he had never discussed his application with McNeill, or sought his aid to intercede with the Committee.

McNeill characterized his relationship with Moss as purely professional and denied ever having discussed the application with him. Nonetheless, to prevent any implication with the applications of either Moss, Trimble or any other applicant, he took no part in the deliberations of the Committee respecting the applications; his only participation was the preparation of the resolutions, in blank, before the hearing, which blanks were filled in by him after the Committee had made its public determination.

He denied discussing any of the applications with the Committeemen with the exception of one conversation he had had with the Mayor, in which he urged that Moss receive equal consideration with other applications and not be pre-judged because of his connection with Moss's law firm.

Mayor Clifford R. Burtoft was on the Committee when McNeill was Mayor and, when he was a candidate for office, McNeill was his campaign chairman; and he was also the chairman for the campaign of Committeeman Mangini.

Committeeman Sheldon Belson considers McNeill one of his best friends, with whom he had served on the Committee since 1971. Committeemen Mangini, Yates and Marsella described their friendship with McNeill as casual or social. They each denied any involvement of McNeill with their deliberation concerning any of the license applications.

Township Administrator James Vincent recalled that a hearing was held shortly after the applications were filed, and in connection with an objection lodged against the Delsea application. McNeill was then Mayor, and presided over that hearing.

II

The grant of the license to respondent Delsea Associates was to a partnership consisting of three persons, one of whom is John W. Trimble, a former Township Solicitor. The remaining partners are Anthony Critis and Walter Washington; Critis is a local realtor. The land containing the license situs was acquired by the partnership from the local tax assessor and another.

Trimble admitted being counsel for the Committee in 1971 and thereafter served as counsel for the Board of Health, and he is now attorney for the "fire district". He was succeeded as Board of Health counsel by a law partner. Of the present Committeemen, only Sheldon Belson held that office when he was municipal solicitor.

Trimble explained that he acted as attorney in connection with the formation of a corporation known as Marsella Brothers; his client in that connection being Richard Marsella, father of Anthony F. Marsella, one of the Committeemen. He denied knowing that Anthony Marsella became president of the corporation at its organizational meeting. The corporation was organized in January 1974.

Mayor Burtoft testified that he knew Trimble in his connection with his vocation as an insurance company representative, and always in an adversary relationship. Belson characterized Trimble as a casual friend; Mangini and Yates made no expression of acquaintanceship with Trimble. Marsella admitted Trimble has been his friend for three or four years and formed the corporation of which he is the president. As previously noted, Burtoft, Belson, Mangini and McNeill were Committeemen when an objection was raised in 1974 to the Delsea application. Neither Marsella nor Yates were then members.

III

Examining the methods used by the respective members of the Committee in making their determinations of the successful applicants, and for the purpose of exploring the influence that Moss and Trimble may have had in the development of that determination, it is first noted that the vote for the two successful applicants was unanimous.

However, before the Committee reached that verdict, each of them scored all applications on the basis of the following criteria: location, ratable, esthetics, traffic impact and credit. After assigning point scores thereon, for each application, Burtoft and Belson gave Moss and Delsea their approval. Mangini selected Moss and applicant Molino. Yates picked Delsea and applicant Hurffville and Marsella urged Delsea and Molino.

Upon initial determination, four of the five Committeemen selected Delsea and three chose Moss. All of the Committee having picked one or the other, by compromise, Moss and Delsea were awarded the licenses.

Were the issues here restricted solely to the question of method or mechanics used by the Committee in making its evaluation of the respective applicants, I would unhesitatingly recommend that the action of the Committee be affirmed. Cf. Lubliner et al v. Paterson et al, 59 N.J. Super. 419 (1960); Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598; Blanck v. Magnolia, 38 N.J. 484 (1962); Fanwood v. Rocco, 33 N.J. 404 (1960).

The Committee, as a quasi-judicial body, is under a duty to excise from consideration or deliberation any suggestion or opportunity for favoritism or prejudice by its members.

IV

The granting of a liquor license has been held to involve action judicial in nature, Dufford v. Nolan, 46 N.J.L. 87 (1884). Thus the standards of disqualifying interest applicable in the matter now under consideration can be no less exacting than in the case of purely judicial action. Freehold Twp. v. Gelber, 26 N.J. Super. 388 (App. Div. 1953). Each case where the question of disqualification of a member of the local issuing authority is involved must be judged on the facts contained therein.

It is a well-established legal principle that a quasi-judicial action of a municipal body is rendered voidable by the participation of a member thereof, who is, at the time, subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty. Aldom v. Roseland, 42 N.J. Super. 495 (App. Div. 1956).

Respondents argue that none of the Committeemen had such private interest in the award of licenses as would disqualify them from acting upon them. It was contended that none of them would obtain any private benefit or gain from either. That argument has been effectively disposed of in Zell v. Roseland, 42 N.J. Super. 75, 82 (App. Div. 1956), in which the court held:

> "That the 'interested' member of the public body is in fact completely free of any improper or pecuniary motivation for his official action is immaterial if he has what in law amounts to an interest in the transaction."

In Zell, supra, the disqualifying interest was the mere membership in a Church Board by a member of the Planning Board, where the church was an interested party to the action before the Board.

The rule of law governing "disqualifying interest" is set forth in McNamara v. Saddle River Borough, 64 N.J. Super. 426, 429 (App. Div. 1960) wherein it was held:

> "If there is 'interest' there is disqualification automatically, entirely without regard to actual motive, as the purpose of the rule is prophylactic, that is, to prevent the possibility of an official in a position of self-interest being influenced thereby to deviate from his sworn duty to be guided only by the public interest in voting as such official. Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958); Griggs v. Princeton Borough, 33 N.J. 207, 219 (1960)."

The issue of disqualification of municipal officials because of a conflict of interest is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it. (Emphasis added) Griggs v. Princeton Borough, supra. In all of these cited cases, the persons were men of integrity and were motivated by sincerity of purpose. Nevertheless, the court held that it was the existence of such interest which was decisive, not whether such interest was actually influential. Cf. Zell v. Roseland, supra.

However, it might be conceded in the matter sub judice, that Moss and Trimble, men of integrity who would neither give favor nor ask one, exerted no direct influence on the Committeemen, their association, direct or indirect, with the Committee and municipal government, painted the benefit given them with the brush of influence. Through McNeill, Moss enjoyed the concern of

Mayor Burtoft, Committeemen Belson and Mangini. Trimble could expect personal interest of Committeeman Marsella, who had had a direct business relationship with Moss as well. Only Committeeman Yates appeared free of friendship connection with either of them.

None of the foregoing is meant to imply any improper motivation to any of the Committeemen; to the contrary, no proof was supplied that their respective votes were other than sincerely intended. However, the connections described gave rise to an inescapable psychological pressure to which they were subject. The effect of such pressure was treated in Aldom, supra, thusly:

> "That there was a psychological pressure on him moving against unqualified devotion to public duty throughout the pendency of the problem, no one would deny. That pressure consciously or unconsciously would have the natural tendency to turn him in the direction in which his vote was cast. In such a situation the rule of law, based as it is on human experience, safeguards him and the public against extraneous influence; it causes the 'cup' to pass from him. it disqualifies him from acting at all." p. 507.

It has been held, further, that if a member of the municipal issuing authority who must abstain from any participation in the application proceeding does not, the proceeding is voidable on review. Pyatt v. Dunellen, 9 N.J. 548 (1952); Paitakis v. New Brunswick, Bulletin 2082, Item 1.

For the foregoing reasons, I find that appellants have established that the action of the Committee was erroneous as required by Rule 6 of State Regulation No. 15. I, therefore, recommend that the action of the Committee be reversed.

Conclusions and Order

Written exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

I have examined and evaluated the exceptions filed and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's report, the exceptions filed thereto, and the answers to the said exceptions, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of May 1975,

ORDERED that the action of the Township Committee of the Township of Washington be and the same is hereby reversed.

Leonard D. Ronco
Director

4. APPELLATE DECISIONS - MACHIAVERNA v. NEWARK.

Grace Machiaverna, t/a Al & Grace's Tavern, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

DeCotiis, Nulty and Hayden, Esqs., by Alfred C. DeCotiis, Esq., Attorneys for Appellant

Milton A. Buck, Esq., by John C. Pidgeon, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Board) which, on October 30, 1974 suspended appellant's Plenary Retail Consumption License C-464, for premises 895-897 18th Avenue, for twenty days, after finding appellant guilty of a charge alleging that, on August 1, 1974 she sold alcoholic beverages to a minor, in violation of Rule 1 of State Regulation No. 20.

The effective date of the suspension, November 25, 1974, was stayed by order of the Director, dated November 20, 1974, pending the determination of this appeal.

Appellant's petition of appeal contends that the Board's action was erroneous in that its determination was based upon improper evidence, principally hearsay, which appellant was not permitted to refute.

The Board answered the petition by the averment that its action was based upon its sound discretion after evaluating the evidence before it.

A de novo appeal was heard in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. A transcript of the hearing before the Board was admitted into evidence, in accordance with Rule 8 of State Regulation No. 15.

The transcript of proceedings before the Board revealed the testimony of Ronald Parm, a detective of the Newark Police Department. He stated that on August 1, 1974 he received a report made by a Police Officer Thomas Derr of the Irvington Police Department. The report of Derr revealed that he had observed one Thomas Bunalski, a minor, purchase beer at appellant's premises. Parm did not visit those premises as he relied upon the Youth Aid Bureau to pursue an investigation. The transcript also reflects that Thomas testified that he was sixteen years of age in appellant's premises on August 1, 1974. He admitted entering the premises for the purpose of purchasing beer, but purchased cigarettes instead.

At the hearing in this Division, the minor, Thomas was examined further and admitted that he had been in the premises on prior occasions in the company of his father. On the evening of August 1, 1974 he entered, purchased cigarettes from a machine after first obtaining change from the bartender.

He recounted that, as he walked from the middle area of the bar to the opposite end of the premises where the cigarette machine was located, he asked a patron seated at the bar to purchase beer for him. Upon obtaining assurance from that patron, not identified, he left the premises and awaited outside the premises nearby to the doorway. The obliging patron exited the premises with the beer which he gave to the minor. The doorway into the premises was closed at the time of the exchange.

Rule 1 of State Regulation No. 20 provides that no licensee shall "allow, permit or suffer" the sale of alcoholic beverages to a minor. To establish a charge within the context of this Rule, it is a basic requirement that the licensee, or her agents either made a sale to a minor or permitted the sale to the minor by knowing of and hence, permitting the infraction. If the licensee knew or "should have known" of such sale and took no steps to prevent it, the Rule is violated. Re Hillcrest, Inc., Bulletin 2105, Item 3.

It has long been held that all relevant evidence in an administrative hearing is admissible, although a decision may not be based upon hearsay alone.

> "...for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36,51 (1951).

The uncontroverted admission of the minor that the alcoholic beverages were acquired by him outside the premises from other than the licensee or her agents, exculpates the licensee from the charge. No testimony was presented which affirmatively established that the licensee knew that the purchase made by the unidentified patron was made for the minor on the exterior of the premises. The testimony of Detective Parm relating information given him is totally inadmissible upon which a finding could be based.

I, therefore, find that the action of the Board was erroneous in its finding of guilt based upon the testimony before it or on the totality of the testimony as produced in this Division.

Accordingly, it is concluded that the appellant has established that the action of the Board was erroneous and should be reversed, pursuant to Rule 6 of State Regulation No. 15.

It is, thus, recommended that the action of the Board be reversed, and the charge herein be dismissed.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 30th day of May 1975,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby reversed, and the charge herein be and the same is hereby dismissed.

Leonard D. Ronco
Director

5. APPELLATE DECISIONS - PENNISI and SILKOWSKI v. GARFIELD - AMENDED ORDER.

Salvatore Pennisi and Fred Silkowski, t/a The Midnight Sun, Appellants, v. Mayor and Council of the City of Garfield, Respondent.	)	On Appeal AMENDED ORDER

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Appellants
Anthony J. Sciuto, Esq., Attorney for Respondent City
Ryan & Sommers, Esqs., by Charles Sommers, Esq., Attorneys for Objectors

BY THE DIRECTOR:

On May 12, 1975 Conclusions and Order were entered herein reversing the action of the respondent Mayor and Council of the City of Garfield and directing the respondent to renew the subject license for the 1974-75 licensing period nunc pro tunc, expressly subject to certain special conditions set forth therein.

In addition, the order provided that the "said special conditions shall be continuing conditions which the Mayor and Council is directed to reimpose upon any renewals of the said license which may be granted."

The Hearer's report, which I adopted, recommended that the "special conditions may be imposed by the respondent upon any subsequent renewals of the said license which may be granted." (underscoring added.) The attorney for the appellant has requested that the said order be amended to reflect the recommendation of the Hearer because he contends that the word shall is a mandate and would represent a significant modification "without notice and hearing", as required by Rule 14 of State Regulation No. 15. I shall, therefore, amend the said Conclusions and Order as requested.

Accordingly, it is, on this 28th day of May 1975,

ORDERED that the final paragraph of the Conclusions and Order herein, dated May 12, 1975, be and the same is hereby amended as follows:

ORDERED that the said special conditions may be reimposed by the respondent upon any subsequent renewals of the said license which may be granted.

Leonard D. Ronco
Director

6. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL ORDER.

In the Matter of Disciplinary Proceedings against Embers Lounge, Inc. t/a Embers Lounge 100 Market Street Paterson, N.J., Holder of Plenary Retail Consumption License C-3, issued by the Board of Alcoholic Beverage Control for the City of Paterson. Transferred to Jordan Pesic t/a Jordan's Lounge Same Address	SUPPLEMENTAL ORDER

Herman W. Steinberg, Esq., Attorney for Licensee

BY THE DIRECTOR:

On January 30, 1975, Conclusions and Order were entered herein suspending the subject license for the balance of its term, effective Thursday, February 13, 1975, upon its plea of guilty to two charges, alleging that on July 19, 1975 it: (1) allowed and permitted lewdness on its licensed premises, viz., the solici ation for prostitution, in violation of Rule 5 of State Regulation No. 20; and, (2) it allowed and permitted a female employee to accept beverages at the expense of customers or patrons; in violation of Rule 22 of State Regulation No. 20.

However, leave was granted to a bona fide transferee of the licensee to apply to the Director, by verified petition, for the lifting of the suspension whenever such transfer became effective, and upon establishing that Carmen DeCrosta, the holder of 98% of the capital stock of the corporate licensee, had completely divested himself of the said stock, and disassociated himself from the said licensee. The Order provided, however, that the said lifting of the said suspension shall not occur in any event, sooner that one-hundred twenty days from the date of the commencement of the suspension imposed herein.

It appears from a letter dated May 29, 1975 signed by Herman W. Steinberg, Esq., attorney for Jordan Pesic, the said transferee that a person-to-person transfer of the said license to Jordan Pesic, t/a Jordan's Lounge for the same premises, was approved on May 28, 1975 by the local issuing authority.

This was confirmed by Division investigation wherein it is noted that the said transfer was a bona fide transaction and that the officers of the former licensee are not associated in any way with the said transferee.

I, therefore, am satisfied that the unlawful situation has been corrected and shall grant the petition requesting termination of the suspension effective June 16, 1975.

Accordingly, it is, on this 13th day of June 1975,

ORDERED that the said suspension be and the same is hereby terminated, effective 3:00 a.m. Monday, June 16, 1975.

Leonard D. Ronco
Director