

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. 07114

BULLETIN 2405

July 2, 1981

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STATE OF NEW JERSEY  
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1. APPELLATE DECISIONS - RICH-DEN KING HENRY VIII, INC. v. PASSAIC.  
#4363

Rich-Den King Henry VIII, Inc. :  
t/a Henry VIII Pub, :

Appellant, :

vs. :

Municipal Board of Alcoholic :  
Beverage Control of the City :  
of Passaic, :

Respondent. :

CONCLUSIONS

AND

ORDER

-----:  
Tencza and Konopka, Esqs, by Michael A. Konopka, Esq.,  
Attorneys for Appellant.  
Randolph A. Newman, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Joseph Rosa, Jr., Administrative Law Judge

Dated: April 15, 1980

Received: April 16, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were filed by the parties hereto pursuant to N.J.A.C. 13:2-17.6.

Having carefully considered the entire record herein including the transcript of testimony, the exhibits and the Initial Decision, I concur in the findings and recommendation of the Administrative Law Judge, except as herein expressly modified, and adopt them as my conclusions herein.

It is uncontrovertible that, during the period when these premises were managed by Dennis Occhiuzzo, an undesirable patronage was permitted in these premises, properly conclude that this had become a "trouble spot". It is the fundamental obligation of this Division in regulating retail licensees to confine the conduct of such business to reputable licensees who will operate the premises in a reputable manner. Zicherman v. Driscoll, 133 N.J.L. 536 Sup. Ct. 1946; In re: 17 Club, Inc., 26 NJ Super. 43, 52 (App. Div. 1953).

However, Occhiuzzo is no longer affiliated with the licensee, and, according to the testimony, many of the problems resulting from his mismanagement have been corrected. This does not mean that

they have been entirely corrected; but good faith efforts have been and are being made by the present management to operate the facility in a law-abiding manner by calling for local police assistance in its efforts to keep out the undesirable persons. I, therefore, believe that the respondent over-reacted and acted arbitrarily in denying renewal of the license. Such action should only be taken where it is unquestionably mandated by the public interest.

I believe that the appellant should be given one other opportunity to prove its worthiness to operate these premises reputably and to eliminate the problems which have caused it to become a trouble spot in the past. If the appellant fails to do so, the respondent, of course, may promptly institute disciplinary proceedings, or take appropriate action when the licensee once again seeks renewal of its said license.

However, I am convinced that such renewal should be made expressly subject to the special conditions hereinbelow set forth, which will help to assure the lawful operation of this establishment, cf. Moon Star, Inc. v. Jersey City, Bulletin 2130, Item 3; Belmar v. Division of Alcoholic Beverage Control, 58 NJ Super. 423, (App. Div. 1958); Borko v. Mansfield Township, Bulletin 1894, Item 3.

Accordingly, it is, on this 30th day of May, 1980,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Passaic be and the same is hereby reversed, and the said respondent is hereby directed to approve appellant's application for renewal of its said license for the 1979-80 license term which said renewal shall be made expressly subject to the following special conditions:

1. the licensee shall employ special police officers or other security personnel who shall be on duty from 9:00 p.m. to closing to adequately and properly police the business operations of the licensed premises;  
to prevent known or reputed narcotics users or purveyors from entering or patronizing the said premises;  
to prohibit the congregation of persons outside of and in the immediate vicinity of the said premises;  
and
2. the licensee shall discontinue the sale of package goods for off-premises consumption after 10:00 p.m.;  
and it is further

ORDERED that my Order to Show Cause dated June 29, 1979 be and the same is hereby vacated.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

IN RE:

INITIAL DECISION

RICH-DEN KING HENRY VIII, INC.,  
t/a KING HENRY'S PUB v. MUNICIPAL  
BOARD OF A.B.C. OF PASSAIC

)  
) OAL DKT. No. ABC 2873-79  
) AGENCY DKT. No. 4363  
)  
)

APPEARANCES:

Tencza and Konopka, Esqs.  
by Michael A. Konopka, Esq. for the Appellant,  
Rich-Den King Henry VIII, Inc., t/a King Henry's Pub

Randolph A. Newman, Esq., attorney for Respondent,  
Municipal Board of Alcoholic Beverage Control,  
City of Passaic

BEFORE THE HONORABLE JOSEPH ROSA, JR., A.L.J.:

This is an appeal from an action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic, (hereinafter Respondent), who by Resolution and Order dated June 22, 1979, refused to renew the plenary retail consumption license of Rich-Den King Henry VIII, Inc., (hereinafter Appellant), license No. 1607-33-116-001, for the year 1979-80. The reasons for said denial were set forth in a Resolution of the Respondent which were as follows:

Past record of violence and/or lack of ability of licensee to carry on operation within the Community in a normal, peaceful and/or proper manner as regards the good and welfare of the community specifically referring to (1. continued nuisance; (2. lack of proper management; (3. continued existence of criminal activity.

A hearing was held before the Respondent Board at which time the aforesaid Resolution was adopted denying the renewal application of the Appellant.

On June 28, 1979, the Appellant filed a Notice and Petition of Appeal with the Director of the Division of Alcoholic Beverage Control, State of New Jersey. On June 29, 1979, the Director of the Division of Alcoholic Beverage Control issued an Order to Show Cause extending the term of the Appellant's plenary retail consumption license pending the determination of the appeal. The matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

In its Appeal, Appellant contends that the action of the Respondent was erroneous in that the determination was against the weight of the evidence, was contrary to the decisions of the Division of Alcoholic Beverage Control, was con-

trary to the law, constituted an abuse of the discretionary power of the Respondent Board, was arbitrary, capricious, and unreasonable.

A hearing de novo, pursuant to N.J.A.C. 2-17.6, was held on March 20, 1980 before the Honorable Joseph Rosa, Jr., Administrative Law Judge. Pursuant to N.J.A.C. 13:2-17.14, all parties were given an opportunity to be heard and to cross-examine witnesses. No transcript of the proceeding below was submitted inasmuch as no stenographic record was taken at the renewal hearing. Respondent contends that there was more than sufficient and competent evidence to support its Resolution and asks that the denial of the renewal be affirmed. Relevant testimony was as follows:

Testifying initially on behalf of the Respondent was Patrolman-Detective Richard Wollack, a member of the Passaic Police Department for nine years, the last three of which he has been a detective and a member of the City's vice squad. He testified that:

He has had cause to enter the King Henry VIII Pub, (hereinafter King Henry's), on a number of occasions since the middle of 1978. A number of these occasions have been as part of investigations which were attempting to uncover narcotics activities at the tavern. On some of these visits, he saw people, who he had known as narcotics users, as patrons of King Henry's. On one occasion he entered the men's room and smelled the odor of marijuana. He has on other occasions seen the patrons drinking alcoholic beverages on the sidewalk immediately in front of the tavern, and has seen some of these patrons harass passers-by. During the period 1978-79, he observed the initial contacts for narcotics transactions take place at King Henry's with the ultimate deals and arrests culminating elsewhere. He recalled that he had been in the tavern during the 1978-79 period approximately ten times. On these occasions, there was usually a barmaid in charge.

He knew the licensee but never saw him present on the premises when he entered.

He feels that under the prior management there was "no control exercised," over the establishment and it was a detriment to the City of Passaic. On some occasions, he saw persons breaking bottles in the public parking lot adjacent to the premises.

Under cross-examination, the Officer admitted that he has seen narcotic users and dealers not only in this tavern, but in others in the City of Passaic, and admitted that to his knowledge no arrests have ever been made for narcotics activities inside the tavern. He further admitted that even though he saw patrons drinking outside the tavern, he never made any arrests for it. The patrons on these occasions went back into the tavern to finish their drinks when they were requested to do so by the Officer.

He admitted that he conducted a surveillance of the tavern for two weeks in the month of 1979 in an attempt to uncover narcotics activity but no arrests were made or no warrants issued as the result of this surveillance.

He saw harassment of passers-by on at least four or five occasions but did not make any arrests as a result of same. He did instruct the barmaid about the situation outside the tavern and asked her to keep the patrons under control. The Officer also admitted that during the three years since the present licensee took control, he has never made an arrest at this tavern. He also stated that, to his knowledge, no arrests have ever been made on the premises for A.B.C. violations, nor has the establishment ever been warned or cited for violations of any A.B.C. rule or regulation.

The next witness on behalf of the Respondent was a Ptl. Phillip Creo, a member of the Passaic Police Department for the past twelve years. He testified that:

He has been to the King Henry Pub on a number of occasions and on some of these occasions has seen patrons drinking alcoholic beverages in front of the tavern. On some of these, he has heard "sexual remarks" made to female passers-by. He has also broken up fights outside the tavern which, after investigation it was learned, had initiated inside the tavern. He, on one occasion, had a patron tell him that he had his money stolen by an alleged prostitute inside of the tavern, but the patron did not wish to make a complaint about the matter. In his opinion, the tavern can "do no justice to the neighborhood."

Under cross-examination the Officer admitted that although he had seen drinking taking place outside of the premises on a number of occasions, he had made only two or three arrests for same. He also stated that he did not know who had made the calls for police assistance on the other occasions when he was present in the tavern and stated that it could very well have been the owners themselves. The Officer also acknowledged that even though on any particular night when he has been in the tavern he has seen at least twenty known narcotics users at the bar, he has never made a narcotics arrest in King Henry's.

Testifying on behalf of the Appellant was Dennis Occhiuzzo, who was a shareholder in the parent corporation of King Henry's at the time of the incidents complained of. He testified that:

He is not presently affiliated in any manner with King Henry's. During the period July 1, 1978 - June 30, 1979, he was a 35 percent shareholder in the parent corporation, and the remaining 65 percent of the shares were owned by an Alice Tikijian. The corporation acquired the King Henry in early 1977 and during this initial period of time he spent many hours at the bar in a supervisory capacity. After a period of time, he acquired an interest in another tavern in the City of Passaic, and employed a floor manager to supervise

the day-to-day running of King Henry's. His other tavern was in the immediate vicinity of King Henry's, and if any problem arose at King Henry's he stated that it was only a few minutes until he arrived there. During his period of ownership, he never received any warning, either from the Respondent or the Division of Alcoholic Beverage Control, regarding the conduct of the tavern, nor was he ever charged with any violations. He stated that no arrests were ever made in King Henry's while he was inside of the tavern. He claimed that he had instructed his employees what to do if there was any trouble inside the tavern and how he wished the tavern to be operated.

Under cross-examination, Mr. Occhiuzzo stated that although he never saw any drug activities at King Henry's, he knew what type of people the patrons were. He stated that he himself had never seen people drinking outside the tavern. He also admitted that there was a period during the years 1978-79 when there was a problem with the tavern, due to the type of clientele which patronized it.

The next witness on behalf of the Appellant was Richard Tikijian, the son of the majority shareholder, Alice Tikijian. He stated that since the departure of Mr. Occhiuzzo, he has gone to the tavern on an almost nightly basis in an effort to keep the tavern operating in an acceptable manner. He stated that he has never seen anyone drinking on the street in front of the tavern and he has given specific instructions to the tavern's employees as to what to do if they notice it. The employees are also under specific instructions to call the Passaic City Police in case of any disturbance at the tavern. He further stated that prior to the renewal hearing, he was not aware of any charges against the bar, and he himself has never seen any of the incidents testified to by the officers.

After this oral testimony was offered, the parties submitted written summations on behalf of their respective positions.

After having observed the demeanor of all the witnesses, having considered the entire record, including the testimony and exhibits submitted after the hearing, together with the arguments of counsel, I FIND:

1. Appellant is the holder of plenary retail consumption license No. 1607-33-116-001 for premises known as the King Henry VIII Pub, which is located at 7 Henry Street in the City of Passaic, in Passaic County, New Jersey.
2. The principal shareholder of Rich-Den King Henry VIII, Inc., t/a the King Henry VIII Pub, is Alice Tikijian.
3. The King Henry VIII Pub is located in a densely populated area of Passaic.

4. On various occasions during the license period 1978-79, the members of the Passaic Police Department observed patrons of the King Henry VIII Pub drinking alcoholic beverages on the sidewalk in front of the tavern.
5. On various occasions during the license year 1978-79, members of the Passaic Police Department heard patrons of the King Henry VIII Inc. Pub, who were congregating in front of the tavern, harass various passers-by.
6. At various times in the 1978-79 license year, members of the Passaic Police Department have seen known narcotics users frequenting the King Henry VIII Inc. Pub.
7. In the 1978-79 license year, the general manager of the tavern and the 35 percent shareholder of the parent corporation was a Dennis Occhiuzzo.
8. Mr. Occhiuzzo is not presently affiliated with the Rich-Den King Henry VIII Inc.
9. No arrests have been made inside of the King Henry VIII Inc. Pub as a result of narcotics activity.
10. Some arrests have been made in front of the King Henry VIII Inc. Pub as a result of the public consumption of alcoholic beverages.
11. The King Henry VIII Inc. Pub received no notice of any pending non-renewal action by the Board of Alcoholic Beverage Control of the City of Passaic.
12. The conduct at the King Henry VIII Inc. Pub has improved since the departure of Dennis Occhiuzzo.

Based on the foregoing, I CONCLUDE that the Respondent has not sustained its action by a preponderance of the legal and credible evidence.

In the present matter, there is no stenographic record of the hearing below and therefore the issue of this appeal is whether the evidence herein justifies the action of the Board in refusing to renew the Appellant's license. Cf. Nordco Inc. v. Newark, Bulletin 1148, Item 2.

In analyzing the testimony, it would be helpful to state the applicable principles pertinent to a determination hereof.

A liquor license is a privilege, and no person is entitled to a liquor license, as a matter of law. Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888). Once granted, it is merely a temporary permit or privilege, Mazza v. Cavicchia, 15 N.J. 498, 505 (1954), which is, however, protected against arbitrary revocation, suspension, or refusal to renew. The Boss Co. Inc., v. The Board of Commissioners of Atlantic City, 40 N.J. 379 (1963).

The granting or denial of an alcoholic beverage license rests within the sound discretion of the local issuing authority. The local issuing authority is vested with a high responsibility and wide discretion, and is to have as its principal guide in issuing liquor licenses the public interest. N.J.S.A. 33:1-19, 24. See also Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955) and Blanck v. Mayor and Council of Magnolia, 38 N.J. 484 (1962).

"The governmental power extensively to supervise the conduct of the liquor business and to confine the conduct of that business to reputable licensees who will manage it in a reputable manner has uniformly been accorded broad and liberal judicial support." In Re 17 Club, Inc., 26 N.J. Super. 43, 52 (App. Div. 1953). See also: Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946).

In arriving at a determination, it should be noted that the burden of establishing that the action of the local issuing authority was erroneous and should be reversed rests with the Appellant. N.J.A.C. 13:2-17.6. Under the settled authority, the municipality's grant or denial of an application will stand so long as its exercise of judgment and discretion was reasonable and founded in law. Fanwood v. Rocco, 33 N.J. 404 (1960). The local authority's exercise of discretion will be accepted absent a clear abuse or unreasonable or arbitrary exercise of discretion. Lyons Farm Tavern Inc. v. Newark, 55 N.J. 292 (1970), and Nordco Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957).

In the present matter, the local authority decided not to renew Appellant's liquor license on the ground that this tavern had become a "trouble spot." Confirmation of this was found by the local board in the testimony of the members of the Passaic County Police Department who testified to certain conditions which they believed existed both within and outside of the tavern.

"It is well established that a licensee is responsible for conditions and incidents that exist both inside and outside the premises which are caused by its patrons." McFadden's Lounge v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 62 (App. Div. 1954). See also Gueche, Inc. v.

Union City, Bulletin 2072, Item 5; Parkins  
v. Newark, Bulletin 2083, Item 2.

The denial of the right to continue the operation of a licensed premises, that is, the revocation or non-renewal of a license presents a most severe penalty that may be imposed upon the licensee. The local board herein chose non-renewal based on the number of unspecified incidents involving congregation of patrons in the area immediately in front of the licensee's premises and the character of some of the tavern's patrons.

I FIND this to be manifestly reasonable. It has been generally held that the exercise of the power to overturn the decision of non-renewal on the part of the local board by the Director, will be applied only when the sanction of non-renewal is manifestly unreasonable. Cf. Sventi and Wilson, Inc. v. Point Pleasant Beach, Bulletin 1930, Item No. 1, and Pom Bon, Inc. v. Cliffside Park, Bulletin 1897, Item 1.

The question herein therefore becomes should a licensee who has on a number of unspecified occasions failed to control his patrons and who has some undesirable patrons be penalized when it has made reasonable efforts by calling the local law enforcement authorities. Cf. Ishmal v. Division of Alcoholic Beverage Control, 58 N.J. 347 (1971) and Nordco, Inc. v. State, 44 N.J. Super. 277 (App. Div. 1977).

It appears in the present matter that many of the problems emanated from the location of the licensed premises, and the management of the premises by a Dennis Occhiuzzo who is no longer affiliated with the license.

It should also be noted that throughout the unspecified instances complained of by the members of the local police, there were very few arrests made for the instances complained of. There has never been an arrest for narcotics' violation inside the tavern and only two or three arrests made for drinking in public or harassment of passers-by.

I therefore FIND and CONCLUDE that the local board abused its discretion in not renewing the plenary retail consumption license of Rich-Den King Henry VIII, Inc., and FIND that non-renewal was unreasonable.

I further FIND and CONCLUDE that in the present matter a more satisfactory procedure for the Board would have been to initiate a disciplinary proceeding on a specific charge and to suspend for a period of time on an adjudicated record rather than to base refusal to renew on a non-notice basis.

I therefore CONCLUDE that the Appellant has sustained its burden of establishing that the action of the local issuing authority was erroneous and should be reversed and it is accordingly ORDERED that the action of the local issuing authority be REVERSED and the local issuing authority is HEREBY ORDERED to renew the plenary retail consumption license of the Appellant for the 1979-80 license year.

This recommended decision may be affirmed, modified or rejected by the head of agency, Joseph W. Lerner, Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, my Initial Decision in this matter and the record in these proceedings.

- 2. DISCIPLINARY PROCEEDINGS - LICENSEE GUILTY OF SALE OF ALCOHOLIC BEVERAGES TO A MINOR 17 YEARS OF AGE - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against }

Million Bucks, Inc. }  
t/a Saw Mill }  
1807 Boardwalk }  
Seaside Park, N.J. 08752 }

S-11,598

CONCLUSIONS

Holder of Plenary Retail Consumption License 1527-33-006-003 issued by the Mayor and Borough Council of the Borough of Seaside Park. }

AND

ORDER

Piltzer & Piltzer, Esqs., by David S. Piltzer & Nestor A. Winters, Esq., Attorneys for the Licensee.  
Mart Vaarsi, Esq., Deputy-Attorney General, Appearing for the Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded "not guilty" to the following charge:

On Wednesday, August 25, 1977, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage, directly or indirectly, to a person under the age of eighteen (18) years, viz., Michael L., age 17 and allowed, permitted and suffered the consumption of such alcoholic beverage by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20.

Michael L., age 17 on the date alleged herein, testified in support of the Division charge that, on that date, accompanied by acquaintances, he entered the licensed premises (located on the Boardwalk in Seaside Park) and asked the bartender for a beer. Upon being questioned concerning his age, Michael furnished him with borrowed identification. He paid for and was served the beer drawn from a tap in a paper cup. He then walked away from the bar.

Upon being questioned whether he consumed any of the beer he testified, "yes, I might have taken a sip of that." (T-6-22). Then the bouncer (identified as Joseph Pulvano) approached the minor and asked him for identification. When he could not produce it because he had returned it to his acquaintance, the bouncer seized the beer and threw it in a garbage can.

Michael explained that he walked out onto the boardwalk and, not seeing the bouncer, went back to the licensed premises on the boardwalk, inside the yellow line delineating a boundary of the licensed premises, and chatted with acquaintances. One acquaintance purchased a beer for him. Upon being confronted by ABC agents he threw the beer into the garbage can. Upon being questioned as to whether he had consumed any of the second beer, Michael replied, "I don't really think I did . . ." (T-8-11).

On cross-examination, Michael testified, "I'll state that I did not drink that first beer." (T-11-15).

The witness conceded that he informed Pulvano and a Mr. Winters on October 5, 1977 (the occasion of the Municipal Court Hearing) that he did not drink any of the first beer.

At the time Michael was approached by the agents he was surrounded by many persons drinking from the same type paper cups held by him.

ABC Agent G testified that, accompanied by Agent H, he visited the licensed premises on the night of August 25, 1977. He described the premises as fronting on the boardwalk, serving soft drinks, alcoholic beverages and providing fast food service. A yellow line extends along the boardwalk approximately ten (10) or fifteen (15) feet from the front of the premises. He observed two males patrolling the area inside the yellow line. After making observations of patrons who appeared to him to be minors, he and Agent H contacted the local police department. Two police officers responded, one accompanied Agent G and the other, Agent H in checking ages.

Agent G explained that he observed M inside the yellow line "consuming a glass containing beer" (T-29-5 to 6). He did not observe the sale or service of the beverage. He approached

Michael and during the course of questioning him relative to his age, Michael placed the cup containing the beer in a garbage can which was alongside Michael. Agent G immediately retrieved the cup from the garbage can. Ultimately, the contents of the cup were placed in an evidence bottle and submitted to the Division Chemist. The Chemist's Report indicated that the contents were an alcoholic beverage, which was received in evidence.

On cross-examination, Agent G testified that in order to approach M he had to make his way through a group of people. He observed M put the cup to his lips, "a couple of seconds", "a few seconds" (T-65-8; T-65-10), take a drink and make a swallowing motion.

Glen Hennings, who, on the date in question, was employed as an ABC agent and, at the date of the hearing was employed as a police officer, participated in the subject investigation with Agent G. He testified that he observed M drinking a beverage from a plastic cup which appeared to be beer. Later he and Agent G contacted the local police department. Subsequently, he observed Agent G questioning M and, thereupon, rejoined him. Agent G handed Hennings the aforementioned cup taken from M which was submitted to the Division Chemist and proven to contain beer.

On cross-examination, Hennings asserted that, after he and Agent G made observations of the patronage, they summoned the local police. Police officers responded to the call and he and Agent G returned to the subject premises after an interval of ten (10) minutes. Prior to leaving to summon the police, he had observed M holding a cup filled with liquid "almost full to the top." Neither he nor Agent G seized the beverage then. It was Henning's belief that the cup that M was holding contained the same beverage that was later seized.

Hennings explained that, upon his return to the premises, he observed M holding a cup of beer standing with Agent G and a police officer on the boardwalk inside the yellow line, but outside of the structure or building wherein the bar was located. He continued to the bar area, checked some patrons and approximately fifteen (15) minutes later he rejoined Agent G. At that time Agent G was holding a cup in his hand, M wasn't.

In defense of the charge, Joseph Pulvano, employed by the licensee as its Assistant Manager, testified that, while checking ID's of patrons inside the yellow line he observed Michael and a companion each holding "two full beers." Michael's beer was seized and discarded when he couldn't produce a picture ID

and was told to leave the premises. At the local Municipal Court in October 1977, he heard Michael state that he did not consume any portion of that drink before it was seized by him.

In arriving at a determination of the guilt or innocence of the licensee, I observe that the charge preferred against it reads, "On Wednesday, August 25, 1977, you sold, served and delivered and allowed the sale, service and delivery of an alcoholic beverage . . . and allowed, permitted and suffered the consumption of such alcoholic beverage . . . (Emphasis Added) in violation of Rule 1 of State Regulation No. 20." (Now N.J.A.C. 13:2-23.1).

Assuming, arguendo, but not conceding that the Division has not proven the consumption of the alcoholic beverage as contended by the licensee because of the contradictory statements made by the minor, I find the minor's testimony to the effect that he was served a beer upon the production of a borrowed identification not only credible, but also, unchallenged and inculpatory of the licensee.

My examination and analysis of the cited rule generates no doubt that there was a delivery of an alcoholic beverage to the minor by the licensee, as charged. N.J.S.A. 33:1-1(w) defines "sale" (as applicable herein) as: "Every delivery of an alcoholic beverage otherwise than by purely gratuitous title . . . delivering for value . . . and the gratuitous delivery or gift of any alcoholic beverage by any licensee." (Emphasis Added)

Therefore, the mere delivery of the alcoholic beverage sans proof of consumption is sufficient to base a finding of guilt. The subsequent confiscation of the alcoholic beverage may be considered a mitigating circumstance, however, it does not annul or void the prior delivery.

As the court stated in Sportsman 300 v. Bd. of Com'rs of Town of Nutley, 42 N.J. Super. 488, 492:

Courts cannot ascribe to the literal import of the phraseology of the statute a broadly inflated circumference in an administrative disciplinary prosecution where the common judicial realization is that the prevention of sales of intoxicating liquor . . . not only justifies but necessitates the most rigid control.  
Hudson Bergen County Retail Liquor Stores

Ass'n. v. Board of Comm'rs of City of  
Hoboken, 135 N.J.L. 502 (E. & A. 1947);  
In re Schneider, 12 N.J. Super. 449, 456  
(App. Div. 1951).

After carefully considering all of the evidence produced herein and the applicable law, I am satisfied, and find as a fact, that the Division has established the guilt of the licensee by a fair preponderance of the credible evidence, indeed, by clear and convincing evidence. It is, accordingly, recommended that the licensee be found guilty as charged.

Absent prior record, it is further recommended that the license be suspended for fifteen (15) days.

#### CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the licensee and written Answers were submitted thereto by the Deputy Attorney General representing the Division.

In its Exceptions, the licensee asserts that the facts sub judice constitute, at best, a "technical violation" and are not normally subject to Division charges. In the Answers filed thereto, specific rebuttal of these arguments were advanced.

As correctly found by the Hearer, there was a "sale" to the minor at the time of delivery by the licensee to the minor. N.J.S.A. 33:1-1(w). This is not a "technical" violation as asserted by the licensee. The subsequent diligence of the licensee in confiscating the beverage constitutes a mitigating factor, but cannot justify a dismissal of the charges on the merits.

Whether upon bona fide policy grounds a licensee should not be charged when it purportedly exercises diligence need not be decided, because I am satisfied from my review of the record, that the ability to thwart the first sale was basically fortuitous. Within the same area that the licensee's employee confiscated the minor's first alcoholic beverage, the same minor was able to consume an alcoholic beverage on a second occasion shortly thereafter. Only the presence and

action of Division agents prevented further consumption by this minor. The preferment of a charge on the first delivery and sale was proper.

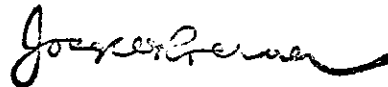
I reject the Exceptions of appellant and I shall suspend the license for fifteen (15) days on the charge herein.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the written summation of the licensee, the Hearer's Report, the written Exceptions filed by the licensee and the written Answers submitted thereto on behalf of the Division, I concur in the findings and recommendations of the Hearer, as heretofore supplemented, and adopt same as my conclusions herein.

Accordingly, it is, on this 9th day of June, 1980,

ORDERED that Plenary Retail Consumption License No. 1527-33-006-003 issued by the Mayor and Borough Council of the Borough of Seaside Park to Million Bucks, Inc., t/a Saw Mill for premises 1807 Boardwalk, Seaside Park be and the same is hereby suspended for the balance of its term, viz., midnight, June 30th, commencing 2:00 a.m., Monday, June 23, 1980; and it is further

ORDERED that any renewal of the said license which may be granted be and the same is hereby suspended until 2:00 a.m., Tuesday, July 8, 1980.



JOSEPH H. LERNER  
DIRECTOR