

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 1803

August 13, 1968

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1. APPELLATE DECISIONS - MORRIS LONG BAR, INC. v. NEWARK.

Morris Long Bar, Inc., t/a)
Morris Long Bar,)

Appellant,)

On Appeal

v.)

CONCLUSIONS

Municipal Board of Alcoholic)
Beverage Control of the City)
of Newark,)

and

Respondent.)

ORDER

---)
Brass & Brass, Esqs., by Leonard Brass, Esq., Attorneys for)

Appellant

Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney)
for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant, the holder of a plenary retail consumption license for premises 216 Norfolk Street, Newark, was found guilty in disciplinary proceedings conducted by respondent of charges alleging that it sold, delivered, allowed, permitted and suffered the sale and delivery of an alcoholic beverage in its original container for consumption off the licensed premises, and allowed, permitted and suffered the removal of such alcoholic beverage from the licensed premises on Sunday, May 14, 1967, in violation of Rule 1 of State Regulation No. 38 and of the local ordinance.

Respondent (hereinafter Board) ordered the suspension of said license for a period of thirty days effective November 13, 1967.

Upon the filing of this appeal challenging such action, an order was entered on November 10, 1967, staying the Board's order of suspension until the further order of the Director.

In its petition of appeal the appellant alleged that the Board's action was erroneous because it was contrary to the weight of the evidence and contrary to law.

In its answer the Board admits the jurisdictional facts and asserts that its determination was based upon the factual testimony before the Board "from which it, in its sound discretion, concluded that the penalty imposed substantiated such action."

The matter was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded counsel to present testimony under oath and cross-examine witnesses.

The stenographic transcript of the proceedings held before the Board was submitted into evidence at this hearing pursuant

to Rule 8 of State Regulation No. 15, and additional testimony was presented on behalf of the appellant.

The record reflects the following. In support of its charges the Board produced two ABC agents who were part of a team of three agents specifically assigned to investigate complaints that Sunday sales of package goods were being made at the above licensed premises.

ABC Agent M gave the following account: In company with Agents L and B he arrived in the vicinity of the above premises at about 10 a.m. on Sunday, May 14, 1967, and seated himself in his motor vehicle at a point of observation about two hundred feet from the said premises. In the course of the next thirty minutes he observed about fifteen colored males enter the side entrance of the licensed premises, and each would leave shortly thereafter carrying a concealed object which he believed to be alcoholic beverages. At about 10:43 a.m. he left the other two agents and approached the premises and, between 10:40 and 11 a.m., personally observed about ten other males entering the side door into the premises and then departing; "it was obvious that they were making attempts to either conceal something underneath their arm or in their pockets."

About 11 a.m. he observed an individual (later identified as Abe Warren) enter the premises from the side door. After several minutes the agent proceeded to the side door, which was opened by a male later identified as Jethro Williams. Upon entering the premises he saw Warren standing by the bar and concealing something under his arm. The agent sought to make a purchase and was refused. In the meantime Warren left the premises. Agent M followed him down the street and confronted him at the point where his vehicle was parked. He questioned Warren about where he got the bottle that he had under his arm. Warren took out a bottle of gin and, at this point, the other two agents joined them. Thereupon Warren admitted that he had obtained the bottle of gin in the premises and that he had paid \$2.80 therefor.

The agents and Warren then returned to the premises, at which time Warren "changed his story completely." Williams denied that he had ever seen Warren before. At this point this witness noted that the tape in the cash register showed a sale in the amount of \$2.80 and he asked Williams to remove the tape. Williams refused to do so, claiming that he did not know how to remove the tape.

Williams then called the president of the corporate licensee (Morris Constantin) on the telephone. Constantin was reported to have said that he would be down in twenty minutes, but the agent explained that he could not wait because this was one of a number of assignments that he had scheduled for that morning. On cross examination he explained that, since he was the only negro of the three agents who participated in this investigation, he decided that it would be logical for him to try to make a buy since these premises had a total negro patronage. This he did, despite the fact that he had made a prior investigation some months before this date and, as the testimony later indicates, was immediately recognized by the employees therein. Questioned as to why he did not apprehend the other patrons who had apparently made buys during that morning, he explained that this was the usual technique used by agents in similar investigations and he decided to attempt to make a buy personally.

His testimony was corroborated with respect to the activities on the outside of the premises and the final confrontation by ABC Agent B.

Warren testified that the bottle of gin was actually purchased at these premises on Saturday evening, May 13, 1967, at 9 or 9:30 p.m. (the evening before this occurrence); that he went to the premises on the morning in question in order to obtain a loan from Williams who was an acquaintance. He carried the bottle of gin with him when he first entered the premises because he intended to consume it while attending a baseball game that afternoon. When he was confronted by two agents he was asked to produce the bottle and he answered "What bottle?" He finally produced the bottle and accompanied the agents back to the premises. He denied telling the agents that he had purchased the bottle that morning at these premises. On cross examination he admitted that he had visited these premises on prior Sundays after 12 o'clock and usually entered at the front entrance. However, as this was before 12 A.M., the front entrance was closed so he entered through the side door. Finally he stated that he paid \$2.80 for this pint of gin.

Jethro Williams denied selling any alcoholic beverages on the date charged herein, and insisted that Warren came that morning for the sole purpose of trying to borrow money from him. He asserted that, when Agent W came, he immediately recognized him as an ABC agent who had on a prior occasion participated in an investigation at these premises. He stated that, when Agent W came inside the premises, Warren was about to leave, after being in the premises for about three or four minutes.

John Batts (who had been employed for many years as a floor waxer for the licensee, and was actually employed that morning in the premises) also denied seeing any sales of alcoholic beverages, and corroborated the testimony with respect to the alleged conversation between Warren and Williams wherein Warren asked for a loan of "\$6.00 or something." He was then asked:

"Q Do you know whether it was Warren or not?

A I didn't observe him too close...."

He further explained that there were a number of persons who came into the premises that morning to pick up their baseball uniforms. Members of the baseball team stored their uniforms in the basement of the premises and had to enter the tavern in order to get into the basement to get their uniforms, bats, balls, etc. Finally he admitted that he immediately recognized Agent M when he entered the premises.

At the plenary de novo hearing Mrs. Gertrude Taylor testified that she occupied an apartment on the second floor of the premises and that, several months after the hearing before the Board, she was contacted with reference to any information she may have of activities on the morning in question. She gave the following account: She gave a going-away party for her brother which started on Saturday afternoon and lasted until 3 or 4 p.m. on Sunday, May 14. During Saturday night and the morning of May 14 her guests were constantly going in and out of her apartment. She thought that approximately ten or twelve persons entered or left her apartment through a separate staircase adjoining the front entrance of the tavern. On cross examination she admitted that she knew the bartender (Williams) for a long time, since she grew up in that neighborhood. She concluded her testimony by insisting that occupants of a car parked in an automobile about three hundred feet up the street could not observe persons entering her premises or the tavern because the building was set back about three feet from the building line.

Morris Constantin (president of the corporate licensee) agreed with the prior witness' testimony that observation of persons entering the premises would be difficult, as described hereinabove. He also asserted that the cash register is never locked, and the register tape could be removed by anyone who knows how to do it. He admitted, however, that, when a sale is rung up, it is reflected on the glass part of the register as well as on the tape.

We are dealing here with purely disciplinary measures and their alleged infractions. Such proceedings are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948). Thus the Board was required to establish its case only by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373. In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

Since there was a sharp conflict in the testimony adduced before the Board, it became the function of the Board to evaluate the testimony after observing the demeanor of the witnesses and giving weight to such testimony as it found credible. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). It is quite apparent that the Board chose to believe the testimony of the ABC agents and found their testimony to be credible in the circumstances.

From my evaluation and analysis of the transcript and the evidence produced before me, I find that the Board acted properly and that the testimony on behalf of the Board preponderates in support of its ultimate determination. It is quite understandable that Agent M. sought to make the purchase personally in order to make a solid case for the Board. I can also understand why, in view of the nature of the patronage, he decided not to send either of the other two agents. I believe this was perhaps unwise and not the best strategy in view of his previous recent investigation of the premises, and the concomitant likelihood that he would be recognized. However, his motive is unquestioned.

I completely discount the version given by Warren as to the reason for his visiting the premises on that morning. It is highly unlikely that he would have carried the bottle of gin with him while visiting the said premises for the alleged purpose of seeking to obtain a loan of money from a person who was no particular friend of his. His action in attempting to conceal the bottle of gin when finally confronted by the agents reflects a consciousness of guilt.

The Board undoubtedly took his actions into consideration as well as the testimony relating to the tape on the cash register which showed the last sale as being in the sum of \$2.80. Counsel argues that, although some twenty-five patrons visited the premises between 10 and 11 a.m., suddenly no one entered the premises while the agents were there. This is clearly understandable and the testimony supports the fact that at least seven or eight prospective patrons were turned away because of the critical situation which resulted from the appearance of the ABC agents.

I am not the least impressed with the suggestion that these alleged patrons were in fact guests at a party given by

Mrs. Taylor on the evening before and during the morning of the alleged sale. Appellant's excavation of this witness long after the hearing before the Board and her transparent explanation cast grave doubts both as to her veracity and credibility.

I am persuaded that the evidence on the whole supports the decision reached unanimously by the Board. Cf. 1 Greenleaf Evidence, sec. 13-a; cf. Wyatt v. Curry, 77 N.J. Super. 1.

The burden of establishing that the Board acted erroneously and in an abuse of its discretion is upon the appellant; the ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way, could the Board, as reasonable men, acting reasonably, have come to its determination based upon the credible evidence presented. Cf. Hudson Bergen Liquor Dealers Ass'n v. Hoboken, 135 N.J.L. 502. In other words, the Director should not reverse until he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Cf. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957).

My examination of the applicable rule generates no doubt whatever that there was in fact a sale and delivery during prohibited hours by the employee of the corporate licensee to Warren on the date alleged in the charges herein.

Under these circumstances, I believe that there has been established the necessary quantum of proof, namely, by a preponderance of the believable evidence, to establish appellant's guilt. I conclude, therefore, that appellant has failed to sustain the burden of proof establishing that respondent's action was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15.

It is further recommended that an order be entered affirming respondent's action and dismissing the appeal, and fixing the effective date for the suspension of license imposed by respondent.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including transcript of the testimony, the exhibits, the memorandum submitted by the attorneys for the appellant in summation, and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 20th day of May 1968,

ORDERED that the action of the respondent be and the same is hereby affirmed and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-719, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Morris Long Bar, Inc., t/a Morris Long Bar, for premises 216 Norfolk Street, Newark, be and the same is hereby suspended for thirty (30) days, commencing at 2 a.m. Monday, May 27, 1968, and terminating at 2 a.m. Wednesday, June 26, 1968.

JOSEPH M. KEEGAN
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 20 DAYS.

In the Matter of Disciplinary Proceedings against)

GREAT EASTERN LIQUOR CORP.)
t/a Great Eastern Liquor Corp.)
Rt. #1, Block 703, Lot 17-E)
New Brunswick, New Jersey)

CONCLUSIONS

and

Holder of Plenary Retail Distribution License D-8, issued by the Board of Commissioners of the City of New Brunswick)

ORDER

-----)
Wilentz, Goldman & Spitzer, Esqs., by Alan E. Davis, Esq.,
Attorneys for Licensee
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic
Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On Saturday, October 14, 1967, 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 twenty-one (21) years, viz., Daniel ---, age 17; in violation of Rule 1 of State Regulation No. 20."

At the hearing herein, Daniel --- testified that he was born on February 14, 1950, and hence was seventeen years of age on October 14, 1967. He further testified that "somewhere after eight" p.m. on October 14, 1967, the car driven by John, in which he (Daniel) and three other youths were passengers, parked "directly in line with the store liquor department;" that he had about \$2.75 (representing the sum obtained from contributions made in the car by himself and his companions); that after entering the premises, he walked to the section where the wine was located and selected a gallon bottle of "Great Eastern grape wine" and then proceeded to the counter where payment was made, placed the bottle on the counter, "gave the person the money, and he added it up and put it in a bag and give me change...six cents; it was \$2.69 for the wine." Daniel said he carried the bottle of wine to the car, entered the rear thereof, and in "about two minutes" they left the vicinity and some time thereafter stopped on a side road where he and each of his companions drank some of the wine. Daniel further stated that he neither was asked about his age nor did he sign a representation thereof.

On cross examination Daniel testified that he knew the location of the licensee's premises because he had been in the place on two previous occasions. In answer to a question why he was selected by his companions to purchase the wine, Daniel said "they knew I went there twice before."

Daniel identified a cap from a bottle marked " G E Liquors, 4876, \$2.69" as the cap shown to him by ABC Agent H two or three

days after the incident. Daniel further testified that the last time he saw the bottle with the cap attached was when he left it in John's car at the high school on the night of October 14.

Thomas --- testified that at 8:45 p.m. on October 14, 1967, he was one of the passengers in John's car which was parked "straight away from the liquor store entrance about fifteen car lots away;" that "three of us pooled our money" and then Daniel got out of the car and walked toward the "Great Eastern store itself;" that "the liquor store, as you face the building, is off to the right of the shopping area, and we were directly in front of the liquor store area;" then when he next saw Daniel he was "twenty or twenty-five feet" from the car carrying a parcel and coming from the direction of the licensee's store; that Daniel entered the rear of the car and he (Thomas) ascertained that the parcel contained a gallon of "Kosher Concord grape wine"; that in a matter of minutes, they drove away but thereafter parked on a side road where they "had a couple of drinks."

John F --- testified that at 8:30 p.m. on October 14, 1967, he drove the car into the parking lot and parked about two hundred feet from the licensee's premises; that the four occupants of the car contributed money to purchase "a bottle of something or other," after which Daniel left the car, walked in the direction of the liquor store and some time thereafter came from that direction carrying a bag, got into the car, opened the bag, and he (John F--) saw that it contained a bottle of Great Eastern concord grape kosher wine; that he (John F--) attended a dance until 11 p.m. and, after leaving, they entered the car where he observed the bottle on the rear floor; that when John C-- got out of the car "across from the donut shop on Route 18," he took the bag containing the bottle with him.

ABC Agent H testified that he made two visits to the licensee's premises; that on the first visit, Monday, October 16, Daniel and Thomas, passengers in his car, directed him and Agent W to the licensee's liquor store where Agent H spoke to "Mr. Grossman," the manager of the Great Eastern, at which time arrangements were made to produce Mr. Hughes, Mrs. Lastfogel and Mrs. Havrilla on Friday, October 20.

Agent H further testified that he observed that the brand of wine in question was on the bottom shelf at the right wall and, if a person desired such item, he would walk in the door and walk approximately fifteen feet, bend down slightly, pick up a bottle, and walk to the check-out counter;" that there was no other way a person could leave the store.

Agent H also stated that on October 16 John C-- directed him to a street in South River where, on the curb thereof, Agent H found a broken gallon bottle and a cap which showed it came "from the Great Eastern store;" that these items were shown to Mr. Grossman, the manager, who said "the cap indicated this particular bottle did come from the Great Eastern liquor store and the number 4876 indicated the stock number and \$2.69 represented the price" plus eight cents tax.

On cross examination Agent H stated that Daniel first was not sure whether a male or female waited on him but later "indicated that he thought it was a male;" that Daniel's description of the person who had checked him out was "elderly".

Charles J. Hughes, Jr. testified that he was acting manager on October 14, reporting for duty at 9:30 a.m.; that Mrs. Lastfogel "opened up her register six o'clock and I closed mine, the one I was using;" that although he had actually left the premises to go home at 8:30, he had left temporarily prior thereto to go "upstairs to straighten out the mail and things and came back down twenty-five after eight;" that the store was busy but he "did not observe any one under-age or who I felt was under-age in the store."

Ruth Lastfogel testified that at 6:00 p.m. on October 14 she reported for duty and immediately opened her cash register; that she knew Daniel (who lives across the street from her) but did not see him on the evening in question; that the price of a gallon of wine of the brand allegedly purchased is \$2.69 plus eight cents tax; that she did not recall "exactly what I sold that night;" that between 8:30 and 9:30 she and Mrs. Havrilla were the only persons working on the premises but she could not recall that she left the register at any time between 8:30 and ten o'clock that evening.

On rebuttal, Daniel testified that Mrs. Lastfogel is a neighbor and, although she might have been behind the cash register on the evening of October 14, he did not see her.

It has long been established that failure to identify the person making the sale or service of alcoholic beverages to a minor is not fatal in disciplinary proceedings provided it is established that a minor purchased alcoholic beverages on licensed premises. Ott's, Inc. v. Division of Alcoholic Beverage Control (App. Div. 1962), not officially reported, reprinted in Bulletin 1444, Item 1.

In adjudicating the matter now under consideration, we are guided by the established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof only by a preponderance of the believable evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (App. Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented in this proceeding, the credibility of witnesses must be weighed. Testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

The general rule in such cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I have had an opportunity to observe the demeanor of the witnesses as they testified, and have made a careful analysis and evaluation of their testimony.

The licensee does not dispute that the type of wine in question is its exclusive brand and sold at its liquor establishment. The testimony of Daniel, who stated that he made the purchase of the wine on the day in question at the licensee's store, appears truthful in every respect. He described how he had obtained the wine from a shelf at the right wall as you enter the

premises and how he thereafter placed it on the counter where the clerk put the bottle in a bag and accepted payment therefor. Daniel stated that he remembered paying only \$2.69 for the gallon of wine. Admitting that Daniel could have been mistaken with reference to the exact amount charged for the item, that in itself is insufficient to disbelieve Daniel's testimony. The testimony of the two other youths as to where the car was parked and how they contributed toward the payment of the said purchase of wine is unshaken. Moreover, the witnesses for the licensee merely gave negative testimony to the effect that Daniel was not seen in the licensed premises on the evening in question. An inference was drawn by Mr. Hughes that it was possible that Daniel surreptitiously obtained the wine and left the premises without payment therefor. However, the testimony of the witnesses for the Division discloses that the wine was in a bag, which bags, according to the licensee's witnesses, are kept beneath the counters of the check-out stations. The said witnesses also made mention that in a storage area of the store, it was possible that a paper bag could have been obtained. There was no proof that such a thing did happen.

After carefully considering all of the evidence adduced herein, I am satisfied and find as a fact that the Division has proved its case by clear and convincing testimony and by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the charge.

The licensee has no prior adjudicated record of suspension of license. I further recommend that its license be suspended for twenty days. Re Key Bar, Inc., Bulletin 1765, Item 11.

Conclusions and Order

Exceptions to the Hearer's report and argument thereto were filed by the licensee's attorneys pursuant to Rule 6 of State Regulation No. 16.

I find that the matters contained in the exceptions raise purely factual questions which had been considered in detail by the Hearer in his report and that they are without merit.

In so far as mitigation of penalty for the violation herein is concerned, the licensee's attorneys cited a case wherein the minor was nineteen years of age, and another case wherein the minor was twenty years old, in which lesser penalties were imposed. However, the case sub judice involved a sale of alcoholic beverages to a minor seventeen years of age. Thus the greater minimum penalty is warranted, as indicated by the precedents cited.

Consequently, having considered the entire record herein, including the exceptions filed, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 15th day of May 1968,

ORDERED that Plenary Retail Distribution License D-8, issued by the Board of Commissioners of the City of New Brunswick to Great Eastern Liquor Corp., t/a Great Eastern Liquor Corp., for premises Route #1, New Brunswick, be and the same is hereby suspended for twenty (20) days, commencing* at 9 a.m. Wednesday, May 22, 1968, and terminating at 9 a.m. Tuesday, June 11, 1968.

JOSEPH M. KEEGAN
DIRECTOR

*By order dated May 17, 1968, the suspension was deferred to commence at 9 a.m. Monday, June 3, 1968, and to terminate at 9 a.m. Sunday, June 23, 1968.

3. MORAL TURPITUDE - ATROCIOUS ASSAULT AND BATTERY - CONVICTION HELD NOT TO INVOLVE MORAL TURPITUDE.

Re: Eligibility No. 754

Applicant seeks an advisory opinion as to whether or not he is eligible to be associated with the alcoholic beverage industry in this State in view of his conviction of a crime.

Applicant's criminal record discloses that on February 23, 1966, he was indicted in the Somerset County Court for atrocious assault and battery by atrociously wounding and maiming one Williams (age 16) on August 25, 1965, with a certain dangerous weapon, to wit, a revolver, in violation of N.J.S. 2A:90-1 and 2A:151-5.

On March 31, 1966, following a trial of three days, the jury returned a verdict of guilty, with strong recommendations of leniency. On July 29, 1966, the applicant was sentenced to serve concurrent terms of not less than two nor more than four years in New Jersey State Prison on above statutes, both sentences were suspended and applicant was placed on probation for concurrent periods of two years.

Applicant appealed to the Superior Court, Appellate Division. On March 8, 1967, the Appellant Division in a per curiam opinion affirmed the conviction.

Upon request of applicant's attorneys, a hearing was scheduled to determine whether the convictions involved the element of moral turpitude. At the hearing held herein, applicant (51 years old) testified that he is the president and fifty-one per cent stockholder of a corporate licensed business; that in 1959 he was the victim of two holdups at the licensed premises following which he obtained annual permits to carry a revolver; that on many occasions between 1959 and August 25, 1965, he had discovered, after checking his stock, that alcoholic beverages had been stolen from the premises; that such thefts took place from an unattended section of the premises, while he was waiting on customers in another part thereof.

Applicant further testified that on August 25, 1965, while in the front part of the premises he observed a reflection of two young fellows (Williams and a companion) in a mirror, attempting to remove beer in the back of the premises; that he told them not to touch the beer; that immediately thereafter he saw Williams, in possession of beer, fleeing from the premises; that he pursued him to a point about three feet beyond the exit of the same; that at this time he saw Williams running in an alleyway on the opposite side of the street, a distance of about ninety-seven feet; that he took his revolver from his trouser pocket; that he raised his arm about two feet; that he took no aim; that he intended to fire a warning shot; that the pistol exploded accidentally; that he had realized immediately that the bullet had struck Williams; and that Williams fell in his path.

A copy of the transcript of the testimony received in the criminal trial was introduced into evidence.

Applicant's attorneys in the memorandum filed herein contend that the Division has the right as well as the duty to examine the underlying facts of a conviction of a crime to determine whether there existed moral turpitude under Title 33. In support thereof

they cite State v. McNally, 91 N.J. Super. 513 (App. Div. 1966), wherein the Court stated at page 518:

"In the case at bar we must do so, and we hold that in so far as licenses under Title 33 are involved, the ABC may, and when the convicted individual requests it must, look at the underlying facts to determine whether there existed moral turpitude, unless the crime is of such a nature that moral turpitude or its absence must be conclusively presumed." (Emphasis supplied)

The McNally case dealt with the crime of bookmaking, and the Court held that it was necessary to explore the facts in that case to determine whether it involved moral turpitude because it was not conclusively ascertainable from either the indictment or conviction.

Based on the foregoing, the attorneys for applicant contend that the underlying facts in the case sub judice must be considered in determining whether or not the element of moral turpitude is present. In other words, applicant's attorneys are asking that we go beyond the record (the indictment, the guilty verdict and sentence) and examine the surrounding facts and circumstances to ascertain whether or not the crime involves moral turpitude. With this I agree.

In this connection, applicant's attorneys contend that the underlying facts of this conviction do not involve moral turpitude. They cite the case of Re Donald A. Rothrock (Cal. Sup. Ct. (in Banc) 1940), - - Cal 2d --, 160 P. 2d 907, 131 A.L.R. 226.

Rothrock, an attorney, was convicted of assault with a deadly weapon and, as a result thereof, was sentenced to serve two months in the county jail. As indicated in the memorandum filed herein:

"Rothrock made a motion to dismiss the proceeding for disbarment on a ground of conviction of an offense involving moral turpitude. His motion was granted and the proceeding was dismissed."

The court in its summary of this case states:

"From the foregoing discussion and review of cases dealing with the question whether the offense of assault with a deadly weapon involves moral turpitude, we arrive at the following conclusions:

"In the absence of a statutory definition indicating that evil intent is inherent in the commission of the crime, the courts generally are reluctant to classify the crime of assault with a deadly weapon as one involving moral turpitude as a matter of law. Where the question has arisen in disbarment proceedings, such conduct has been deemed not to call for disbarment as a matter of course. A high degree of moral standards is required of an attorney, but the courts have not been inclined to impute moral turpitude in the commission of the lesser infractions of the penal laws which carry no reflection upon the attorney's moral fitness to practice law. The commission of such lesser offenses

by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to involve moral turpitude. Our statute sec. 245, Pen. Code, does not define assault with a deadly weapon so as to indicate that it is an offense which by these tests involves moral turpitude as a matter of law. That it did not involve moral turpitude in the particular case may be reflected by the record of conviction which is all that is before the court in this proceeding. That record consists of the charge of the offense to which the defendant pleaded guilty; the plea; and the judgment of conviction. See sec. 1207, Pen. Code; 8 Cal. Jur. p. 474. The light sentence imposed on the attorney indicates that the trial court was of the opinion that the offense to which a plea of guilty was entered did not involve moral turpitude. Our consideration of the record leads us to the same conclusion."

The Rothrock case dealt with the question of whether or not the conviction justified disbarment. Here we are concerned with the eligibility of an individual to be associated with the alcoholic beverage industry in this State. See State v. McNally, supra and cases cited therein, where the court said:

"McNally contends that an administrative agency should not and therefore may not be entrusted with the task of determining whether a particular crime involves moral turpitude. On the contrary, when dealing with licensing, it seems to us that the agency entrusted with the granting and supervision of licenses should be permitted to decide, in the first instance, whether a crime involved disqualifying moral turpitude. After all, what may be disqualifying moral turpitude in one occupation - - for example, an attorney - - may not necessarily be so with reference to another - - for example, a liquor salesman." (Emphasis supplied)

I have carefully considered the background facts in this case, including the testimony of the applicant and the transcript of applicant's trial, and find as a fact that the crime of which applicant was convicted does not involve moral turpitude within the meaning of R.S. 33:1-25 of the State Alcoholic Beverage Law. Although the conviction herein necessarily includes a finding that the shooting in question was not accidental as contended by the applicant, I find that the use of excessive force to apprehend one committing a felony in his presence, in the particular circumstances present herein, does not bespeak a sufficient degree of wickedness or depravity (cf. State v. McNally, supra, at page 516) to constitute moral turpitude within the meaning of R.S. 33:1-25.

Under the circumstances, I recommend that applicant be advised that in the opinion of the Director he is not disqualified from being associated with the alcoholic beverage industry by reason of his hereinabove described conviction of crime.

I. Edward Amada
Attorney

Approved:

Joseph M. Keegan
Director

Dated: May 22, 1968

4. DISCIPLINARY PROCEEDINGS (NUMBERS BETS) - LOTTERY (NUMBERS POOL AND SPORTS EVENTS) - LICENSE SUSPENDED FOR 60 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

HOWARD J. and HELEN AWARAMKO t/a Paul's 377 Crooks Avenue Paterson, New Jersey)

CONCLUSIONS

and

ORDER

Holders of Plenary Retail Consumption License C-30; issued by the Board of Alcoholic Beverage Control for the City of Paterson.)

Licensees, by Helen Awaramko, Pro se Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensees plead non vult to charges (1) and (2) alleging that on divers days between November 29, 1967 and January 12, 1968, they permitted acceptance of numbers bets and possessed lottery tickets in a numbers pool and on sports events on the licensed premises, in violation of Rules 6 and 7 of State Regulation No. 20.

Absent prior record, the license will be suspended for sixty days, with remission of five days for the plea entered, leaving a net suspension of fifty-five days. Re Cantore's Bar & Grill, Inc., Bulletin 1716, Item 2.

Accordingly, it is, on this 16th day of May 1968,

ORDERED that Plenary Retail Consumption License C-30, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Howard J. and Helen Awaramko, t/a Paul's, for premises 377 Crooks Avenue, Paterson, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1968, commencing at 3 a.m. Thursday, May 23, 1968; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3 a.m. Wednesday, July 17, 1968.

JOSEPH M. KEEGAN DIRECTOR

5. DISQUALIFICATION REMOVAL PROCEEDINGS - PETITION DENIED NOTWITH-
STANDING 5 YEARS GOOD CONDUCT.

In the Matter of an Application)
to Remove Disqualification)
because of a Conviction, Pursuant)
to R.S. 33:1-31.2)

CONCLUSIONS
and
ORDER

Case No. 2201)
- - - - -)

BY THE DIRECTOR:

Petitioner requests the entry of an order removing his statutory disqualification resulting from six convictions of crime involving moral turpitude.

The following is a summary of petitioner's record of convictions of crime:

- 1937 Larceny Placed on probation for two months.
- 1940 Uttering checks Sentenced to Annandale Reformatory.
- 1943 Larceny and receiving Sentenced to Annandale Reformatory.
- 1947 Breaking, entering and larceny Sentenced to Rahway Reformatory.
- 1961 Unlawful use of a dangerous weapon in violation of R.S. 2A:151-56 Sentenced to N.J. State Prison for two to three years; recalled and given a suspended sentence and placed on probation for three years.
- 1963 Theft from interstate shipment Five years probation.

At the hearing held herein, petitioner (48 years old) testified that he is married and living separate and apart from his wife and two minor children; that he has lived at his present address for five years and that for the past twenty years he has been employed as an automobile salesman.

Petitioner further testified he is asking for the removal of his disqualification to be free to engage in the alcoholic beverage industry in this State and that, ever since his conviction in 1963, he has not been convicted of any crime.

Petitioner produced three character witnesses (three automobile salesmen) who testified that they have known petitioner for more than five years last past and that in their opinion he is now an honest, law-abiding person with a good reputation.

The Police Department of the municipality wherein the petitioner resides reports that there are no complaints or investigations presently pending against petitioner.

To afford petitioner the relief requested, it is necessary that I find not only that he has been conducting himself in a law-abiding manner for five years last past but also that his association with the alcoholic beverage industry will not be contrary to the public interest. See R.S. 33:1-31.2.

While more than five years have elapsed since his conviction in 1963, I am not satisfied, by reason of petitioner's long criminal record and the nature of the offenses of which he was convicted, that his association with the alcoholic beverage industry will not be contrary to the public interest.

In view thereof, I shall, in the exercise of my discretion, deny the petition.

Accordingly, it is on this 29th day of May 1968,

ORDERED that the petition herein be and the same is hereby denied.

JOSEPH M. KEEGAN
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - ORDER IMPOSING DEFERRED SUSPENSION.

In the Matter of Disciplinary Proceedings against

P-T-J CORPORATION
t/a Dot's Spot
557 West Glenwood Avenue
West Wildwood, New Jersey

SUPPLEMENTAL
ORDER

Holder of Plenary Retail Consumption License C-1, issued by the Mayor and Council of the Borough of West Wildwood.

John R. Bennie, Esq., Attorney for Licensee
Walter H. Cleaver, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

On February 14, 1968, I entered an order herein deferring the license suspension of five days (for possession of an alcoholic beverage not truly labeled) because it appeared that the licensed business was not then being conducted. Re P-T-J Corporation, Bulletin 1785, Item 8.

Report of recent inspection discloses that the licensed business has now been resumed on a substantial basis. Consequently I am satisfied that the deferred suspension may now be imposed.

Accordingly, it is, on this 27th day of May 1968,

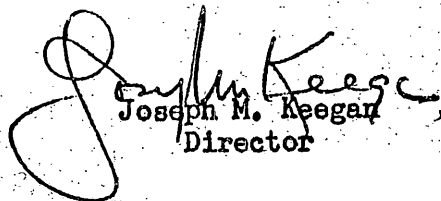
ORDERED that Plenary Retail Consumption License C-1, issued by the Mayor and Council of the Borough of West Wildwood to P-T-J Corporation, t/a Dot's Spot, for premises 557 West Glenwood Avenue, West Wildwood, be and the same is hereby suspended for five (5) days, commencing at 3 a.m. Monday, June 3, 1968, and terminating at 3 a.m. Saturday, June 8, 1968.

JOSEPH M. KEEGAN
DIRECTOR

7. STATE LICENSES - NEW APPLICATION FILED.

Mystic Bottling Co., Inc.
72-76 Lehigh Avenue
Paterson, New Jersey

Application filed August 8, 1968 for State Beverage Distributor's license.


Joseph M. Keegan
Director