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

BULLETIN 301. MARCH 8, 1939.

1. PLENARY RETAIL CONSUMPTION LICENSES - OTHER MERCANTILE BUSINESS - WHAT CONSTITUTES - SALE OF BREATH DEODORANTS PROHIBITED.

February 28, 1939.

Lee Products Company,
Basking Ridge, N. J.

Gentlemen:

The New Jersey Alcoholic Beverage Law provides, by R.S. 33:1-12 (Control Act, Sec. 13), that plenary retail consumption licenses (the license that is issued to bars and taverns) "shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which a grocery, delicatessen, drug store, or other mercantile business (except the keeping of a hotel or restaurant, or the sale of cigars and cigarettes at retail as an accommodation to patrons, or the retail sale of nonalcoholic beverages as accessory beverages to alcoholic beverages) is carried on."

The sale of breath deodorants by taverns would constitute the conduct of another mercantile business on the licensed premises, and is therefore prohibited. By way of illustration, see Re Hudson Tobacco Co., Bulletin 265, Item 16; Re Feldman, Bulletin 253, Item 1.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

2. APPELLATE DECISIONS - WATTS v. PRINCETON.

RAYMOND WATTS,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
TOWNSHIP COMMITTEE OF THE)
TOWNSHIP OF PRINCETON,)
Respondent)
- - - - - - - - - - - - - - - - -)

Ernest S. Glickman, Esq., Attorney for Appellant.
Louis Gerber, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail consumption license for premises on State Highway 31, in the Township of Princeton.

Respondent denied appellant's application on the following grounds:

"1. There are a sufficient number of licensed places in the Township of Princeton and there is no need for a place to sell liquor in that isolated location, such a place would have to depend entirely on transient trade.

"2. Objections by a large number of the property owners and residents in the vicinity of the place."

Princeton Township contains six retail liquor places (five taverns and a package store) to service its population of 3,000 and its area of 17 square miles. Appellant's premises are located in a sparsely settled vicinity, most of whose inhabitants seem opposed to a liquor establishment there. The two nearest liquor places are two and one-half miles away, one — a tavern — being located to the southwest on State Highway 31, and the other, also a tavern but more directly to the south, being located in a community of some 500 persons.

Seven neighboring owners and residents within 250 feet to three-quarters of a mile of appellant's premises, and including the local Chief of Police, the local Health Officer, and the local Overseer of the Poor and Director of Relief, appeared at the hearing on appeal as objectors.

Appellant testified that he has been selling occasional sandwiches and meals at his premises, where he has been conducting a vegetable and gasoline business; that various transients on the highway have asked for liquor with their food; that some twenty-five or thirty persons in the Township have also asked why he does not obtain a liquor license; that, however, only three or four of these residents live within a radius of one-third or one-half a mile of his place. To testify that there is public necessity for the license applied for, appellant produced (outside of his wife) four witnesses, one a tenant at his wife's property some twenty feet away; two others living between two and three miles away; and the fourth residing three miles away in an adjoining municipality.

A local issuing authority may validly refuse to issue a public retail liquor license if, at the time, sufficient liquor places are already outstanding in the municipality, even though, as here, there is no formal regulation limiting the number of such licenses. Haycock v. Roxbury, Bulletin 101, Item 3; Dunster v. Bernards, Bulletin 121, Item 11; Widlansky v. Highland Park, Bulletin 209, Item 7; Goff v. Piscataway, Bulletin 234, Item 5.

There is no substantial proof that respondent's judgment on this issue is unreasonable. The five taverns and the one package store now outstanding are not shown to be incapable of satisfactorily meeting the liquor needs of the Township.

Nor is there proof that public necessity requires a liquor place to be established in this sparsely settled vicinity whose majority sentiment seems to be against the establishment of such a place. The fact that State Highway 31 is a fairly well traveled road does not of itself prove this need but is merely one of the circumstances to be considered. Levitt v. Liberty, Bulletin 169, Item 4. It does not appear that the traveling public is so inconvenienced by the lack of a liquor place here that one must be established despite the tavern two and one-half miles away on the same road, the majority sentiment of the vicinity against such a place, and the opinion of the Township Committee that the present liquor establishments in the Township are sufficient.

The action of respondent is therefore affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 4, 1939.

3. APPELLATE DECISIONS - GARRISON v. BRIDGETON.

CHARLES H. GARRISON, JR.,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
CITY COUNCIL OF THE CITY OF BRIDGETON,)
Respondent)

Douglas V. Aitken, Esq., Attorney for the Appellant.
Samuel Iredell, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail distribution license for premises located at 71 South Avenue, City of Bridgeton.

By resolution of July 19, 1934, respondent adopted a quota of six plenary retail distribution licenses to be outstanding at any one time in the City.

When appellant filed his present application for license, viz., on November 18, 1938, this quota was still in effect and one vacancy existed therein. However, on December 6, 1938, respondent introduced an ordinance reducing the quota on distribution licenses to the then outstanding number of five. On that same day, it denied appellant's application for the reason that "City Council feels that there is enough of this type of license in the City of Bridgeton, and tonight passed an Ordinance on first reading reducing the number of authorized Retail Distribution licenses to the number now issued and outstanding."

The present appeal was filed on December 17, 1938. The ordinance reducing the quota was finally adopted on December 27,1938. Hearing on the appeal was held on January 11, 1939.

Appellant argues that the denial of his application was erroneous because, when it was filed and passed upon, a vacancy existed in the then quota of six distribution licenses for the City; that the ordinance reducing the quota to five, and thus eliminating the vacancy, is inapplicable to his application since it was introduced only on the day of denial and not finally adopted until three weeks thereafter.

A similar situation occurred in Franklin Stores v. Elizabeth, Bulletin 61, Item 1. In that case, too, the application was made and denied before the ordinance was enacted. It was there contended by the appellant that such subsequently enacted ordinance did not validate denial of the application; that such an ordinance could not have any retroactive effect; that the appeal must be adjudicated on the factual situation as it existed at the time of the denial of the application.

I there ruled against such contention, saying:

"The spirit and not the letter of the law should dominate. Sound public policy requires that if a special privilege is to be given, the grant must be consonant with such policy at the time the grant is made. Whether a license should be issued is not a game of legal wits or abstract logic, but, rather, a solemn determination on all the concrete facts, whether presented originally or on appeal, whether or not it is proper to issue that license. It is not a mere umpire's decision whether or not some administrative official previously made a move out of order or erred in technique or did something which by strict rules he had no right to do, but rather a final adjudication whether the license should be issued NOW... True, the ordinance had not been adopted at the time of the denial, but it was in actual, bona fide contemplation. The good faith of respondents is demonstrated by the actual adoption of such ordinance the month following the denial. I find, as fact, that the policy existed at the time the application was denied even though it was not formally manifested until a later date. The contention of appellant fails, not because the application was barred by the ordinance but rather because to grant it now would be in defiance of the local policy manifested by the ordinance in active, bona fide contemplation at the time the application was denied."

See also to the same effect Widlansky v. Highland Park, Bulletin 209, Item 7; Cocciolone v. West Deptford, and Trovato v. West Deptford, Bulletin 247, Item 3; Galluccio and Sciarrabone v. Belmar, Bulletin 255, Item 8.

So, in the present case, I conclude that the municipal policy, exhibited by the Bridgeton ordinance, which has been in force as a formal regulation since December 27, 1938, is the true criterion on which this decision must be based.

No attack is made on respondent's good faith in adopting the ordinance, or upon the reasonableness of establishing a quota of five distribution licenses for the City.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 4, 1939.

4. ENFORCEMENT DIVISION ACTIVITY REPORT FOR FEBRUARY, 1939

To: D. Frederick Burnett, Commissioner

ARRESTS: Total number of persons - - - - - - - - - - - - - - 42
Licensees - 1 Non-Licensees - 41

SEIZURES: Stills - total number seized - - - - - - - - - - 9
Capacity 1 to 50 Gallons - - - - - - 4
Capacity 50 Gallons and over- - - - 5

Motor Vehicles - total number seized - - - - - - 6
Trucks - 0 Passenger Cars - - - - 6

Alcohol
Beverage Alcohol - - - - - - - - - - - - - - - - 16 Gal.

Mash - Total number of gallons - - - - - - - - - 6,360

Alcoholic Beverages
Beer, Ale, etc. - - - - - - - - - - - - - 0
Wine - - - - - - - - - - - - - - - - -225 Gallons
Whiskies and other hard liquor- - - - 66 "

RETAIL INSPECTIONS:
Licensed premises inspected - - - - - - - - - - - - 1,378
Illicit (bootleg) liquor- - - - - - - - - - 11
Gambling violations - - - - - - - - - - - - - 18
Sign violations - - - - - - - - - - - - - - - 31
Unqualified employees - - - - - - - - - - - 33
Other mercantile business - - - - - - - - - 65
Disposal permits necessary - - - - - - - - 3
"Front" violations- - - - - - - - - - - - - 1
Improper beer markers - - - - - - - - - - - 2
Other violations found- - - - - - - - - - - 19

Total violations found- - - - - - - - - - -183
Total number of bottles gauged- - - - - - - - - -10,103

STATE LICENSEES:
Plant Control Inspections completed - - - - - - - 252
License applications investigated - - - - - - - - 10

COMPLAINTS:
Investigated and closed - - - - - - - - - - - - - - 326
Investigated, pending completion- - - - - - - - - 165

LABORATORY:
Analyses made - - - - - - - - - - - - - - - - - - - 139
Alcohol and water and artificial coloring cases - - - - - - - - - - - - - - - - - - 20
Poison and denaturant cases - - - - - - - - - - - 0

Respectfully submitted,

E. W. Garrett,
Deputy Commissioner.

5. APPELLATE DECISIONS - ZOLNIEROWICZ v. JERSEY CITY.

JOSEPH ZOLNIEROWICZ,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
BOARD OF COMMISSIONERS OF THE CITY OF JERSEY CITY,)
Respondent)

Matthew F. Czachorowski, Esq., Attorney for Appellant.
N. Louis Paladeau, Jr., Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the revocation of appellant's plenary retail consumption license for premises at 1 Senate Place, Jersey City, opposite to a large plant of the American Can Company.

Respondent revoked the license because appellant committed an assault, allegedly unwarranted, on employees of the American Can Company. It contends that had this conduct occurred prior to the issuance of appellant's license such license would have been denied on the ground of personal unfitness; that, therefore, it is empowered to revoke the license under R. S. 33:1-31 (Control Act, Sec. 28), which provides, inter alia:

> "Any license.....may be suspended or revoked....for .....any.....act or happening occurring after the time of making application for a license which if it had occurred before said time would have prevented the issuance of the license."

The story of the assault is as follows:

On a night in July last, employees on the seventh floor of the American Can Company's plant called appellant's wife a "whore" as she stepped into the street from appellant's tavern. Appellant, who was with her at the time, remonstrated and was dared "to come up and shut us up." He entered the plant soon thereafter and told one Grebb, an employee whom he met on the second floor, that he was going to beat up the "group on the seventh floor." He left, however, after being counseled by Grebb to make a report to the company and being promised the names of the insulting employees. Upon return to his tavern, appellant called the police and was advised to discover the name of the employees in question and to swear out a complaint against them.

Appellant, after closing his tavern at about 12:30 or 12:45 A.M., reentered the American Can Company's plant and went into the employment office on the second floor, where Grebb and eight or nine other employees were sitting around. He there demanded the names of the persons who had insulted his wife. One of appellant's friends, who had remained on the outside, entered the room at about this time. Words ensued. Appellant and his friend struck Grebb and knocked him "out." A short time later, one Fred Demmers, another employee, on leaving the plant, was assaulted by appellant and his friend. Demmers' jaw was broken.

Appellant contends that respondent is without power to revoke his license because of the above conduct; that the above quoted portion of R. S. 33:1-31 (Control Act, Sec. 28), upon which respondent relies, refers only to violations of the liquor laws.

The contention is without any merit. The Statute means just what it says. It has already been so decided. Re Hoboken, Bulletin 165, Item 7. In that case, I said:

> "This is a case of first impression in the State. It illustrates the flexibility and adequacy of the provisions of the Control Act to deal effectively with cases out of the ordinary run. Thus, this licensee was convicted, after he had received his license, of a crime which had nothing to do with the handling of liquor nor did the crime bear on any of the problems of liquor control except that the conviction for conspiracy demonstrated that he was not worthy of having a license."

So, in the instant case, the reprehensible conduct of the licensee above recited in committing atrocious assault and battery upon two men, wholly innocent of the insult to appellant's wife, demonstrates his unworthiness to be invested with the privileges of a liquor licensee. The fact that a jury in the Court of Quarter Sessions found appellant guilty of atrocious assault and battery and that Judge Erwin placed him on probation to make restitution of $1500.00 for the medical expenses of his victim, Fred Demmers, confirms the conclusion of the Board of Commissioners of Jersey City.

The action of respondent is therefore affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 4, 1939.

6. LICENSEES - UNLAWFUL DISCOUNTS - HEREIN OF THE SCHEME OF THE PICKWICK DELICATESSEN.

March 4, 1939

Pickwick Delicatessen,
Plainfield, N. J.

Gentlemen:

I have just seen your circular reading:

> "We are happy to say that Pickwick is now celebrating its Fifth Birthday and we feel our success is due to you and the others who have helped us reach this Anniversary.
>
> "We certainly appreciate your past patronage of course, but then, that is not enough. We want to reciprocate in a substantial manner.
>
> "So we decided to offer you a 10% profit sharing allowance on any single purchase made up to March 4, 1939. All you have to do is present this enclosed check, in person, when you are ready to avail yourself of this offer and we will cheerfully deduct 10% from the amount of the purchase. Just our way of saying THANKS for your patronage in the past five years.

"This is not a Public Sale. It is a confidential offer to our very select and valued customers.

"Looking forward to seeing you real soon, believe us to be

"Most appreciatively yours,
"PICKWICK DELICATESSEN & LIQUOR SHOP
"Herman Sturche
"Treasurer.

"P.S. Of course you won't forget to bring the enclosed check, will you? It may be used in both our Delicatessen and Liquor departments.

"Certain few products coming under The New Jersey Fair Trade Act are excluded from the above offer."

The discount certificate is in the form of a bank check which, if presented before March 4th, entitles the person to whose order it is drawn to the ten per cent discount.

It is not that I wish to detract from the joy that will be yours when you cheerfully deduct the ten per cent for these valued customers. Indeed, I appreciate the care that you have taken to point out that the items for which minimum prices have been established by Fair Trade contract are excluded.

But haven't you forgotten Rule 20 of Regulations No. 20, which provides:

"20. No retail licensee shall, directly or indirectly, offer or furnish any gifts, prizes, coupons, premiums, rebates, discounts or similar inducements with the sale of any alcoholic beverage for consumption off the licensed premises; provided, however, that nothing herein contained shall prohibit retail licensees from furnishing advertising novelties of nominal value."

I am sorry that I did not catch up with this scheme earlier for I note that the offer expires today. Otherwise, upon proof that you had given such discounts, you would be called upon to show cause why your license should not be revoked for disobedience of the rule.

If you wish to celebrate any further anniversaries, don't let this ever happen again. Your pledge to that effect is required forthwith.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. APPELLATE DECISIONS - VASAPOLI v. PLAINFIELD and BIVONA.

FRANK VASAPOLI,)

Appellant,)

-vs-) ON APPEAL
CONCLUSIONS

MAYOR AND COMMON COUNCIL OF THE CITY OF PLAINFIELD and AUGUSTUS BIVONA,)

Respondents)

Joseph Mutnick, Esq., Attorney for Appellant.
William Newcorn, Esq., Attorney for Respondent, Mayor and Common Council of the City of Plainfield.
Joseph I. Bedell, Esq., Attorney for Respondent, Augustus Bivona.
Leon Gerofsky, Esq., by Leonard Blumberg, Esq., Attorney for W. H. Cawley Co., a creditor of Appellant.

BY THE COMMISSIONER:

This is an appeal from the action of respondent, Mayor and Common Council of the City of Plainfield, in granting a transfer of appellant's plenary retail consumption license to respondent Augustus Bivona. The premises in question are located at 501 Richmond Street, Plainfield.

Appellant contends that the transfer should have been refused because (1) Bivona was endeavoring to perpetrate a fraud upon the appellant and the creditors of appellant, (2) appellant withdrew his consent to said transfer before respondent Bivona had fully complied with all the legislative requirements necessary to confer jurisdiction on the issuing body, (3) Bivona had neither legal nor equitable interest in the premises to which he sought a transfer of the license.

On November 21, 1938 appellant and the respondent, Augustus Bivona, entered into a written agreement whereby Vasapoli agreed to transfer to Bivona all of his right, title and interest in and to a certain retail liquor business situated at 501 Richmond Street, Plainfield, in consideration of the sum of Forty-five Hundred Dollars ($4500.00). By the terms of the agreement, Bivona was to assume all obligations outstanding against such business to an amount not exceeding Four Thousand Dollars ($4,000.00) and to pay the balance in cash to the seller "after serving one hundred days' notice to said creditors after the date of sale." No closing date is mentioned in the agreement.

On November 23, 1938 Vasapoli signed a written consent to the transfer of his license to Augustus Bivona and, on the same date, Bivona executed an application for the transfer of said license, which application and consent were subsequently filed with the City Clerk. The notice of intention was published on November 25, 1938 and December 2, 1938. On December 1, 1938 the City Clerk and the Mayor and Common Council of the City of Plainfield received letters from Vasapoli withdrawing his consent. On December 5th written objections were received from Sam Weissman, as owner of premises in question, and others, and the matter was set down for a hearing to be held on December 19, 1938.

It appears from a transcript of the evidence taken at the hearing held by the Mayor and Common Council, on December 19, that the only substantial objections against the transfer were urged by appellant herein, who contended that the transfer should be denied for the same reasons upon which he bases his present appeal. After considering the evidence, respondent Mayor and Common Council granted the transfer. Hence, this appeal.

As to ground (1): It is unnecessary to consider herein the question of fraud because, at the hearing on appeal, appellant abandoned said ground with the explanation that said question is being litigated in a proceeding pending in the Court of Chancery.

As to ground (2): It is unnecessary to consider the merits of this contention because I find that the transfer should have been refused because of the evidence given under the third ground of appeal hereafter considered.

As to said ground (3): The premises in question are owned by Richmond Realty Corporation, of which Sam Weissman is President. Appellant was not a lessee of said premises, but a tenant from month to month at a rental of $40.00 per month. It appears that, at the hearing held on December 19th, an attorney representing Richmond Realty Corporation notified the Mayor and Common Council that his client would not accept Augustus Bivona as a tenant; that, on the following day, Richmond Realty Corporation leased said premises to Gustav Miller, for a period of three years commencing February 1, 1939, which lease, by its terms, entitled said Gustav Miller to immediate possession of the premises; that Miller has been in possession of said premises since December 20, 1938 under the terms of said lease. There is nothing in the agreement, dated November 21, 1938, which refers specifically to the right of possession in and to the licensed premises. Bivona contends that, by the general terms of said agreement, all of Vasapoli's interest in the licensed premises accrued to Bivona, but it is clear that Bivona never entered into possession and that the landlord refused to accept Bivona as a tenant. Under these circumstances, respondent Bivona had neither legal nor equitable interest in the licensed premises at the time the transfer was granted. He has no such interest at the present time. Hence, the license cannot be transferred to him. Procoli v. Trenton, Bulletin 28, Item 6; Caplan v. Trenton, Bulletin 29, Item 11; Re Sakin, Bulletin 67, Item 13; White Castles, Inc. v. Clifton and Weiss, Bulletin 97, Item 13; Re Fisher, Bulletin 107, Item 8; D'Annibale v. Fredon, Bulletin 159, Item 7; Eavenson v. South Orange, Bulletin 283, Item 8.

For these reasons, the action of respondent, in granting the transfer to Augustus Bivona, is reversed.

There is sufficient evidence in the present record to lead me to believe that Vasapoli at the present time is not the real licensee. He admits that he became financially embarrassed about July 1938. It appears that, in the latter part of November 1938, he owed debts amounting to approximately Four Thousand Dollars ($4,000.00), including eight months' rent. On December 3, 1938 he hired Gustav Miller as a bartender, at a weekly salary of Thirty Dollars ($30.00). Miller had been engaged for years in the leather business, and knew nothing of the liquor business. The day after the transfer was granted to Bivona, Miller paid the sum of Three Hundred Twenty Dollars ($320.00) in cash to the landlord, and took an assignment of its claim for rent against Vasapoli. On the same day he entered into the lease with the landlord, which has been already described. Vasapoli contends that there is no agreement

between him and Miller with reference to the sale of the business and that, during the month of December, he continued to operate the business as his own, reimbursing Miller for the rent which Miller paid. It does not appear if any arrangements were made to satisfy creditors and, if so, by whom they were paid, but the entire situation raises a suspicion that Vasapoli is not the actual operator of the licensed business.

Accordingly, I have directed that charges be preferred and served upon the licensee, Vasapoli, to show cause why his license should not be suspended or revoked on the ground that he is operating the said licensed business as a "front" for Gustav Miller. In said proceedings Vasapoli, of course, will be given an opportunity to explain all the circumstances concerning the present conduct of the licensed business.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 5, 1939.

8. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - SALE AFTER HOURS - SECOND OFFENSE.

In the Matter of Disciplinary Proceedings against

DONATO DI GIACOMO,
2 Prospect Place,
Newark, New Jersey,

Holder of Plenary Retail Consumption License No. C-116, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Frank Calabrese, Esq., Attorney for the Licensee.
Charles Basile, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Licensee pleads non vult to charges of keeping his licensed premises open, and selling alcoholic beverages therein on Sunday between 2:00 A.M. and 12:00 noon, in violation of Section 1 of Newark Ordinance No. 3930.

On Sunday, February 5, 1939, at about 10:40 A.M., Investigators Palmieri and Emmetts found the rear door locked, but, upon being admitted by the licensee, they discovered six persons seated at tables in the sitting room. Each person had a glass of alcoholic beverages.

This is licensee's second offense of record.

On June 20, 1935, the Municipal Board of Alcoholic Beverage Control of the City of Newark found him guilty of possessing illicit alcoholic beverages and suspended the license which he then held from June 24, 1935 to June 30, 1935. At a rehearing, the Board mitigated said sentence and returned the license to the licensee on June 25, 1935.

Since this is a second offense, I shall suspend the license for a period of fifteen days for keeping the licensed premises open and selling alcoholic beverages in violation of the City Ordinance, less five days for making no alibis.

Accordingly, it is, on this 5th day of March, 1939, ORDERED that Plenary Retail Consumption License No. C-116, heretofore issued to Donato DiGiacomo by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of ten (10) days, effective March 9, 1939 at 3:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

9. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - LEWDNESS

In the Matter of Disciplinary Proceedings against

JULIA MAZZIOTTI,
22-24 Seventh Avenue,
Newark, New Jersey,

Holder of Plenary Retail Consumption License No. C-113, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Mario V. Farco, Esq., Attorney for the Licensee.
Samuel B. Helfand, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charges were served upon the licensee alleging that (1) on or about November 20, 1938, she permitted lewdness and immoral activities in and upon her licensed premises, contrary to Rule 5 of State Regulations No. 20; (2) on or about the same day she bottled alcoholic beverages for sale, contrary to R. S. 33:1-78 (Control Act, Sec. 78); (3) on or about the same day she employed females to sell and serve alcoholic beverages to patrons at her licensed premises, contrary to a resolution adopted by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

As to (1): On the early morning of November 20, 1938, Investigators Kane and DiPietro were present in the cellar of the licensed premises, after having paid an admission fee of twenty-five cents to enter that portion of the licensed premises. While the investigators were present, a colored girl gave a performance which, without going into detail, was lewd and indecent. There is no substantial denial that the performance described by the investigators took place.

The licensee and her husband testified that they were not on the premises at the time the violation is alleged to have occurred. The licensee testified that, at that time, George Galanti, to whom she had agreed to transfer her license, was in charge of the licensed premises. Galanti did not testify. Ambrie Lee testified that he was employed by the licensee, waiting on tables and cleaning the place up; that he was taking care of the basement on

the morning in question and that Galanti was taking care of the barroom upstairs. Lee denied that he saw any indecent performance, but I believe the testimony of Investigator Kane who testified that Lee sat close to his table and said, "Go to it, baby" while the girl was performing her pick-the-coins-off-the-table act.

The defense seems to be that the colored girl was not employed by the licensee and, if Lee's testimony is to be believed, that the girl merely dropped in with three or four friends and performed without the knowledge of those in charge of the premises. The testimony, however, shows that the performer was introduced by one of the men in the orchestra who announced that a special dance would be performed; that a special charge of twenty-five cents was made for admission to the basement; that George Galanti had told the investigators on the early morning of November 19, 1938 that they were going to have a time there that evening and invited the investigators to attend. The evidence is sufficient to show that Galanti and Lee, who were the agents of the licensee, knew that the indecent performance was to take place and that they permitted it to take place on the licensed premises. The licensee is responsible for the acts of her agents performed within the scope of their duties. The licensee is guilty as to Charge 1.

As to (2): The evidence shows that, while the investigators were in the barroom on the evening of November 19th, one of the waitresses came to the bar and ordered a half-pint of rye whiskey; that Galanti took a pint bottle of "White Eagle" whiskey and measured a half-pint out of said bottle into an empty quart bottle which was labeled "White Eagle Whiskey"; that the waitress took the order to the basement. There is no evidence to show that the quart bottle was sealed, and hence the quart bottle may be considered in substance a mere form of container. Re Jacoby, Bulletin 60, Item 6. The evidence is not sufficient to show that the licensee or her agent bottled alcoholic beverages for sale. Hence, I find the licensee not guilty as to the second charge.

As to (3): The testimony shows that, while the investigators were present in the barroom, two waitresses took containers of alcoholic beverages from the bar to be served in the basement part of the premises. In her application licensee sets forth that her principal business is tavern, and that she intends to conduct no business other than the sale of alcoholic beverages on the premises sought to be licensed. Despite the fact that licensee serves some food, I am satisfied that her principal business is the sale of alcoholic beverages, and hence the employment of females to sell or serve alcoholic beverages to patrons on her licensed premises constitutes a violation of a resolution adopted by the Municipal Board of Alcoholic Beverage Control of the City of Newark. Licensee is guilty as to the third charge.

I shall suspend her license for a period of ninety days for permitting lewdness and immoral activities, and for a further period of five days for employing females to sell and serve alcoholic beverages to patrons at her licensed premises, making a total suspension of ninety-five (95) days.

Accordingly, it is, on this 5th day of March, 1939, ORDERED, that Plenary Retail Consumption License No. C-113, heretofore issued to Julia Mazziotti by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of ninety-five (95) days, commencing March 9, 1939 at 3:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

10. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - HOSTESSES.

In the Matter of Disciplinary Proceedings against

NEW ELKHORN TAVERN, INC., 986 Broad Street, Newark, New Jersey,

Holder of Plenary Retail Consumption License No. C-235, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Nathaniel Klein, Esq., Attorney for the Licensee.
Charles Basile, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Notice served upon the licensee contained seven charges.

Charge (1) alleges that, on May 19, 1938, licensee employed certain females known as Georgie ----- and Barbara ----- to act as hostesses and in a similar capacity on its licensed premises; charge (2) alleges employment of the same females on May 27, 1938; charge (3) alleges employment of the same females and another girl known as Trixie ----- on June 2, 1938; all of which is alleged to be in violation of a resolution adopted August 29, 1934 by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

The testimony of Investigator Hulin shows that these girls approached him and Investigator Best on the licensed premises and requested the investigators to purchase drinks for them on the dates set forth in the charges, but there is no evidence that any of the girls was employed by the licensee, and, in the absence of such evidence, charges (1), (2) and (3) must be dismissed.

Charge (4) alleges that, on August 19, 1938, the licensee permitted Janet ----- and other girls to act as hostesses and in similar capacity on its licensed premises, contrary to the said resolution. Janet ----- testified that on August 19, 1938 she was working in the licensed premises; that she had been employed there since about April 1938, having been employed by Louis Siegendorf, the manager of the licensee; that her salary varied between Seventeen Dollars and Twenty Dollars a week, which was paid in cash by Siegendorf; that her duties consisted solely of drinking on the licensed premises. This evidence is sufficient to show that Janet ---- was employed as a hostess on the licensed premises on August 19, 1938. I find the licensee guilty as to the fourth charge.

Charge (5) alleges that the licensee knowingly employed said Janet ----- and Walter Wilson, who are not residents of the State of New Jersey for five years last past, contrary to R.S.33:1-26 (Control Act, Sec. 23). Janet testified that she has been a resident of the City of Newark since September 1934, having previously resided in Massachusetts. Since I find that she was an employee on the licensed premises, the licensee is guilty of the fifth charge in so far as said charge concerns Janet -----.

As to Walter Wilson, who was employed as a bartender: He testified that he has been a resident of New Jersey for the past

twenty-nine years, although he admits that he worked at various times in the City of New York within the past five years. It is undisputed that Wilson came to New Jersey from Scotland at the age of ten years and that he is now a resident of New Jersey. The mere fact that he was absent during part of the time while working in New York does not necessarily mean that he ceased to be a resident during the time he worked outside the State. The question of residence is largely a question of intent and, under the circumstances, the fifth charge has not been proved as to Walter Wilson.

Charge (6) alleges that, on August 19, 1938, the licensee permitted its licensed premises to remain open between the hours of 3:00 A.M. and 7:00 A.M., to wit: 3:10 A.M., contrary to an ordinance of the City of Newark. Testimony shows that Investigators Hulin, Best and Togno left the licensed premises by the front door at approximately 3:00 A.M. on August 19, 1938; that, when they left, a few girls, including Janet -----, remained on the licensed premises with some male patrons. The investigators met Inspector Tapner, who had remained outside of the premises. About 3:10 A.M. the investigators and the inspector went to one of the front doors of the premises and knocked, whereupon Louis Siegendorf came to the door, and, after Investigator Hulin showed his badge and said, "We are from the State Department of Alcoholic Beverage Control; we want to come in", Siegendorf answered, "The place is closed", and turned around without opening the door. Investigators Hulin and Best then walked around to East Kinney Place, which is in the rear of the licensed premises, and saw three girls, including Janet, and three men on East Kinney Place. Janet testified that they left the licensed premises by a back door and passed through a back yard which led into East Kinney Place. On cross-examination, she said:

"Q When you got out beyond that door that was unlocked, where did you find yourself? A I think through the back yard.
Q You found yourself in the back yard? A I think so; we were so excited I could not remember, we were pushed so quickly out of there. I remember we went to where they hang the clothes, like a little cellar.
Q You went through the yard? A Yes.
Q Is there anything between the yard and Kinney Place?
A A long driveway, as you get out straight into Kinney Place."

It is clear from the foregoing that the management was decidedly anxious to get the girls off the premises. But the testimony falls short of proving that the place was open at 3:10 A.M. as charged.

Charge (7) alleges that, on August 19, 1938, licensee failed to facilitate the inspection of its licensed premises by investigators of the State Department of Alcoholic Beverage Control, and hindered and delayed the said inspection, contrary to R. S. 33:1-35 (Control Act, Sec. 32). The evidence as to said charge has been considered above. Siegendorf denies that he heard Investigator Hulin say that they were from the Department of Alcoholic Beverage Control and that Hulin placed his badge against the door. He testified that, on previous occasions, people had tried to coax him to open up after hours, and that he could not see who was at the door. The testimony affords some inference that Siegendorf deliberately refused to open the door because the patrons were then present in the licensed premises, but I shall give the licensee the benefit of the doubt, and therefore acquit the licensee on this charge.

The license will be suspended for a period of thirty days on the fourth charge, and for a further period of five days on the fifth charge.

Accordingly, it is, on this 5th day of March, 1939, ORDERED, that Plenary Retail Consumption License No. C-235, issued to New Elkhorn Tavern, Inc. by the Municipal Board of Alcoholic Beverage Control of the City of Newark, shall be and hereby is suspended for a period of thirty-five (35) days, effective March 9, 1939 at 3:00 A.M.

D. Frederick Burnett

Commissioner.