STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07102

BULLETIN 2352 May 27, 1980

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ITEM

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BULLETIN 2352 May 27, 1980

1. APPELLATE DECISIONS - DANTE's FIRESIDE, INC. v. DENVILLE.

#4248

Dante's Fireside, Inc.,
Appellant,
v.
Township Committee of the Township of Denville,
Respondent.

ON APPEAL
CONCLUSIONS
AND
ORDER

James, Wyckoff, Vecchio & Thomas, Esqs., by Kurt G. Senesky, Esq., Attorney for Appellant.
Clifford J. Weinsinger, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Appellant appeals from the action of respondent, Township Committee of the Township of Denville (hereafter Committee) which, on June 27, 1978, suspended appellant's Plenary Retail Consumption License No. 1408-33-005-001, for premises 53 Broadway, Denville, for ten days, in consequence of a finding of "guilty" to a charge alleging that, on December 20, 1977, appellant sold alcoholic beverages to a minor; in violation of N.J.A.C. 13:2-23.1(a).

Appellant contends that the finding of the Committee was contrary to the weight of evidence. The Committee denies this contention in its Answer.

Upon the filing of this appeal, the Director of this Division, by Order dated June 29, 1978, stayed the Committee's order of suspension pending the determination of this appeal.

A de novo appeal was heard in this Division, pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. Additionally, a transcript of the testimony of the proceedings before the Committee was placed in evidence pursuant to N.J.A.C. 13:2-17.8.

Testifying before the Committee, Patrolman Bruce

Williams of the Denville Police Department recounted that, on December 20, 1977, a Robert White, then under 18 years of age, was arrested attempting to enter a house which White believed to be his own, but because of his extreme drunken condition, had become confused. An investigation conducted by the Detective Bureau revealed that the youth had been drinking in the appellant's premises.

Mark Parker, eighteen years old, testified that he and White were served beer in the appellant's premises. No identification of White had been required prior to the service of the beer.

Robert White testified before the Committee and affirmed that he had been in the appellant's premises on December 20, 1977 and there consumed a large amount of beer. He recalled he was served by a waitress whom he identified as Donna Belby. He verified that he was seventeen years of age on the date of the charge.

Another youth who was present with White and Parker on the evening in question at appellant's premises, Robert Kummert, testified that he received beer in a pitcher for consumption by all three of the youths, including the minor, White. No identification had been required of White at any time during the evening. As he attends college in Florida and has been away, he has not seen White or Parker since the evening the incident occurred.

Denville Police Detective Erwine testified that, on the third day following the incident, he returned to appellant's premises with the minor. White identified Donna Belby as the person who served him and his companions. He interviewed Belby who admitted having served three young men, one of whom she recalled was Parker.

The president of the corporate appellant, John Lombardy, testified both before the Committee and at the hearing in this Division in defense of the charge. He vigorously denied that White, Parker or Kummert had been in his premises and his insistance that they had not been stemmed from a militant policy to prevent any sales to minors in his establishment. At the hearing in this Division, he recounted a later colloquy with Parker, wherein Parker threatened "I'll get you for this"; implying that, in revenge for being evicted by Lombardy, he would take steps against the license.

The waitress, Donna Belby, denied that she had the

conversation with Detective Ervine as he had recounted it and further denied that she could have served White, for he appears to be "about fifteen."

In determining this matter it is observed preliminarily that we are dealing with a disciplinary action which is purely a civil action and not criminal. In re Schneider, 12 N.J. 449 (App. Div. 1951). Thus, the proof must be supported only by a preponderance of the credible evidence. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is firmly settled that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds as a fact that there was a clear abuse of discretion, an unwarranted finding of fact or a mistake of law by respondent. Schulman v. Newark, Bulletin 1520, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2; Harry's Bar and Grill, Inc. v. Roselle Park, Bulletin 2234, Item 1.

The burden of establishing that the Board acted erroneously and in an abuse of its discretion rests with appellant. N.J.A.C. 13:2-17.6. The ultimate test in these matters is one of reasonableness on the part of the Committee. The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or an unwarranted finding of fact or mistake of law by the Committee. Hudson-Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502 (E. & A. 1947).

Although appellant maintained, by implication, that the charges were the result of a "plot" by Parker to bring injury upon Lombardy, I do not find same to be supported by the evidence. The argument between Parker and Lombardy could not, in any way, have provided Parker with any opportunity to "set up" Lombardy, since Detective Ervine investigated the incident within two days following its occurrance which was much earlier than the quarrel between Parker and Lombardy.

The appellant also maintains that the long delay between the date of the incident and the time when charges were preferred against it supports an inference that the charges were manufactured. This contention is without foundation. The direct testimony herein of service to a minor is credible; and I make that finding.

I conclude that appellant has failed to sustain the

burden of establishing that the Committee's action was erroneous and should be reversed as required by N.J.A.C. 13:2-17.6, as aforesaid.

It is, therefore, recommended that an order be entered affirming the action of the Committee, dismissing the said appeal and vacating the Order staying the suspension. I also recommend that the suspension imposed by the Committee of ten days be reimposed by the Director.

CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed by the parties pursuant to N.J.A.C. 13:2-17.14.

In lieu thereof, the appellant requested that the Director consider its application to pay a fine, in compromise, in lieu of suspension of license for ten days, pursuant to N.J.S.A. 33:1-31. The respondent objected to that application.

The payment of a fine, in lieu of suspension, is not considered a lesser penalty, per se. The amount of a fine is intended to have the same economic impact on a licensee as a suspension. This is particularly applicable to short-term suspensions, as compared to long-term closings, where the loss of clientele may have greater financial consequences. This factor, in conjunction with the absence of a prior adjudicated record, persuades me to accept an offer by the appellant to pay a fine of $1,000.00, in lieu of suspension of license for ten days.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits and the Hearer's Report, I concur with the findings and recommendations of the Hearer and adopt the same, subject to the payment of a fine, as my conclusions herein.

Accordingly, it is, on this 3rd day of October, 1979,

ORDERED that the action of the Township Committee of of the Township of Denville be and the same is hereby affirmed, and the appeal be and is hereby dismissed; and it is further

ORDERED that my Order of June 29, 1979, staying the suspension pending determination of the appeal, be and the same is hereby vacated; and it is further

ORDERED that the payment of a fine of $1,000.00 by the appellant is hereby accepted in lieu of suspension of license for ten (10) days.

JOSEPH H. LERNER
DIRECTOR

2. APPELLATE DECISIONS - BORDENTOWN LIQUORS & LOUNGE, INC. v. BORDENTOWN.

#4279
Bordentown Liquors & Lounge, Inc.,
Appellant,
v.
Board of Commissioners of the City of Bordentown,
Respondent.

ON APPEAL
CONCLUSIONS
AND
ORDER

James J. Armstrong, Jr., Esq., Attorney for Appellant.
Kessler, Tutek & Gottlieb, Esqs., by Henry G. Tutek, 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 Board of Commissioners of the City of Bordentown (hereafter Board) which, on September 11, 1978, suspended appellant's Plenary Retail Consumption License No. 0303-33-002-001 for premises Rt. 130 & Butts Avenue, Bordentown, for thirty-six days upon a finding of guilty to a charge of selling alcoholic beverages to a minor by an employee of appellant's establishment, in violation of N.J.S.A. 33:1-77.

Upon the filing of the appeal, the Director of this Division, by Order of September 12, 1978, stayed the effective dates of the said suspension pending the determination of the appeal.

Appellant contends, in its Petition of Appeal, that it had been denied a fair hearing. The determination to impose a suspension of license resulted in a finding by the Municipal Court that an illegal sale of alcoholic beverage to a minor had occurred as charged. The Board determined that a hearing before it was unnecessary, which appellant asserts was error. The Board did not respond by written Answer to the Petition.

A de novo appeal was heard in this Division pursuant

to N.J.A.C. 13:2-17.6, at which the parties were permitted to introduce evidence and cross-examine witnesses. However, counsel for the parties, by stipulation, entered into the record the transcript of the appeal to the County Court from the municipal court's conviction of a bartender of appellant who was charged with having sold alcoholic beverage to a minor in violation of N.J.S.A. 33:1-77. Other than oral argument and written memorandum supplied, no further evidence was offered.

The burden of establishing that the action of the Board was erroneous and should be reversed rests with the appellant. N.J.A.C. 13:2-17.6.

An examination of the transcript supplied and a review of the memorandum furnished indicates that a police officer testified that he and his partner, then in front of appellant's establishment, observed a young man emerging therefrom carrying cartons of beer. Upon questioning him, they learned that he was a minor of seventeen years. He was then taken to police headquarters. The officers did not enter the establishment to obtain further details of the transaction.

The minor testified that he entered and found the brand of beer he desired in the cooler. He removed three cartons and took them to the counter. He paid "seven dollars and change" to a male clerk who placed the beer in a carton. The cartons were located behind a railing adjacent to the cash register.

Appellant produced the testimony of the defendant bartender, the corporate stockholder and the bookkeeper. From their testimony, the appellant's version of what had transpired was as follows: On September 30, 1977 about quarter to eight, the premises were crowded with customers purchasing alcoholic beverages for off-premises consumption. Most of the customers make their selection from the cooler and take them to the counter near the door, where the principal officer of the corporate licensee was employed. Because of the large number of customers, the bartender had been assisting at the counter until he had taken a break about seven-twenty p.m. From then onward he was seated eating his meal at a nearby table.

Some commotion relating to a police car was reported to be in progress on the exterior. The bartender asked one of the other employees to investigate, while he, the bartender, resumed assisting at the counter.

The witness, who described herself as the "owner" of the premises, denied the subject bartender ever rung up a sale at that time, as she herself was on duty, She recounted that the business does experience losses from theft and that she believed the youth in question merely walked in and removed the beer without making any payment. The sales tapes of that day were introduced into evidence.

The guilt of the bartender in the municipal court proceeding had to be proven beyond a reasonable doubt; the matter here is merely a civil matter and needs proof by a preponderance of the credible evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

The contention was vigorously asserted that, as there appeared no specific sale on the tapes of the day's transcations which could be correlated to the alleged sale to the minor, it could be assumed that he had merely walked into the establishment, helped himself to beer and walked out.

That contention was advanced before the municipal magistrate and the County Court Judge who apparently were reluctant to believe that the youth could have obtained three six-packs of beer from the coolers and have reached over a railing adjacent to the register, helped himself to a larger carton and brazenly departed.

The absence of a sales receipt on the carton and an amount on the cash register tape of $7.05 are advanced by appellant to support its contention that the boy had stolen the beer. However, there was no testimony by the boy that $7.05 was the amount he had paid. He had first said $7.50 and thereafter on cross-examination declared that the amount was "seven dollars and change." When the police seized the carton, their obvious interest was the age of the boy and the possession of an alcoholic beverage. Hence, they made no demand for the sales slip, if indeed, they thought of it at all.

I find no reason to disturb the finding of the Board. Appellant has not sustained its burden of establishing that the action of the Board was erroneous and should be reversed, as required by N.J.A.C. 2-17.6.

It is therefore, recommended that the action of the Board be affirmed, the appeal dismissed, the stay of the imposed suspension be vacated, and that the Director re-

impose the suspension established by the Board.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the appellant, and written Answers were submitted thereto by the respondent, pursuant to N.J.A.C. 13:2-17.14. In addition, I scheduled this matter for Oral Argument.

In its Exceptions, the appellant reiterates the arguments set forth in its Petition of Appeal that it was denied its hearing rights as provided in N.J.S.A. 33:1-31. While the procedure employed by the Board was erroneous in its failure to produce witnesses at its hearing, and its blanket acceptance of a municipal court conviction for sale to a minor, such errors were cured by the de novo hearing in this Division.

The appellant had full opportunity to present witnesses on its behalf at the Division hearing, and its stipulation of the testimony before the Municipal Court in this appeal constituted his acceptance, procedurally, of the adequacy of the cross-examination of witnesses for respondent below. Thus, I reject this Exception as without merit under the specific facts sub judice.

The appellant further asserts that the Hearer misinterpreted its defense with respect to the inferences to be derived from the failure to establish a sales receipt applicable to the price of alcoholic beverages seized from the minor, I am satisified that such factor, i.e., absence of a sales receipt or cash register entry, is not, in and of itself, sufficient to warrant the conclusion that the minor stole three six packs of beer and a carton and then walked out of the licensed premises. To do so would be to reject the direct testimony of the minor, the testimony concerning the physical interior layout of the licensed premises and location of the beer coolers and cartons, and the common experiences and understandings of mankind and this Division. Thus, I find this Exception to be without merit.

Lastly, the appellant submitted, at the Oral Argument,

several factors it considered as mitigation for reduction of the penalty imposed. The Board considered the offense to be serious, and opposed any payment of a fine, in compromise, in lieu of the thirty-six (36) days suspension.

I find the penalty imposed is not manifestly excessive or unjust and shall affirm same. I shall deny any opportunity to pay a fine, in lieu of suspension, particularly since the appellant had paid a fine of $4,800.00 in lieu of a thirty-six days suspension on August 12, 1977 for prior dissimilar violations.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the legal memoranda of the parties, the Hearer's Report, the written Exceptions filed thereto and the written Answers to said Exceptions, and the Oral Argument of counsel, 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 October, 1979,

ORDERED that the action of the Board of Commissioners of the City of Bordentown be and the same is hereby affirmed, and the appeal be and is hereby dismissed, and it is further

ORDERED that my Order of September 12, 1978, staying the suspension pending determination of the appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0303-33-002-001 issued by the Board of Commissioners of the City of Bordentown to Bordentown Liquors and Lounge, Inc., for premises Rt. 130 and Butts Avenue, Bordentown be and the same is hereby suspended for thirty-six (36) days commencing 12:01 a.m., Monday, November 12, 1979 and terminminating 12:01 a.m. Tuesday, December 18, 1979.

JOSEPH H. LERNER
DIRECTOR

3. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - PETITION OF SAMUEL T. GARRISON AND ROBERT C. GARRISON.

In the Matter of:

Petition of Samuel T. Garrison and Robert C. Garrison

SPECIAL RULING

Basil D. Beck, Esq., Attorney for Licensee.
Mart Vaarsi, Esq., Deputy-Attorney General, representing the Division.

Initial Decision Below

Jack Berman, Administrative Law Judge

Dated: September 25, 1979 - Received September 27, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision below were filed by the parties.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Initial Decision below, I concur in those findings and recommendations and adopt them as my conclusions herein.

I specifically note that the proofs, sub judice, were correctly supplemental and in addition to the proofs adduced by the petitioner in the recent appeal, Garrison et al v. Bridgeton, Bulletin _____, Item _____, decided October 24, 1978, also dealing with the inactive status of this license.

Clearly, subsequent application for pocket license renewal approvals must exhibit a continuing substantial effort to activate the license. Absent same, the legislative mandate set forth in N.J.S.A. 33:1-12.39 would be rendered nugatory.

Accordingly, it is, on this 16th day of October, 1979,

ORDERED that the City Council of the City of Bridgeton be and the same is hereby authorized to consider the application for renewal of the subject license for the 1979-80 license term, and, to thereupon, grant or deny said application in the reasonable exercise of its discretion; and it is further

ORDERED that any renewal which may be granted shall be subject to special conditions that the license certificate shall be retained by the issuing authority until an appropriate situs for the license is approved, and, further, that the license must become operational during the 1979-80 license term.

JOSEPH H. LERNER
DIRECTOR

Exhibit "A"
Initial Decision Below

In the Matter of:)

PETITION OF SAMUEL T. GARRISON) INITIAL DECISION
and ROBERT C. GARRISON)

) OAL DKT. NO. ABC 2621-79

Appearances:

Basil D. Beck, Esq., for Licensee

Mart Vaarsi, Esq., Deputy Attorney General
Division of Alcoholic Beverage Control
for Respondent

BEFORE THE HONORABLE JACK BERMAN, A.L.J.:

Petitioners move pursuant to N.J.S.A. 33:1-12.39 for renewal of their Plenary Retail Consumption License C-1, for the 1979-1980 licensing period.

A hearing de novo was held on September 6, 1979 pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. At the hearing it was stipulated by the parties that the petitioners burden was to show good cause on its part from October 28, 1978 to the present to enable the Director of the Alcoholic Beverage Control to authorize a further application of renewal.

The petitioners sole witness was Samuel T. Garrison. He stated that the petitioners have been actively engaged in attempting to find a relocation site (original site taken as a consequence of Urban Renewal in 1972) and have explored the matter with the mayor and other city officials of the City of Bridgeton. He stated that petitioners have since October 1978, entered into negotiations with several business groups with regard to prospective relocation. He stated that such negotiations had been held during this period with: Wilbert Bacon, owner of a local men's store, and Dr. Joseph Riley, for relocation at the Bruskin Building, South Laurel Street, Bridgeton, who together with him visited a French restaurant in Atlantic City, New Jersey, to get the mode, design and menu for the proposed use, the intention being to use it as a small second story French restaurant with an exclusive menu. Mr. Garrison

also stated that he met with and talked on the telephone a few times with a Mr. Gruber who was a restauranteur from Delaware with regard to property owned by the City of Bridgeton. However no contract price was formulated as Mr. Gruber could not obtain proper financing. A Mr. Martin from Bridgeton was also interested in relocating the license to an old tavern in the downtown area of Bridgeton in an existing building only to subsequently learn that the land sought was not available. Mr. Garrison further stated that he had conversations with Mr. Tom Bevagua who was representing the Pizza Hut and that they were considering locating one of its restaurants in Bridgeton. Although they had three or four conversations an agreement was never reached. The witness stated that there were on-going conferences with realtors Carl Bea and Robert D'Agostino to relocate the license. He stated that all these conversations and negotiations have taken place since October 1978 until the present, notwithstanding that an Agreement of Sale had been entered into on November 21, 1978 between petitioners and Charles Veale for the sale of the liquor license in question. The City Council of the City of Bridgeton denied the application of transfer after a public hearing had been held. This determination, he stated, has been appealed and is presently pending before the Division of Alcoholic Beverage Control. Notwithstanding this, the license was contracted to be sold to Lee W. Buirch, Sr., and Kerry Buirch. An Agreement of Sale was entered into and signed on March 8, 1979. However the purchasers under that Agreement were unable to obtain proper financing and consequently they forfeited their deposit.

The sole issue is whether the petitioners have shown "good cause" from October 28, 1978 to the present in accordance with the provisions of N.J.S.A. 33:1-12.39.

N.J.S.A. 33:1-12.39 states:

> "No Class C license, as the same is defined in R.S. 33:1-12, shall be renewed if the same has not been actively used in connection with the operation of a licensed premises within a period of two years prior to the commencement date of the licensed period for which renewal application is filed unless the director, for good cause and after a hearing, authorizes a further application for renewal; provided however that, if the licensee has been deprived of the use of the licensed premises as a result of eminent domain, fire or other casualty, and establishes by affidavit filed with the director that he is making a good faith effort to resume active use of the license in connection with the operation of a licensed premise then the period of two

years provided for in this section shall be automatically extended for an additional period of two years" (emphasis supplied).

Therefore, based on a review of the entire record in this matter, the COURT FINDS:

1. Petitioners are the owners of Plenary Retail Consumption License C-1.

2. From October 28, 1978 until present, the Petitioners have entered into two Sales Agreements to sell their license.

3. Petitioners since Octboer 28, 1978 until the present time have had numerous negotiations for the sale of their license with many restauranteurs.

4. Petitioners since October 28, 1978 until the present have had many conferences with local realtors for the purchase by them of a suitable location to transfer their license to.

5. Petitioners since October 28, 1978 until the present have had negotiations and/or discussions with several business groups including the mayor and other city officials with regard to a prospective relocation of their license.

Therefore, the COURT CONCLUDES that the petitioners have established good cause as specified in N.J.S.A. 33:1-12.39. Accordingly, the petitioners shall make FURTHER APPLICATION FOR RENEWAL of Plenary Retail Consumption License C-1, for the 1979-1980 licensing period.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

The COURT HEREBY FILES with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

DATE

JACK BERMAN, A.L.J.
Receipt Acknowledged:

DATE

AGENCY HEAD

DATE

Mailed to Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

4. STATE LICENSES - NEW APPLICATION FILED.

Leonardo & Helga LoCascio
t/a LoCascio Imports
721 Carroll Place
Teaneck, New Jersey
Application filed May 12, 1980 for wine wholesale license.

Joseph H. Lerner
Director