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

BULLETIN 279 NOVEMBER 10, 1938.

1. APPELLATE DECISIONS - MASON v. EGG HARBOR.

JOEL MASON, Appellant, -vs- TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EGG HARBOR, Respondent	)	ON APPEAL CONCLUSIONS

Rudolph S. Ayres, Esq., Attorney for the Appellant.
C. B. Dixon, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail consumption license for premises located at the foot of Jeffers Landing Road, Egg Harbor Township.

The Township has an approximate area of 70 square miles and a population (in 1930) of 3,024 persons. Its southern boundary is the Great Egg Harbor River, whose waters are used by both fishermen and bathers. Appellant's premises (a 1½-story bungalow) are located in open country at the shore of this River. He there conducts an establishment serving sandwiches, soft drinks, and (on infrequent occasions) regular meals on special order. During the summer week-ends, his place is patronized by 150 to 200 persons. The nearest liquor place is 3½ miles, and the next nearest 4½ miles away.

Respondent contends that its denial of appellant's application was valid because (1) the municipal quota of 25 consumption licenses (fixed by Ordinance of May 7, 1938) was filled, and (2) that to license appellant's place will violate the geographic scheme of distribution of licenses set forth in that Ordinance.

As to the Township's quota, the evidence (together with the records of this Department) reveals the following: On June 17, 1937, respondent adopted a resolution limiting plenary retail consumption licenses in the Township to 20. In July 1937, the Municipal Clerk, pursuant to respondent's instructions, refused appellant an application blank for a consumption license on the ground that this quota was exhausted. Thereafter, on November 13, 1937, and on January 22, 1938, respondent by resolution raised the quota to 21 and 23 respectively. (These resolutions were invalid by reason of R. S. 33:1-40, Control Act, Sec. 37, which requires that no municipal quota may be fixed on or after July 1, 1937 except by ordinance). At one of respondent's meetings in March, 1938 appellant informally requested a consumption license, but there being no formal application on file, respondent refused to consider this request. Thereafter, on May 7, 1938, it adopted, on final reading, an ordinance raising the quota to 25, which was exhausted on that same day. Appellant's present application, filed on June 14, 1938, was denied on June 27th because of the ordinance and the filled quota.

From the time of adopting the quota of 20 through the time of denying appellant's present application, the Township Committeemen have remained the same. Inasmuch as these Committeemen did not appear at the hearing on appeal, there is no personal explanation as to why they successively raised the quota on consumption licenses. It may fairly be assumed that the increase of the original quota of 20 to the present quota of 25 is partially explainable by the fact that 2 seasonal licenses, originally allowed in the resolution of

June 17, 1937, were later eliminated. This, however, merely explains an increase to 22. As to the reason for the quota of 23, the Municipal Clerk testified:

> "Well, they (the Township Committeemen) said a party wanted a license and they thought they were respectable and qualified to have a license, so they raised it."

And as to the cause for the increase to 25:

> "....the chairman said he had a party who wanted to have a license; that is the reason it was raised to twenty-five."

To allow respondent, after having denied even an application blank to appellant when the quota stood at 20, later to increase that quota so as to permit favored persons to obtain a license and thereafter to deny appellant's application on the ground that the new quota is exhausted, is but to penalize appellant because he came before the Township Committee, both in the past and on the present occasion, without solicitous backers. While a municipal quota will be sustained when fair and reasonable in its application, it will not, as here, be permitted as a flexible device, changeable by respondent at will when seeking to license arbitrarily selected persons, yet soulfully invoked when utilized to deny those in disfavor. Cf. Van Schoick v. Howell, Bulletin 150, Item 7. The exhausted quota of 25 is, therefore, no bar to appellant's application in view of the arbitrary and discriminatory action of respondent.

As to respondent's second contention, viz., the scheme of geographic distribution of licenses in the Township, the ordinance of May 7, 1938 provides:

> "4. That no licenses of any description shall be granted on any streets or roads of said Township except as follows:
>
> "pleasantville east line east, 1 license; Delilah Road, 2 licenses; Fire Road, 1 license; Washington Avenue (Pleasantville West line to State Route No. 48) 1 license; State Route No. 48 to Township of Hamilton East line, 13 licenses; Pineview Avenue, 1 license; Mulberry Avenue, 1 license; Zion Road, 1 license; Mill Road, 1 license; Blackman Road, 1 license; Steelmanville Road, 1 license; Mays Landing-Somers Point Boulevard, 1 license; Longport Boulevard, 1 license."

A local scheme of distribution of liquor licenses is valid only when reasonable. See Re Clifton, Bulletin 233, Item 5; Rosenvinge v. Metuchen, Bulletin 249, Item 6.

In the present case, the plan appears to be but an allotment of liquor licenses to the election districts of the respective Township Committeemen. The Clerk, answering a question of the Hearer as to whether he knew of any reason why the plan was adopted, testified:

> "....one time they (the Township Committeemen) talked it over. Godfrey was going to have so many in his election district, and Angerman was going to have so many, and McMahon had the rest."

Such an arbitrary scheme of distribution is void and furnishes no ground for the denial of appellant's license.

The action of respondent is reversed.

It appears that, when appellant's application was denied, respondent returned to him the posted license fee less 10%, which it retained as a statutory investigation fee. Respondent is, therefore, directed to issue a license to appellant forthwith as applied

for, provided, however, that no such license shall actually be issued until appellant has posted with the Municipal Clerk a sum of money which, when added to the 10% already retained, shall equal his proportionate license fee for the remainder of the term.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 2, 1938.

2. SOLICITORS' PERMITS - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

November 2, 1938

Re: Case No. 236

Applicant admits that he has been convicted on a charge of conspiracy. The sole question is whether he has been convicted of a crime involving moral turpitude.

In August 1934 applicant and two other defendants, all of whom were at that time officials of a municipality, were convicted on an indictment charging conspiracy to defame the good name of a fellow councilman. The conviction was affirmed by the Supreme Court and the Court of Errors and Appeals. After said conviction, applicant was sentenced to pay a fine of $1,000.00, which fine was subsequently remitted by the Board of Pardons.

The indictments charged the defendants, all of whom were then officials of a municipality in New Jersey, with having conspired to deprive Doctor ------, a fellow councilman, of his good name and character and to subject him, without just cause, to public infamy and disgrace and to injure him in the practice of his profession and in his standing as a member of the governing body, and to connect him with the charge of unlawful sale of narcotics in this, that they did falsely accuse his chauffeur with the unlawful sale of heroin, which complaint was untrue and was made for the unlawful purpose of connecting Doctor ------ with the crime of the unlawful sale of narcotics, and, in furtherance of said conspiracy, caused a newspaper to publish an extra edition which contained statements and innuendos in relation to the sale of said narcotics, which statements and innuendos were against the good name of the said Doctor ------ and which unlawful conspiracy was false and made for the purpose of exposing Doctor ------ to public infamy.

Whether a conspiracy involves moral turpitude should be determined by the type of conspiracy with which the defendant is charged. Individuals entering into a conspiracy to deprive another of his good name and character, and to subject him without just cause to public infamy and disgrace, are clearly guilty of an act of baseness, villainy or depravity in the private social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man. An individual found guilty of having committed such a crime should, therefore, be held to have been found guilty of a crime involving moral turpitude.

At the hearing appellant contended that his conviction was the result solely of a political situation which existed in the community. His guilt, however, has been determined by a jury whose finding has been affirmed on appeal and, hence, determination as to his guilt or innocence is not an issue herein. I believe that the crime of which he was convicted unquestionably involved moral turpitude.

It is recommended, therefore, that the application for solicitor's permit be denied.

Edward J. Dorton,
Attorney-in-Chief.

APPROVED:
D. FREDERICK BURNETT,
Commissioner.

3. APPELLATE DECISIONS - TEDONA v. HACKENSACK.

VINCENT TEDONA,)

Appellant,)

-vs-) ON APPEAL ORDER

CITY COUNCIL OF THE CITY OF HACKENSACK,)

Respondent)

Feder and Rinzler, Esqs., by Joseph A. Feder, Esq., Attorneys for Appellant.
Horace F. Banta, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This matter comes on to be heard on the return of an order to show cause why an order should not be entered suspending appellant's license for the fiscal year 1937-1938 nunc pro tunc, and also any renewal license at the same place that appellant may have obtained for the fiscal year beginning July 1, 1938 for the balance of their respective terms, for failure to comply with conclusions heretofore entered herein on June 25, 1938. Tedona v. Hackensack, Bulletin 256, Item 7.

On the return day the only witness who appeared on behalf of appellant was a Mr. Battaglia, who testified that he was familiar with the arrangement of appellant's premises both in April 1937 and at the present time; that the long bar has been removed, and a short bar, having a length of between ten and eleven feet, has been placed on the opposite side of the room; that this short bar is in the left rear corner of the main room in the same place where the service bar was placed in April 1937; that the original service bar in April 1937 had a back bar.

On behalf of respondent, City Manager Rich testified that, since the conclusions dated June 25, 1938 were filed, appellant has removed his twenty-four foot bar and set up a twelve foot bar on the opposite side of the room; that the bar which is now there has a back bar "loaded with liquor bottles, mirrors and everything else to go with it"; that the original plans submitted to the City Council provided for a ten foot service bar in the rear of a room and no back bar; that in April 1937 the service bar as set up in the licensed premises substantially complied with the plans as filed; that there were no stools in front of the first service bar; that the original service bar was parallel to the rear wall of the room, whereas the present bar extends along the left side of the room at right angles to the rear wall. Investigator Pfeiffer, of this Department, who visited the licensed premises on August 19, 1938 and August 23, 1938, corroborates City Manager Rich's testimony as to the present position of the bar and the present existence of the back bar. He also found that there were eleven chromium plated leather top stools in front of the bar but not fixed to the floor; that the signs on the show windows of the licensed premises were as follows: "Hudson Restaurant and Bar" in four inch letters on both windows; "Quick Lunch" and "Ravioli" in two and one-half inch letters on the right-hand window; "Spaghetti" and "Sandwiches" in two and one-half inch letters on the left-hand window; and that both of the windows are decorated with liquor ads.

Subsequent to the hearing appellant submitted an affidavit of a plumber who installed the original service bar, and an ice man who swears that he was familiar with the licensed premises in April 1937. Both of these affidavits set forth that the bar now existing

in the premises is in exactly the same position as the original service bar, and also that there were mirrors in back of the original service bar. Although these affidavits are objectionable because not subject to cross-examination, I have nevertheless considered them in reaching a conclusion.

There is no substantial dispute as to the present condition of the licensed premises. The only question to be decided is whether appellant has restored the premises to the approximate condition in which they existed in April 1937. The present bar is approximately the size of the service bar which existed at that time. It seems to be immaterial whether the service bar is parallel with the rear wall or at right angles to said wall. Hence, the position of the bar itself is in substantial compliance with the conclusions heretofore entered. However, I am satisfied from the evidence that the service bar as it existed in April 1937 had no back bar containing liquors, mirrors, etc. and no stools for the accommodation of customers; that the show windows on the licensed premises in April 1937 contained no reference to a bar.

From the foregoing, it appears that appellant has not submitted to me proof that he has restored the premises to the condition in which they existed in April 1937 as required in the Conclusions filed June 25, 1938. The place still has all the appearances of a saloon rather than a restaurant.

Accordingly, License No. C-25, issued by the City Council of the City of Hackensack to Vincent Tedona for the fiscal year 1937-1938, is suspended from June 25, 1938 to midnight June 30, 1938 nunc pro tunc, and License No. C-55 issued by the City Council of the City of Hackensack to Vincent Tedona for the present fiscal year, is hereby suspended for the balance of the present fiscal year ending June 30, 1939, effective November 6, 1938; provided, however, that at any time after the expiration of twenty (20) days from the effective date of the suspension of the present license, as set forth herein, appellant may apply to me to lift the suspension of License No. C-55 for the present fiscal year upon submitting to me proof that he has removed (1) the back bar, (2) the stools which presently exist in front of the bar, (3) all liquor ads from the show windows, (4) the words "and Bar" from the lettering upon the show windows. If, eventually, an order is entered herein lifting said suspension, said order will contain a provision requiring appellant to maintain the licensed premises in substantially the same condition in which they exist at the time the order lifting the suspension is entered.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 3, 1938.

4. DISQUALIFICATION - APPLICATION TO LIFT - GRANTED.

In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to R. S. 33:1-31.2 (as amended by Chapter 350, P. L. 1938).

CONCLUSIONS

Case No. 40.

Francis P. Meehan, Esq., Attorney for Petitioner.

BY THE COMMISSIONER:

Prior to November 1931 petitioner herein was arrested at seven different times on various charges, three of which arrests resulted in convictions, namely, (1) in 1927, on a charge of violating the National Motor Vehicle Transportation Act, as a result of

which he was sentenced to twenty-eight days in jail; (2) in 1928, on a charge of carrying concealed weapons, on which he was sentenced to eighteen months in the penitentiary; (3) in November 1931, on a charge of carnal abuse, on which he was placed on probation for three years.

From the evidence given at the hearing, I am satisfied that, since the time of his last arrest, petitioner has reformed and that he has conducted himself in a law-abiding manner since that time. He married in the early part of 1932, and is the father of two children. Since that time he has lived with his family in various properties owned by his mother, and has been making efforts to contribute to the support of his family by doing odd jobs although, as he testified, it has been difficult for him to obtain work because of his criminal record. His wife is conducting a rooming house.

My finding that petitioner has conducted himself in a law-abiding manner since 1931 is founded upon the evidence given at the hearing by his parole officer, a neighborhood grocer who has known him for nineteen years, a friend who has known him for fourteen years, an insurance agent who has known petitioner and petitioner's family for seven years, and a contractor for whom petitioner worked in 1935 and 1936. All of these witnesses testified that petitioner's conduct has been good during the past five years.

The mother of petitioner is a retail licensee. In 1933 petitioner tended bar during the time that his mother had a beer license, but he testified that he has not worked for her since she obtained a plenary retail consumption license. Some of the character witnesses testified that the petitioner helped in the kitchen of his mother's licensed premises, but both petitioner and his wife testified that he was not employed by his mother, that he drew no salary from her and that he has had nothing to do with the conduct of the licensed premises since 1933. If it appeared that petitioner were employed in the licensed premises despite his disqualification, I would not grant any relief in this proceeding but, under the circumstances, the evidence does not convince me that he has been so employed. The mere fact that a man helps his mother, so far from weighing against him, makes me think more of him. I shall, therefore, lift his disqualification.

It is, therefore, on this 3rd day of November, 1938,

ORDERED that petitioner's disqualification from holding a license or being employed by a licensee because of the convictions referred to herein, be and the same is hereby removed, in accordance with R. S. 33:1-31.2, as amended.

D. FREDERICK BURNETT,
Commissioner.

5. FLAVORING EXTRACTS - USE OF ALCOHOLIC FLAVORING EXTRACTS IN MANUFACTURE OF ICE CREAM PERMISSIBLE PROVIDED THE ICE CREAM CONTAINS LESS THAN ONE-HALF OF ONE PER CENT ALCOHOL BY VOLUME.

Dear Commissioner Burnett:

There seems to be some misapprehension on the part of ice cream manufacturers as to the meaning of your Bulletin 260, dated July 15, 1938, with reference to ice cream flavored with liquor or alcohol. Some ice cream manufacturers are fearful that even the use of alcoholic flavor is prohibited. Of course, vanilla contains 40 or 50% of alcohol and lemon and orange extracts contain more than this amount to hold the flavoring principles in solution.

There are also well established on the market certain flavors such as Imitation Rum, Egg Nog and Bisque Flavors which contain alcohol, Rum or other liquors in their production, but which are of

such a concentration that the finished ice cream would contain not more than 1/4 of 1% of alcohol. We take it that products of this kind are not at all prohibited by your ruling.

We also have another product called Rum Raisin flavor which consists of a Rum flavored syrup containing small steamed raisins, and this product in use by the ice cream manufacturer shows less than 1/4 of 1% alcohol in the finished product.

In order that we may set our customers straight in the matter, will you please advise us that your Bulletin 260 refers to products containing more alcohol in the finished goods and if it is the fact that it is not the intention of your Bureau to prohibit the use of the flavors such as indicated above, which have been in use for a great many years.

Very truly yours,
Virginia Dare Extract Co., Inc.

November 3, 1938

Virginia Dare Extract Co., Inc.,
Brooklyn, N. Y.

Gentlemen:

I take it that you refer to my ruling forbidding liquorized ice cream promulgated in Re London, Bulletin 260, Item 5.

Liquorized ice cream is prohibited because, having an alcoholic content of over one-half of one per cent and being fit in liquid state for beverage purposes, it is an alcoholic beverage under the New Jersey law and therefore is not to be marketed at soda fountains to children.

There is no objection to the use of flavoring extracts containing alcohol in manufacturing ice cream, or for that matter to ice cream having liquor flavors whether the taste is infused with a flavoring extract or with real liquor, provided the ice cream contains less than one-half of one per cent alcohol by volume.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

6. DISQUALIFICATION - APPLICATION TO LIFT - GRANTING POSTPONED.

In the Matter of an Application to Remove Disqualification because of a Conviction, pursuant to the provisions of R. S. 33:1-31.2 (as amended by Chapter 350, P.L. 1938)

Case No. 39

CONCLUSIONS

Petitioner Pro Se.

BY THE COMMISSIONER:

In 1920, petitioner, then 20 years of age, was convicted of "breaking, entry and larceny", and sentenced for an indefinite term at the State Reformatory, where he remained for 15 months and was then released on parole. Being disqualified from holding a liquor license or being employed by a liquor licensee in this State by reason of that conviction (R. S. 33:1-25, 26; Control Act, Secs. 22, 23), he now applies for removal of his disqualification.

Petitioner has been married for nine years, and has two children. Since his release from the State Reformatory, he has resided in and around Hoboken, and presently lives in Union City. Until about 1931, he was employed as a truck driver by various trucking concerns in Hoboken; thereafter, until 1933, he was employed as a car washer and night man at a garage in that same city; he then obtained employment with the William Peter Brewing Company in Union City as a driver, and on July 15, 1935, obtained a solicitor's permit from this Department to act as a salesman for that company. In November, 1936, his permit was cancelled and he was ruled, by reason of his above conviction, to be disqualified from holding a liquor license or being employed by a liquor licensee in this State. Since that time, he has been employed as superintendent of the building where he now resides in Union City.

Petitioner produced four character witnesses at the hearing - viz., the secretary and business agent of the Brewery Drivers Union of the United Brewery Workmen of America, Local 106 (in Union City), of which petitioner has been a member since 1933; his father, a police sergeant in Hoboken who voluntarily retired on pension in 1936 after 45 years of service; a police lieutenant in Hoboken who, after 37 years of service, voluntarily retired on pension several months ago, and who has known petitioner since childhood; a retired Belleville business man who likewise has known petitioner since childhood.

These witnesses testified that the petitioner, since his release from the Reformatory, has led an honest and law-abiding life and has not been involved in any trouble; that his reputation in his community and in his Local of the Brewery Drivers Union is good; that, in their opinion, removal of his disqualification will not be prejudicial to the public interest or to the liquor industry in this State. The petitioner's fingerprint record corroborates the testimony that he has never been in trouble on any occasion other than in 1920.

The statutory provisions under which the present application is brought (R. S. 33:1-31.2, Control Act, Sec. *22B, as amended by P. L. 1938, ch. 350), in authorizing such application to be made five years or more after the criminal conviction, nevertheless leaves to the sound discretion of the State Commissioner the question of whether the disqualification shall be removed. Re Case 27, Bulletin 268, Item 5.

Ordinarily, the evidence in the present case would lead me to lift the disqualification imposed on petitioner by his conviction in 1920. However, petitioner, when obtaining his solicitor's permit in 1935, deliberately denied under oath in his questionnaire that he had ever been convicted of a crime. This gives grave pause to my reaching a determination that the petitioner's disqualification should be presently removed. Strongly in petitioner's favor is the fact that his only conviction of crime was 18 years ago when he was a minor of 20, and the further fact that his character witnesses speak well of him. However, in view of his false oath in 1935, I shall not remove his disqualification at the present time.

The petition is granted, effective February 1, 1939.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 3, 1938.

7. DISQUALIFICATION - APPLICATION TO LIFT - DENIED.

In the Matter of an Application to Remove Disqualification because of a Conviction, Pursuant to R. S. 33:1-31.2 (as amended by Chapter 350, P. L. 1938).)

Case No. 38.)

CONCLUSIONS

BY THE COMMISSIONER:

In September 1932 petitioner was convicted, by confession, of grand larceny, first degree, as defined by the laws of the State of New York. He was sentenced to serve not less than three or more than ten years in the State Prison. On September 29, 1934, he was paroled and permitted to return to the municipality in New Jersey where he had resided before his conviction and where he has since resided.

The first question is whether the crime involved moral turpitude. Records of a New York Police Department show that petitioner was accused of appropriating $1,760.00 to his own use, while employed as a clerk in a bank. A letter addressed to whom it may concern, by the Vice-President of a bank which absorbed the bank for which petitioner worked at the time of his arrest, recites that "In August of 1932 it was discovered that there were substantial discrepancies in the accounts of several of the depositors at that office, and an investigation disclosed that, over a period of years, ---- had been appropriating to his own use various funds of the trust company and making irregular charges to customers' accounts in order to cover this shortage." A letter addressed to whom it may concern, by the Chief Adjuster of the surety company, recites that "It was discovered that he had been for five or six years taking funds of the bank received by him from depositors and appropriating them to his own use, making fraudulent entries on the books of the bank to conceal from the bank officials what he was doing."

At the hearing petitioner testified that "there was not a penny of the bank's money that I ever used"; that the charge involved a $4,000.00 over-draft which was made good by another account; that nine other clerks were just as involved as he was. In view of his confession of guilt to grand larceny, first degree, the question of his guilt or innocence cannot be redetermined in this proceeding. A crime involving misappropriation of bank funds by an employee of the bank clearly involves moral turpitude. Re Case No. 193, Bulletin 217, Item 5.

The evidence presented at the hearing shows that the petitioner has led an exemplary life since his release on parole in September 1934. The statute under which these proceedings are brought provides that any person convicted of a crime involving moral turpitude may, after the lapse of five years from the date of his conviction, apply to the Commissioner for an order removing the resulting statutory disqualification; that whenever any such application is made and it appears to the satisfaction of the Commissioner that "at least five years have elapsed from the date of conviction", that the applicant has conducted himself in a law-abiding manner "during that period" and that his association with the alcoholic beverage industry will not be contrary to the public interest, the Commissioner may, in his discretion, enter an order removing the applicant's disqualification. It is clear from the above quoted language, read together, that the Legislature intended that the probationary period during which the applicant is to be law-abiding was not to start with the date of his conviction but was to commence at the time the applicant reenters society after release from prison. Re Case No. 31, Bulletin 273, Item 2. Petitioner argues that his record in

the State Prison was good, and that this should be taken into account in determining whether he has conducted himself in a law-abiding manner for the past five years. I have heretofore ruled that the time while one is confined for a crime is not a part of the probationary period. Case No. 16, Bulletin 222, Item 12; Case No. 31, supra. The ruling made in those cases applies herein.

Petition to remove disqualification is, therefore, denied, with leave to file a new petition on or after September 29, 1939, which will be five years from the date of petitioner's release.

D. FREDERICK BURNETT,
Commissioner.

Dated: November 3, 1938.

8. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - REVOCATION INDICATED AND EFFECTED.

In the Matter of Disciplinary Proceedings against

Daniel J. Roselle,
T/a Log Cabin Inn,
985 Frelinghuysen Avenue,
Newark, N. J.,

Holder of Plenary Retail Consumption License C-892, issued by the Newark Municipal Board of Alcoholic Beverage Control.

CONCLUSIONS AND ORDER

Samuel B. Helfand, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Jacob Pfeferstein, Esq., Attorney for the Licensee (Morris Feinberg, Esq., of Counsel).

BY THE COMMISSIONER:

The licensee was charged with

(1) Employing a female bartender and female waitresses in violation of Section (a) of resolution of the Newark Municipal Board of Alcoholic Beverage Control adopted August 29, 1934;

(2) Employing and permitting females to act as hostesses in violation of Section (c) of the same resolution;

(3) Sale and service of alcoholic beverages after 3:00 A.M. during hours prohibited by Section 1 of ordinance adopted by the Newark Board of Commissioners on December 23, 1936;

(4) Keeping the licensed premises open after 3:00 A.M. during hours prohibited by the same ordinance;

(5) Employing persons who would fail to qualify as licensees in violation of R. S. 33:1-25 and 26 (Control Act, Sections 22 and 23);

(6) Permitting female impersonators and persons of ill repute upon the licensed premises in violation of State Regulations 20, Rule 4;

(7) Selling alcoholic beverages to a person actually or apparently intoxicated in violation of State Regulations 20, Rule 1.

The licensee pleaded not guilty to all of the foregoing charges but at the conclusion of the State's case retracted his plea

of not guilty as to charges 1, 3 and 4, and as to them entered a plea of guilty instead.

So far as they bear on charges 2, 5, 6 and 7, as to which the licensee denied guilt, the facts are as follows:

On July 14, 1938, Investigator King entered the licensed premises and had no sooner ordered a drink than he was approached by one Julia Salony, who sat beside him and made the usual request for a cigarette. Obtaining the cigarette, she asked him to buy her a drink of whiskey, which he did. Shortly thereafter she was called upon to sing from the dance floor.

While he sat at the bar, two men entered and stood at the bar. In conversation with King, the bartender referred to them as "fags" and remarked that they were "married" to each other. Pressed for an explanation by the Hearer, the witness King described a "fag" as a pervert, having abnormal sexual relations with men and/or women, and who, by manner of speech, movement of the body and expression of the face seeks to attract attention in a manner closely resembling that commonly attributed to females. In a word, female impersonators.

As the evening wore on, King observed another man come in. He was first solicited to buy a drink by one Cecelia Clark, who refused to take beer, insisting on a highball. Being unsuccessful, she left, whereupon one Pearl Williams approached, and, after protracted persuasion, succeeded in getting the customer to buy her a whiskey. Becoming disgusted with her insatiable demands for drinks, the patron disparagingly referred to her as a "woodpecker" because of her constant knocking on the bar asking for more drinks, and left with the observation that he was no "Santa Claus."

As three o'clock approached, the bartender left the bar, the entertainers and waitresses went into a dressing room, and the patrons who were in the know repaired to the Men's Room to await the clearing out of the patrons who were not. The entertainers and waitresses reappeared in the barroom at about 3:15 dressed in street clothes and business continued merrily until a raiding party of Newark Police and investigators of this Department entered the premises at 4:45 A.M. In the interim, the licensee sat outside and acted as a look-out and the bartender, now acting as a waiter, looked over prospective customers from a window near the rear entrance. At about four o'clock a man was admitted, his body shaking, he staggering and sagging, holding himself upright by grasping a partition around the bar - thoroughly intoxicated. He was nevertheless served with alcoholic beverages.

At 4:45 A.M., when the raiding party entered, the place was in total darkness and the licensee claimed that there was no one there. The officers requested that the lights be turned on and insisted that the door to the dressing room be unlocked. Crowded inside in darkness were six girls, the entertainers, waitresses and the manager. At police headquarters, they gave statements disclosing that the three entertainers were residents of New York. The licensee held no permit authorizing their employment.

On the charge of employing hostesses (No. 2 above), the licensee testified that he had never employed any females for that purpose but hired only entertainers. On cross-examination, however, he defined a hostess as one who doesn't know dancing or singing and is not an entertainer. Asked whether his entertainers understood that they had to drink with customers, he first said that he did not permit them to but subsequently admitted that between floor shows they had drinks at the bar and paid for their own drinks - "sometimes." The plain intent of the regulation is to prohibit female employees from soliciting patrons to buy them drinks. I find the licensee guilty on the charge of employing females and permitting them to act as hostesses.

On the charge of employing persons who fail to qualify as a licensee (No. 5 above), the licensee admits that he knew that the three entertainers lived in New York. He also admits knowing that special permits were necessary. Yet he contented himself with asking each girl whether she held a special permit from this Department and when each said "Yes", he was satisfied. I find the licensee guilty on this charge.

On the charge of permitting female impersonators upon the licensed premises (No. 6 above), the defense was a categorical denial by the bartender. The denial might have had more weight had the witness not professed to be ignorant of what a "fag" was. With respect to the two men described by King, even he admitted that their voices were "a little off tune." I find the licensee guilty on this charge.

On the charge of sale of alcoholic beverages to an intoxicated person (No. 7 above), again the defense was a categorical denial. Some attempt was made on cross-examination to create a belief that possibly the customer that King observed was ill and that his actions were thus explainable. Investigator King has been with this Department almost four and one-half years. In that time he has, in line of duty, visited literally thousands of taverns. From his wide experience he, in effect, qualifies as an expert on intoxication. If he swears the patrons was intoxicated, I believe him. I find the licensee guilty on this charge.

There remains only the question of the penalty to be imposed. The licensee's previous record with the Newark Police and the Municipal Board of Alcoholic Beverage Control is far from stainless. In September, 1934, his bartender was arrested for the sale of liquor in unlabeled bottles and refilling bottles, and was fined $100.00. In August, 1936, disciplinary proceedings were conducted by the Newark Municipal Board on charges of sale after hours, sale to intoxicated persons and hindering investigation. The charges were dismissed with a reprimand and warning although as a result of the same incident the licensee had been found guilty of selling during prohibited hours in the First Criminal Court in June 1936. Again in February, 1937, disciplinary proceedings were had against the licensee by the Newark Board on charges of sale during prohibited hours and failure to provide an unobstructed view of the interior. Although he was found guilty on the latter charge, sentence was suspended because the condition complained of had in the meantime been corrected. In February, 1938, on routine inspection of the premises, disqualified entertainers were found without permits.

In view of the licensee's previous record, and in view of the wholesale violations discovered on one visit to the licensed premises, it is clear that the licensee has no conception of his obligation to observe the law. Revocation is indicated and will be effected.

Accordingly, it is on this 5th day of November, 1938, ORDERED that plenary retail consumption license C-892, heretofore issued to Daniel J. Roselle, t/a Log Cabin Inn, for premises 985 Frelinghuysen Avenue, Newark, N. J., by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby revoked, effective immediately.

D. FREDERICK BURNETT,
Commissioner.

9. RETAIL DISTRIBUTION LICENSEES - GIFTS OF PAPER CUPS WITH SALES OF LIQUOR - THE POTENTIAL EVILS AND THE REMEDIES - DISTRIBUTION LICENSEES ARE NOT TO FURNISH THE ACCESSORIES FOR CONSUMING LIQUOR IN AUTOMOBILES OR ON THE PUBLIC HIGHWAY BY GIFTS OF PAPER CUPS - PRETENDED SALES WILL BE TREATED AS GIFTS.

Dear Sir:

Received your ruling dated October 24, 1938 (Re Grossman, Bulletin 276, Item 6).

If package goods are purchased for consumption off premises and are, as you infer, to be consumed in streets or alleys or automobiles, then they will be consumed in these places regardless of whether paper cups are furnished or not. The evil will not be eliminated by preventing the giving of cups.

If drinking is done in such places you mention and is to be prevented or reduced in any manner, then it seems to me to become a problem for the Police Department to work on and control.

As a point of further information regarding the law, is it permissible for a licensee to sell commodities in his store other than liquor.

Very truly yours,
Grossman Paper & Bag Co.

November 5, 1938

Grossman Paper & Bag Co.,
Irvington, N. J.

Gentlemen:

I did not think for a moment that stopping package goods stores from giving out paper cups with purchases of liquor would absolutely eliminate the drinking of liquor in streets or alleys or automobiles. It was a step, however, in the right direction. I believe it will tend to minimize the evil and certainly it lends no encouragement to it, whereas the giving away of paper cups as you had purposed would be a standing invitation to drink in the highways and the byways. The object of Control is not to create problems for the Police but to lighten their burden as much as can be by preventing those things which invite trouble and are the cause of so much of the drunken driving.

Whether the holder of a plenary retail distribution license may sell commodities other than liquor depends upon local municipal regulation. If there is an ordinance prohibiting the issuance of such licenses for premises upon which any mercantile business other than the sale of alcoholic beverages is carried on, he may not. If there is no such ordinance, he may. You can ascertain whether or not such an ordinance has been adopted in any particular municipality by inquiring of the Municipal Clerk.

If it is the distribution of your paper cups that you're still bothered about, you will see from the foregoing that liquor stores may sell them, provided there is no prohibiting ordinance. But such sales must be bona fide sales to persons who actually want to buy paper cups. If what you have in mind is just a fake or pretended sale at less than cost or for a merely nominal price in order

to get around the ruling in Bulletin 276, Item 6, in which I disapproved the free distribution of paper cups with sales of packaged liquor, the retailers are going to get into trouble. I doubt if they will attempt any trifling. Certainly if they do try it, you won't get any repeat orders once I catch up with them.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

10. COMBINATION SALES - WHERE PERMISSIBLE.

Dear Sir:

I would like to advertise a group of three (3) bottles of wine under one price. This merchandise is not under Fair Trade Act.

Kindly let me know if this is permissible.

Very truly yours,
Dumont Wine & Liquor Store.

November 5, 1938

Mr. Philip Berner,
Dumont Wine & Liquor Store,
Dumont, N. J.

My dear Mr. Berner:

I am sending you herewith Re Harris, Bulletin 220, Item 7, which sets forth Rule 19 of Regulations No. 20, dealing with combination sales, and illustrates the type of sales that are permissible.

Assuming that there is no minimum fixed by Fair Trade contract in respect to the particular wines you have in mind, you may advertise several bottles of the same wine at whatever price you choose. That is not a combination sale within the meaning of the Rule. But you may not do it with combinations of wines or other alcoholic beverages of different type, kind or make, unless the articles making up the combination are itemized in detail, the unit price of each article is specifically stated at the same figure that it is currently sold by you separately and independently of any combination, and the price for the assortment is the aggregate of all the individual items. Combinations of different items, at lower prices than the aggregate at which the specific items are sold separately, are prohibited by the Rule and hence are not permissible.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

11. ADVERTISING - DISTINGUISHED FROM SALE - FOREIGN BREWERY NOT LICENSED IN NEW JERSEY MAY ADVERTISE HERE BUT MAY NOT SOLICIT OR ACCEPT ORDERS.

Gentlemen:

One of our clients, a brewer, has no license in New Jersey, but has one distributor in Newark who has exclusive distributing rights in New Jersey.

This brewer wishes to have some advertising done in New Jersey. I am told that it is not possible for him to advertise over his own name in New Jersey because that would be selling without a license. But is it possible for him to furnish the distributor with the money to advertise over the distributor's name?

Yours very truly,
Maurice Collette.

November 5, 1938

Batten, Barton, Durstine & Osborn, Inc.,
New York City.

Att: Mr. Maurice Collette.

Gentlemen:

The ordinary advertising of alcoholic beverages is not a sale. Hence, there is nothing in the Act or the rules and regulations of this Department which would prohibit your client, a brewery - not licensed in New Jersey - from advertising in newspapers or on billboards in this State. I see no reason why your client should attempt to do indirectly through a distributor what he may do directly in his own name.

It could not, however, send missionary men into New Jersey or send any agents to solicit or accept orders for alcoholic beverages. To do that, the brewery itself would have to be licensed in New Jersey as well as the solicitors.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

12. APPELLATE DECISIONS - DeLUCCA v. FAIRVIEW.

THOMAS DeLUCCA,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS
BOROUGH COUNCIL OF THE BOROUGH OF FAIRVIEW,)
Respondent.)

Cosmo D. Palmisano, Esq., Attorney for the Appellant.
Harry A. Accomando, Esq., Attorney for the Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail consumption license for premises located at 418 Edgewater Avenue (formerly Edgewater Road), Borough of Fairview.

The Borough (area, approximately 1 square mile; population, some 10,000) contains 26 taverns and 7 "package" stores. Appellant's premises are in a business section whose only liquor establishment is a "package" store. A tavern existed in the section for several years until destroyed by fire in February 1938. The owner of that tavern did not renew his consumption license for the current fiscal year.

There is no objection to appellant's fitness to hold a license or to the suitability or location of his premises. Respondent contends that the denial of his application was valid because, in its opinion, the taverns now in existence are sufficient for the Borough.

I have no doubt of the reasonableness of a belief that 26 taverns are a sufficient number for Fairview. However, a municipal resolution of June 19, 1934, still in effect, provides that consumption licenses in the Borough "shall be limited to 30." See R.S. 33:1-40 (Control Act, Sec. 37). Such a quota, while on the books, is decisive as to the number of consumption licenses permissible in the municipality and may not be varied by an informal opinion. Hence, where, as here, vacancies exist in that quota, an applicant may not be denied a consumption license merely on the declared ground that sufficient consumption places exist in the Borough. Respondent's argument that it has changed its mind since adopting the quota of 30 and now thinks the present number of consumption places to be sufficient, loses sight that the proper way to manifest its change of opinion is by a change in its formal quota. Eisen v. Plainfield, Bulletin 68, Item 12; Sosnow v. Freehold, Bulletin 68, Item 13; Re Smith, Bulletin 110, Item 6; Kemo v. Trenton, Bulletin 155, Item 6; Pelos and McNamara v. Passaic, Bulletin 156, Item 2; Levy v. Mt. Ephraim, Bulletin 189, Item 3; Re Cliffside Park, Bulletin 224, Item 7. Cf. Baker v. Marlboro, Bulletin 242, Item 9. Otherwise, quotas are so flexible as to be meaningless.

However, respondent contends that it is contemplating an ordinance to reduce the quota on consumption licenses (excepting renewals) to 20, thus eliminating the existing vacancies in the present quota; that the denial of appellant's application should, therefore, be sustained in view of this contemplated reduction.

It appears that the local Liquor Dealers Association has been requesting respondent to effect such a change in the quota; that on September 27, 1938, respondent held a conference with that Association; that respondent unofficially directed the Borough attorney to secure information concerning a general liquor ordinance, including a reduction of the quota on consumption licenses to 20. No ordinance, however, has even at this late date been introduced, let alone enacted.

A quota, even though adopted after the denial of an application, may nevertheless be effective retroactively so as to sustain that denial on appeal. Franklin Stores v. Elizabeth, Bulletin 61, Item 1; Tenenbaum v. Salem, Bulletin 109, Item 1; 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.

However, in all those cases, the quota, although not adopted when the application was denied, was nevertheless actually in effect at the time of deciding the appeal.

In the present case, what confronts me is an actual quota of 30 consumption licenses (with 4 vacancies existing therein) and merely a conjectural possibility that the quota may possibly be reduced to 20. It is manifestly unfair to appellant to sustain the denial of his license on the basis of a quota which may never exist. The rule of the above cases depends upon facts and not conjectural possibilities.

The action of respondent is, therefore, reversed. Respondent is directed to issue a license to appellant forthwith as applied for.

Commissioner.

Dated: November 5, 1938.