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

BULLETIN 284 NOVEMBER 29, 1938

1. LICENSES - TO COLORED FOLKS - CONSIDERATIONS INVOLVED.

November 26, 1938

Harvey T. Satterthwaite, Esq.,
Trenton, N. J.

Dear Mr. Satterthwaite:

The case which you have in mind is Williams v. Hillsborough, Bulletin 268, Item 7. In that case I said:

> "It is all very well to talk of the theoretical protection given to negroes under the Civil Rights Act, which provides (R. S. 10:1-2, 3, 5) that no tavern keeper shall refuse to sell drinks to patrons merely because of color. However, it is a commonplace fact that negroes, despite this law, are frequently refused service either outright or by more subtle methods. Two of them were informed at the Belle Mead Inn, the nearest liquor place to the Club, that a glass of beer would cost them 35¢ and a glass of whiskey 50¢.
>
> "Practical difficulties like these which confront the colored race, must be fearlessly faced and given practical and fair solutions."

We say so easily that everybody must not only respect but obey the law; that bootlegging must cease; that speakeasies must be driven out; that home manufacture of liquor must terminate; that drunkenness and disorderly conduct must be suppressed. But my control is limited to licensed places. Beyond that I must proceed by search warrant and am fettered by all the red tape of the law. So is every other enforcement agency. If, therefore, we confine all licensed places to those frequented by the white race and where negroes are treated as undesirables, we have not solved the human problem at all so far as our black friends are concerned. They have the same appetites, the same thirsts and the same instincts as the whites. It seems to me that the sane, broad, fair-minded way of handling this problem is to give them a place or places where they may congregate with their own and enjoy in kind the same privileges which the whites have in superabundance. To say that they may abuse the privilege or create a nuisance is to prejudge the case not only without hearing but without any cause. So may any other licensed place. The remedy is that, if they prove themselves unworthy of the privilege, it can be suspended or revoked like any other license.

Once you give them the opportunity where respectable members of the race may buy from their own kind and sit down in peace and quiet without being made to be deadly conscious that they are not wanted, then you are in a position to insist on strict enforcement and to brook no evasions or abuse.

I should, therefore, have no hesitancy in granting a club license to a group of worthy negroes any more than I would to a group of worthy whites.

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

2. APPELLATE DECISIONS - TEDONA v. HACKENSACK - ORDER LIFTING SUSPENSION.

VINCENT TEDONA,

Appellant,

-vs-

CITY COUNCIL OF THE CITY OF HACKENSACK,

Respondent

ON PETITION
ORDER

Feder and Rinzler, Esqs., Attorneys for Petitioner.

BY THE COMMISSIONER:

This matter comes before me on petition to lift suspension of plenary retail consumption license No. C-55 which, by order dated November 3, 1938, was suspended for the balance of the present fiscal year. Tedona v. Hackensack, Bulletin 279, Item 3.

It satisfactorily appears from said petition, duly verified, and from independent investigation made by representatives of this Department, that the licensee has complied with all the conditions set forth in the order dated November 3, 1938. It further appears from a letter received from City Manager Rich, of the City of Hackensack, that the licensee has made the required changes.

Accordingly, it is on this 25th day of November, 1938,

ORDERED that the suspension now in force be lifted effective November 25, 1938 at midnight and that plenary retail consumption license No. C-55, heretofore issued by the City Council of the City of Hackensack to Vincent Tedona, be again in full force and effect beginning November 25, 1938 at midnight, and it is further

ORDERED that the licensee maintain the licensed premises in substantially the same condition in which they exist at the time this order is entered.

D. FREDERICK BURNETT,
Commissioner.

3. ADVERTISING - BILLBOARDS - WORDING APPROVED.

TRANSPORTATION - ALCOHOLIC BEVERAGES MAY BE TRANSPORTED ONLY IN DULY LICENSED VEHICLES.

November 26, 1938

Colonial Wine & Liquor Stores, Inc.,
Trenton, N. J.

Gentlemen:

There is no objection, so far as the State Alcoholic Beverage Law or Regulations are concerned, to a billboard, either as per layout submitted, viz.:

"WISE
BUYERS
Call 4458

For
Wine, Liquor
& Fine Scotch

C O L O N I A L

Deliveries in Private Cars — Wine and Liquor Hamilton at Chambers — STORE"

or with the addition of the words "When You Buy At Colonial You Are Always Sure of Purity, Quality, Service."

You understand, I take it, that deliveries may be made only in vehicles owned or leased by you and under your control, and bearing the transportation insignia. Passenger-type vehicles, as distinguished from trucks, may be used, provided they are duly licensed. Deliveries in private cars which are not licensed will subject the vehicle to seizure.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. FAIR TRADE - SPECIAL PERMITS - NOT ISSUABLE TO BLACK-JACK MANUFACTURERS AND WHOLESALERS INTO TAKING GOODS BACK - HEREIN OF THE PROCEDURE AND THE MERITORIOUS CASE NECESSARY TO OBTAIN A SPECIAL PERMIT.

November 28, 1938

L. N. Renault & Sons, Inc.,
Egg Harbor City, N. J.

Gentlemen:

I have before me yours of the 14th, and note the alleged threat of a customer that if you do not take back all his Renault stock he will ask me for a permit so as to put it on sale at cut prices.

Rest assured that I shall not allow the Fair Trade regulations to be stultified and made impotent through any such device. Special permits are not issued automatically like trading stamps. Good cause must be shown. As a matter of fact, I have issued none so far and shall not until a proper case is presented consonant with the spirit of the Fair Trade Act and the regulations. Immunity to cut prices is not to be purchased by merely paying a fee for the privilege. As I said in Re Brooks Co., Bulletin 280, Item 8:

"The object of a special permit is to ameliorate but not to weaken the Fair Trade Regulations."

If an application for Special Permit is presented by the retailer, and it appears proper on its face, a hearing thereon will

be scheduled and you, as the manufacturer or wholesaler who has established a price under the Fair Trade regulations, will be given ample notice and full opportunity to present your side of the case.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

5. APPELLATE DECISIONS - WELLS v. MATAWAN.

HARRY C. WELLS,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
THE BOROUGH COUNCIL OF THE BOROUGH OF MATAWAN,)
Respondent)
- - - - - - - - - - - - - - - - - - -)

Edward Farry, Jr., Esq., Attorney for Appellant.
Edward W. Currie, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from denial of a plenary retail distribution license for store immediately north of 126 Main Street, Borough of Matawan.

Respondent denied the application because, among other reasons, there were a sufficient number of licensees in the neighborhood to supply the demand there.

The deciding vote against granting the license was cast by Mayor Currie after two Councilmen had voted to grant and two Councilmen had voted to deny the license.

There is no municipal regulation limiting the number of licenses to be issued, but it appears that twelve consumption licenses and one distribution license are now outstanding in the Borough, which has a population of about three thousand. Two of the consumption licenses have been issued for premises at 118 and 131 Main Street; the sole distribution license has been issued to one Kelly, who conducts a grocery and vegetable store at 129½ Main Street. The Mayor testified:

> "In the immediate vicinity, which is called the main business section of Matawan, and is the main business section, there are approximately twelve or fifteen stores and three of those are devoted to the sale of intoxicating liquors, which, to my mind, is a sufficient percentage in the main business section."

Appellant, who never held a liquor license, contends that an additional distribution license is necessary because the store operated by Kelly is not open on Sunday and closes at 10:00 P.M.

on Saturday and 6:00 P.M. on other weekdays, and, therefore, persons who desire to purchase package goods while Kelly's is closed cannot do so unless they visit saloons. The two Councilmen who voted to grant appellant's application testified that there is need for another distribution licensee for the same reasons. Apparently, the other two Councilmen and the Mayor thought that these facts were not sufficient to show the need for an additional distribution licensee especially in that section of the Borough. No other citizens appeared to testify that they were inconvenienced by reason of the fact that they were unable to purchase alcoholic beverages except in saloons on Sundays and during the evening hours on weekdays.

The most that has been shown is a mere difference of opinion. Appellant has not sustained the burden of proof in showing the need for another distribution licensee in the Borough, and particularly in that section of Main Street.

Those who have qualms as to the place where they buy their liquor need not suffer if they will lay in their stock during the reasonable hours that Kelly keeps.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 27, 1938.

6. DISCIPLINARY PROCEEDINGS - SALES AFTER HOURS - THE EFFECT OF DAYLIGHT SAVING TIME ON MUNICIPAL REGULATIONS.

In the Matter of Disciplinary Proceedings against

PAUL A. O'BRIEN,
English Lane and Logan Road,
Ocean Township, Monmouth County,
New Jersey,

Holder of Plenary Retail Consumption License No. C-3, for the fiscal year 1937-1938, issued by the Township Committee of Ocean Township,

and

PAUL'S INCORPORATED,
English Lane and Logan Road,
Ocean Township, Monmouth County,
New Jersey,

Holder of Plenary Retail Consumption License No. C-3, for the fiscal year 1938-1939, issued by the Township Committee of Ocean Township.

CONCLUSIONS AND ORDER

Milton R. Konvitz, Esq., Attorney for Licensees.
Stanton J. MacIntosh, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Charges herein allege that on May 8, 1938, May 29, 1938 and June 12, 1938 alcoholic beverages were sold at the above described licensed premises after 4:00 A.M. (Daylight Saving Time), in violation of an ordinance adopted by the Committee of the Township of Ocean on July 16, 1937, which provides:

> "No alcoholic beverages shall be sold or dispensed between the hours of 4 A.M. and 7 A.M. on weekdays and between the hours of 4 A.M. and 12 Noon on Sundays."

The evidence is sufficient to show that alcoholic beverages were sold on the licensed premises at 4:10 A.M. (Daylight Saving Time) on May 8, 1938, at 5:15 A.M. (Daylight Saving Time) on May 29, 1938, and at 4:20 A.M. (Daylight Saving Time) on June 12, 1938.

Despite this evidence, I find it necessary to dismiss the charges in so far as they apply to the license held by Paul A. O'Brien for the prior fiscal year. That license expired by its terms on June 30, 1938. The license thereafter issued to Paul's Incorporated was a new license and not a renewal of the license formerly held by Paul A. O'Brien. Paul's Incorporated is a distinct legal entity, despite the fact that Paul A. O'Brien is the principal stockholder in said Corporation.

Rules 1, 2 and 3 of State Regulations No. 15 provide:

> "1. Revocation proceedings shall not be barred or abate by the expiration of the license.
>
> "2. Any license may be suspended or revoked for proper cause, notwithstanding that such cause arose during the term of a prior license held by the licensee.
>
> "3. Where revocation proceedings are instituted and the license expires and is renewed during the pendency thereof, such proceedings shall be carried through to completion and any order of suspension or revocation therein shall apply without further proceedings to such renewal license."

While said Rules permit institution of disciplinary proceedings after a license has expired, the entry of an order suspending or revoking the license would be nugatory unless the license were renewed after its expiration. There is nothing in any of said Rules which would make an order entered in such proceeding effective against a new licensee.

Rule 4 of State Regulations No. 15 provides:

> "4. Where the license expires and a new license is issued to another person for the same premises during the pendency of revocation proceedings, such new license shall be subject to any order made in the revocation proceedings declaring the licensed premises ineligible to become the subject of a license during the period therein provided."

Said Rule, however, does not apply herein because these proceedings were instituted on August 23, 1938, which was subsequent to the date upon which the new license was issued to Paul's Incorporated.

Since there is nothing in State Regulations No. 15 authorizing the entry of an effective order against the licensee Paul's

Incorporated, because of violations which occurred while the license was outstanding in the name of Paul A. O'Brien, the three charges concerning said violations are hereby dismissed.

The fourth charge alleges that, on July 3, 1938, alcoholic beverages were sold at the above named licensed premises by the licensee Paul's Incorporated at or about 4:50 A.M. (Daylight Saving Time), in violation of the Township ordinance heretofore mentioned. Licensee Paul's Incorporated admits that the sale was made as set forth in said charge. It contends, however, that, inasmuch as the ordinance is silent as to whether "Standard Time" or "Daylight Saving Time" applies, the situation is governed by R.S. 1:1-2.3, which now provides:

> "The standard time of this State shall be the time of the seventy-fifth meridian west of Greenwich, and wherever time is named within this State in any manner whatsoever, it shall be deemed and taken to be such standard time except where otherwise expressed."

In Re Tanier, Bulletin 261, Item 1, I concluded that, despite the change in verbiage in the Revised Statutes, there was no legislative intent to change thereby the provisions of P. L. 1884, page 185, and that the 1884 statute did not apply to municipal ordinances, resolutions or regulations. I reaffirmed therein my previous ruling made in Re Wagner, Bulletin 58, Item 4, where I held that a municipal regulation which specified neither Standard nor Daylight Saving Time applied to either time which was officially in effect in the particular municipality and just so long as it was so effective.

It appears from the evidence herein that, on April 15, 1938, the Committee of the Township of Ocean adopted a resolution "that, dating from the 6th day of May, 1938 until the 30th day of September, 1938 the Township of Ocean shall operate upon Daylight Saving Time, in accordance with the proclamation issued by the Governor of the State of New Jersey." Said resolution was sufficient to convert into Daylight Saving Time the hours prescribed for the sale of liquor in the ordinance first above stated. Re Wagner, supra.

It follows that licensee Paul's Incorporated is guilty of violating the terms of the ordinance as set forth in the fourth charge.

I shall suspend the license for a period of five days for said violation.

Accordingly, it is on this 27th day of November, 1938,

ORDERED that Plenary Retail Consumption License No. C-3, heretofore issued to Paul's Incorporated by the Township Committee of Ocean Township for the fiscal year 1938-1939, be and the same is hereby suspended for a period of five (5) days, effective at 4:00 A.M. November 30, 1938.

D. FREDERICK BURNETT,
Commissioner.

7. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES.

In the Matter of Disciplinary Proceedings against

GUSTAV OTTO BUSCH,
728 Park Avenue,
Weehawken, N.J.,

Holder of Plenary Retail Distribution License D-3.

JOSEPH GLEESON,
544 Park Avenue,
Weehawken, N.J.,

Holder of Plenary Retail Distribution License D-1.

PALACE DRUG STORE, INC.,
172 Newark Avenue,
Jersey City, N.J.,

Holder of Plenary Retail Distribution License D-15.

WILLIAM S. GUSKIND,
500 Jersey Avenue,
Jersey City, N.J.,

Holder of plenary Retail Distribution License D-45.

RAY MASSARELLI,
397 Broadway,
Bayonne, N.J.,

Holder of Plenary Retail Distribution License D-1.

CONCLUSIONS

AND

ORDER

Samuel B. Helfand, Esq., Attorney for the State Department of Alcoholic Beverage Control.
John J. Meehan, Esq., Attorney for Gustav Otto Busch.
William S. Stuhr, Esq., by Walter J. O'Toole, Esq., Attorney for Joseph Gleeson.
Morris Winograd, Vice-President of Palace Drug Store, Inc., for Palace Drug Store, Inc.
James A. Hamill, Esq., by S. Arthur Schmitzer, Esq., Attorney for William S. Guskind.
Ray Massarelli, Pro Se.

BY THE COMMISSIONER:

The defendants are charged with selling liquor at their retail stores on November 4, 1938 at prices below the minimum retail (or so-called Fair Trade) prices in violation of State Regulations 30.

These defendants are the first licensees brought up on such charges since the recent adoption of those Regulations. Their cases, for convenience, shall be considered together.

On November 4, 1938, Investigator Kaufman of this Department and a "shopper" hired by the Hudson-Bergen County Liquor Dealers Association, at 1:45 P.M. purchased a pint bottle of Calvert's "Special" (Blended Whiskey) at the defendant Busch's store from the licensee himself for $1.10, and at 2:50 P.M. purchased a similar pint bottle from a salesman at the defendant Guskind's store for $1.05, the Fair Trade price being $1.16. At 2:05 P.M., they purchased a fifth of Don "Q" Puerto Rican Rum from a salesman at the defendant Gleeson's store for $1.59, the Fair Trade price being $1.99. At 2:25 P.M., they purchased a pint bottle of Wilson's That's All" Whiskey from a saleslady at the store of the defendant Palace Drug Store, Inc. for $1.05, and at 3:23 P.M. purchased a similar pint bottle from a saleslady at the defendant Massarelli's store for $1.10, the Fair Trade price being $1.16. The Fair Trade prices for the above items of liquor were published and promulgated in Bulletins 270 and 275.

Gleeson, the Palace Drug Store, Inc., and Guskind admit the sales in their stores. As to the other defendants (who make no such admission), the testimony of the Investigator and of the "shopper" of the Liquor Dealers Association is wholly convincing that the sales charged against them occcurred.

As to the "excuses": Busch asserts that he was entrapped. There is, however, not a hint in the evidence. His sale was made voluntarily and without inducement. He also makes much of the fact that the Hudson-Bergen County Liquor Dealers Association cooperated with the Department in detecting his violation. I should think it would. Its cooperation was commendable.

Gleeson asserts that he had been instructed as far back as July 1938 that Don "Q" Puerto Rican Rum "was not going on Fair Trade"; that, therefore, when he received the Fair Trade price lists he did not check on that liquor. His story is wholly unconvincing in view of his own testimony that he checked on all other items.

The Palace Drug Store, Inc. states that the sale in its store was made in unwitting violation of State Regulations 30, because Fair Trade prices at that time were "so confused." This overlooks the fact that the sale of a pint bottle of Wilson's "That's All" Whiskey at its store occurred 39 days after the issuance of Bulletin 270 (September 26, 1938) which promulgated the Fair Trade price of that item. That length of time was surely sufficient to impress the price upon the mind of the manager of Palace Drug Store, Inc. A suspension will help to clarify subsequent confusion.

Guskind asserts that he gave strict orders to the help in his store that the Fair Trade prices must be observed; that the sale which occurred on November 4 was perhaps an innocent mistake by the salesman. This presents no defense. A licensee is directly answerable for the violations of his employees on the licensed premises. Re Boulevard Tavern, Bulletin 272, Item 14.

Massarelli denied the sale.

I find all defendants guilty as charged.

This is the first offense of record for Busch, Gleeson, Palace Drug Store, Inc. and Massarelli. The license of each will be suspended for ten (10) days.

Guskind was found guilty in 1936 of selling on Election Day and in 1937 of selling to a minor. In view of his previous record,

his license will be suspended for twenty (20) days for his instant violation.

Accordingly, it is on this 28th day of November, 1938,

ORDERED that plenary retail distribution license D-3, heretofore issued to Gustav Otto Busch by the Township Committee of the Township of Weehawken, shall be and the same is hereby suspended for a period of ten (10) days, commencing December 2, 1938, at 2 A.M.; and it is further

ORDERED that plenary retail distribution license D-1, heretofore issued to Joseph Gleeson by the Township Committee of the Township of Weehawken, shall be and the same is hereby suspended for a period of ten (10) days, commencing December 2, 1938, at 2 A.M.; and it is further

ORDERED that plenary retail distribution license D-15, heretofore issued to Palace Drug Store, Inc. by the Board of Commissioners of the City of Jersey City, shall be and the same is hereby suspended for a period of ten (10) days, commencing December 2, 1938, at 2 A.M.; and it is further

ORDERED that plenary retail distribution license D-45, heretofore issued to William S. Guskind by the Board of Commissioners of the City of Jersey City, shall be and the same is hereby suspended for a period of twenty (20) days, commencing December 2, 1938, at 2 A.M.; and it is further

ORDERED that plenary retail distribution license D-1, heretofore issued to Ray Massarelli by the Board of Commissioners of the City of Bayonne, shall be and the same is hereby suspended for a period of ten (10) days, commencing December 2, 1938, at 3 A.M.

D. FREDERICK BURNETT,
Commissioner.

8. DISCIPLINARY PROCEEDINGS - FRONTS, DISQUALIFIED PERSONS AND GANGSTERS - CASE DISMISSED.

In the Matter of Disciplinary Proceedings against

STELLA ZIELINSKY,
79 Whitehead Avenue,
South River, N.J.,

Holder of Plenary Retail Consumption License No. C-20, issued by the Borough Council of the Borough of South River.

CONCLUSIONS AND ORDER

Stanton J. MacIntosh, Esq., Attorney for the State Department of Alcoholic Beverage Control.
C. Raymond Lyons, Esq., by Herman Ringle, Esq., Attorney for the Licensee.

BY THE COMMISSIONER:

The charges, summarized, are that the licensee failed, when applying for her license for the 1936-7 fiscal year or while holding that license, to disclose the proprietary interest of one William

Suskowitz in the licensed business, and likewise failed to disclose such interest when applying for her license for the 1937-8 fiscal year, contrary to R. S. 33:1-25, 34 (Control Act, Secs. 22, 31); that she knowingly employed a disqualified person in her tavern, to wit, the said William Suskowitz, in violation of R. S. 33:1-26 (Control Act, Sec. 23); and that she permitted a "known criminal, gangster, and racketeer", to wit, the said Suskowitz, upon her licensed premises, in violation of Rule 4 of State Regulations 20.

William Suskowitz and the defendant, who had been living together for many years, were recently married. The tavern was originally in his name. In November 1935, he was convicted in the Federal Courts because of complicity in the operation of an illicit still, and sent to prison for a year and a day. He and she testified that when he went away, he left the business in her charge as manager and declared that, if she wanted, she could keep it. She, at the expiration of Suskowitz' license on June 30, 1936, took out a license in her own name and has done so each year since. When he was released from prison in December, 1936, he returned to her home to live. Both testified that she remained the actual proprietor of the business; that he worked there as a bartender, generally in the evenings; that she, in addition to furnishing Suskowitz with his needs, also gave him $12.00 a week to enable him to pay alimony to his divorced wife; that goods were ordered and paid for by Suskowitz or by the defendant, depending on who was in the tavern at the time; that Suskowitz is now working under a garbage collecting contract with the Borough of South River.

The Department's case rests on the fact that on July 1, 1937 one of its investigators visited the licensed premises and there discovered various bills in Suskowitz' name - viz., six bills for liquor furnished by Greenspan Brothers, Inc., two dated January 18, 1937, and the others dated January 26, March 1, and May 15 and 17, 1938, respectively; three bills for liquor furnished by the Seeber Brewing Company, dated February 8 and 26 and March 22, 1937, respectively; four bills from the Orange Crush Bottling Co., without year or address specified; an oil bill, dated March 18, 1937; a water bill and an electricity bill, each dated July 1, 1937; a gas bill, paid on July 1, 1937.

The defendant testified that she had never noticed that these bills were addressed to Suskowitz; that the water, gas and electric bills were sent in his name because she had never changed the deposit which Suskowitz had originally made for such items. Her explanation for the other bills being in Suskowitz' name is that the creditors had probably failed to realize that Suskowitz, who originally ran the business, was no longer the proprietor. Suskowitz testified that he did not know the bills were in his name since he is unable to read.

The defendant's claim that she never noticed that the above bills were made out in Suskowitz' name is subject to grave doubt. However, with nothing in the record to support the Department's case other than the fact that such bills were found in the tavern on July 1, 1937, I conclude that there is insufficient evidence that the defendant was a "front" for Suskowitz.

The conviction of Suskowitz for complicity in the operation of a still does not involve moral turpitude unless aggravating circumstances are present. Re Case 41, Bulletin 166, Item 5. No such circumstances appear. Suskowitz testified that his connection with the still was the sale of a boiler to the operators.

The above mentioned conviction is the only evidence in support of the charge of permitting a "known criminal, gangster and racketeer" upon the licensed premises. The generality of these terms shows that they were not intended to apply to a person convicted on a single occasion and then for a crime not involving moral turpitude.

Accordingly, the charges are dismissed.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 27, 1938.

9. APPELLATE DECISIONS - LANDGRAFF v. NORTH PLAINFIELD.

SIGURD LANDGRAFF, t/a SOMERSET RESTAURANT,
Appellant,
-vs-
THE MAYOR AND COUNCIL OF THE BOROUGH OF NORTH PLAINFIELD,
Respondent

ON APPEAL
CONCLUSIONS

Frederick A. Onore, Esq., Attorney for Appellant.
Edward Sachar, Esq., of Counsel.
Charles M. Dolliver, Esq., Attorney for Respondent.
George L. Feaster, Esq., of Counsel.
Samuel S. Swackhamer, Esq., Attorney for Objectors, Mr. and Mrs. Neuman.
Charles A. Reid, Jr., Esq., Attorney for Objectors, Licensees of North Plainfield.

BY THE COMMISSIONER:

This is an appeal from the denial of a plenary retail consumption license for premises 109 Somerset Street, North Plainfield.

The assigned reason for respondent's action was "that the best interests of the Borough would be served by denying this license." In its answer to the petition of appeal, respondent sets up the additional reason that it has since 1934 consistently limited the number of plenary retail consumption licenses to five, and that the issuance of this license would increase that number. Appellant contends that the denial was arbitrary, discriminatory and unreasonable; that respondent failed to afford a hearing as required by law; and that the reason assigned for denial is insufficient.

The Borough has, each year since 1934, issued no more than five plenary retail consumption licenses. In aid of its policy to restrict their issuance, it has each year adopted a resolution limiting their number to five. Although the limitation embodied in the resolution of June 24, 1938 is technically defective because not adopted by ordinance as now required by R.S. 33:1-40, it does not follow that the license applied for must necessarily be granted. It still must be established that public convenience and necessity call for the issuance of the license. The burden of proof is, of course, upon the appellant.

The Borough is primarily a residential community, contiguous to the City of Plainfield, and has an estimated population of 10,000. Heretofore five licenses have apparently sufficed. The policy of the municipality has been honestly carried out. Appellant contends, however, that none of the existing licenses in the Borough are issued to restaurants and that social convenience and necessity require the issuance of a license for his restaurant.

The Somerset Restaurant, conducted by appellant, is furnished with a short order lunch counter, booths and tables seating 52 persons, serving approximately 350 patrons each day. From the photographs in evidence, it appears to be a typical lunchroom. Appellant, his wife and two employees testified to occasional requests by patrons for alcoholic beverages but cross-examination established that, despite the lack of a liquor license, no appreciable decrease in the volume of business occurred. In fact, during the dinner hour, it was testified that people stood in line to get in. Two good friends, regular patrons for the past five years, testified they "sometimes" went elsewhere because no liquor was obtainable there. Appellant admits that a restaurant with a liquor license exists just over the line in the City of Plainfield, three blocks away.

The charge that no hearing was afforded appellant when his application was considered has no basis in fact. It affirmatively appears that his attorney appeared before the Licensing Committee and the Borough Council, by both of whom he was heard in behalf of appellant. State Regulations 2, Rule 8, provide that no hearing need be held if the issuing authority shall have determined not to issue the license applied for. Furthermore, appellant has had full opportunity to be heard on this appeal.

The burden of proof in showing that social convenience and necessity requires the issuance of the license has not been sustained. I therefore cannot conclude that its denial was arbitrary or unreasonable.

The action of the respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 27, 1938.

10. APPELLATE DECISIONS - FANEL REALTY CO. ET AL. v. NEWARK.

FANEL REALTY CO., a corporation of New Jersey,

Appellant,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK and MORRIS RICHMAN,

Respondents

ROSE GREENWALD, ESSEX AND UNION RETAIL LIQUOR PACKAGE STORES ASSOCIATION, a corporation of the State of New Jersey, SIDNEY'S, INC., a corporation of the State of New Jersey, and ABRAHAM SHERMAN,

Appellants,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK and MORRIS RICHMAN,

Respondents

ON APPEAL
CONCLUSIONS

Paul Lustbader, Esq., Attorney for Fanel Realty Co.
Herman C. Silverstein, Esq., Attorney for Rose Greenwald, Essex and Union Retail Liquor Package Stores Association, Sidney's, Inc. and Abraham Sherman.
Joseph B. Sugrue, Esq., Attorney for Municipal Board of Alcoholic Beverage Control of the City of Newark.
Irving Mandelbaum, Esq., Attorney for Morris Richman.

BY THE COMMISSIONER:

By stipulation, testimony in both of the above appeals was taken at the same time and, since the issues are substantially the same, both cases will be decided together.

Appellants in each case seek to set aside the transfer of a plenary retail distribution license for the fiscal year 1937-1938 from United Cigar Stores, Inc. to Morris Richman and from premises 873 Broad Street to premises 82-84 Prince Street, Newark, and also the issuance of a renewal of said license for the present fiscal year to Morris Richman for premises 82-84 Prince Street, Newark.

The petition of appeal filed by Rose Greenwald, et als., alleges, in substance, that the granting of the transfer and the issuance of the renewal license was erroneous because (a) the needs of persons - residents and transients - are adequately served by existing consumption and distribution licensees; (b) an existing bona fide church is less than two hundred feet from 82-84 Prince Street, Newark; (c) the granting of the transfer was in violation of the terms of an ordinance of the City of Newark and a policy expressed at the time of the adoption of said ordinance; (d) the granting of the transfer and renewal was contrary to the Control Act and the rules and regulations of this Department.

The petition of appeal filed by appellant Fanel Realty Co. alleges that the transfer of the license was improper because no hearing was held upon objections filed by Fanel Realty Co. to the transfer of said license.

As to (a): It is admitted that a large number of distribution and consumption licenses were already outstanding in the vicinity of 82-84 Prince Street at the time the transfer was granted; that Greenwald held a distribution license for 109 Prince Street; that Sidney's, Inc. held a consumption license for 62 Prince Street; that Sherman held a distribution license for premises 102 Prince Street. On the other hand, it appears that respondent Richman has conducted a grocery and dairy business at 82-84 Prince Street for the past five years; that he purchased the building and expended a large sum of money in altering his store; that his patrons reside throughout the City of Newark, and that only about ten per cent of his business is local in character. Prince Street is a business street. The number of licenses which may be permitted in a strictly business district is very largely a matter of discretion with the issuing authority. While there is much room for difference of opinion on this point in the instant case, and the local decision might well have gone the other way, I find no abuse of discretion on the facts presented. Sobocienski v. Newark, Bulletin 239, Item 8; Hudson Bergen County Association v. Gold's, Bulletin 253, Item 3; Finfer v. Morristown, Bulletin 267, Item 8.

As to (b): An incorporated religious organization, known as the Overwhelming Church of God, conducts its services in rooms which it occupies as a tenant on the second floor of a building known as 230 Court Street. The street entrance to this building is 179.64 feet from the nearest entrance to Richman's store. It appears, however, that the ground floor of this building is rented to another tenant who uses the premises for the storage of quilts; that the third floor is occupied by another tenant, Mecca Temple, and that the fourth floor is used for residential purposes. The building itself has all the appearances of a business building. Under these circumstances, the building known as 230 Court Street is not a church within the meaning of R. S. 33:1-76 (Control Act, Section 76), which I have held to mean an edifice permanently devoted to the worship of God as distinguished from the religious group which may happen to conduct services in the whole or in part of an ordinary building. Manning v. Trenton, Bulletin 247, Item 1; Quality House Wine & Liquor, Inc. v. New Brunswick, Bulletin 249, Item 4.

As to (c): The ordinance in question was adopted by the Board of Commissioners of the City of Newark on May 4, 1938. Section 5 of said ordinance provides:

> "No Plenary Retail Distribution License excepting renewals for the same premises as have heretofore been licensed, and transfers from person to person, shall be granted or transferred to another premises within a distance of seven hundred and fifty (750) feet from an existing licensed premises covered by a Plenary Retail Distribution License.***"

If this ordinance was effective at the time the transfer was granted, then the transfer to premises within 750 feet of the Greenwald and Sherman premises was in violation of the ordinance and should be set aside. The ordinance, however, further provides in Section 7:

> "This ordinance shall take effect upon July 1, 1938, subject to passage and publication according to law."

Inasmuch as the transfer was effected before July 1, 1938, the ordinance, by its terms, does not apply. Appellants introduced a portion of the minutes of the meeting of the Board of Commissioners of the City of Newark, held on May 4, 1938, from which it appeared that, in the course of a discussion during which Mayor Ellenstein announced that the ordinance was to become effective July 1, Commissioner Byrne added:

"And that all pending applications where the money has been paid be not effected."

There is nothing further in the official minutes to show that the remark made by Commissioner Byrne was adopted as an amendment to the ordinance. The ordinance itself, as adopted, contains no such amendment. The offer of appellants to prove by persons who were present at said meeting that the minutes did not fully and correctly set forth the proceedings was properly denied. Parole evidence cannot be invoked to alter or supplement the records of a municipality. Campbell v. Hackensack, 115 N.J.L. 209 (E.&A.1935). Since the ordinance in question did not take effect until July 1, 1938, it did not prohibit the transfer of the license referred to herein. By its terms, it excepted the renewal for the current fiscal year which was granted after hearing held on July 14.

As to (d): In considering this point, the contention made by Fanel Realty Co. will also be considered, since that contention also concerns compliance with the rules and regulations of this Department providing for a hearing after written objections have been filed. There is no serious dispute as to the facts. Respondent Richman published his notice of intention to apply for the transfer on June 18 and June 25. Written objections having been received, the City Clerk, on June 22, scheduled a hearing on said objections, to be held on Friday, June 24, at 11:00 A.M. All appellants except Fanel Realty Co. appeared in person or by attorney at said hearing and raised substantially the same objections which have been raised herein. Among those who filed written objections, and who appeared at the hearing held on June 24, was Fannie Lustbader, who is the holder of a plenary retail consumption license for premises located at 206-210 Court Street and who is also the President of the Fanel Realty Co., the owner of the building at 206-210 Court Street. After the objectors had been heard at the hearing held on June 24, the Board granted the transfer applied for. On June 25, which was the date upon which the second publication appeared, Fanel Realty Co. wrote to the City Clerk a letter, signed by its Secretary, stating its objection to the transfer of the license. The City Clerk replied to said communication advising that "a hearing of objectors was held in the above matter on June 23, 1938." The letter apparently misstated the date upon which the hearing was held, but that is immaterial to the present issue. No further hearing on objection to the transfer was scheduled or held. Paul Lustbader, Secretary of Fanel Realty Co. and a son of Fannie Lustbader, testified that the objection filed by the corporation

"was based on a number of reasons, the first was:- That there were such a number of consumption and distribution licenses in the immediate vicinity of the place proposed to be licensed that it wasn't any too healthy for the economic life of the neighborhood nor was it any benefit to the church in existence, the people living there, and I believe it would result in irreparable injury to everybody in the neighborhood if this transfer were made."

Unquestionably, the hearing held on June 24 was not in accordance with Rule 9 of State Regulations No. 3, which provides that the date fixed for such hearing shall not be less than two days after the second insertion shall have been published and should not be more than seven days. However, by appearing at such hearing and taking part in the proceedings without objection, appellants herein, other than Fanel Realty Co., have waived their rights to object to the violation of the State regulation. As to Fanel Realty Co., it appears that Fannie Lustbader, its President, had actual knowledge of and participated in the hearing held on June 24. It may well be

that she was not formally authorized to appear at said hearing on behalf of the Corporation and, hence, technically did not waive any rights of the Corporation by her appearance at the hearing. In determining the effect of the failure to comply with the provisions of Rule 9 of State Regulations No. 3, I cannot, however, overlook the fact that Fannie Lustbader, the President of Fanel Realty Co., was given an opportunity to testify at the hearing held on June 24 and that the written objections subsequently filed by Fanel Realty Co. were based upon the same objections considered at the hearing held on June 24.

Ordinarily, the failure to hold a hearing after the due filing of written objections would require that the entire matter be remitted to the issuing authority for further proceedings. Retail Liquor Distributors v. Atlantic City, Bulletin 88, Item 11; Greifinger v. Newark, Bulletin 89, Item 2; Corado v. Camden, Bulletin 159, Item 13. Unquestionably, the omission to have a hearing on the objections filed by Fanel Realty Co. was a technical violation of the State regulations. While its objections were directed to the exercise of discretion, the same objections had been considered by respondent Municipal Board at its hearing held only three days before. It is not suggested that the Corporation could have presented evidence substantially different from that presented by the individual objectors at the hearing held. It would be sacrificing substance to form to decide that, under such circumstances, the mere fact that no additional hearing was held on the Fanel objections is, in and of itself, sufficient cause for reversing the action of respondent Municipal Board in transferring the license. Cf. Granger v. Oakland, Bulletin 91, Item 1.

The action of respondent Municipal Board in granting the transfer and renewal of the license is affirmed.

Frederick Burnett

Commissioner.

Dated: November 29, 1938.