

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

BULLETIN 1640

October 18, 1965

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - SASSI v. BRIDGETON.
2. DISCIPLINARY PROCEEDINGS (LODI) - SALE TO MINORS - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.
3. DISCIPLINARY PROCEEDINGS (BOONTON TOWNSHIP) - SALE TO A MINOR - LICENSE SUSPENDED FOR 15 DAYS.
4. DISCIPLINARY PROCEEDINGS (NEWARK) - ORDER IMPOSING DEFERRED PENALTY.
5. DISCIPLINARY PROCEEDINGS (Jersey City) - SALE IN VIOLATION OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

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1. APPELLATE DECISIONS - SASSI v. BRIDGETON.

John Sassi and Carmine Sassi,)
t/a Colonial Liquor Store,)
Appellants,) On Appeal
v.) CONCLUSIONS
City Council of the City of) AND ORDER
Bridgeton,)
Respondent.)

William Gallner, Esq., Attorney for Appellants.
Matthew Aaron, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

The appeal herein is from the action of respondent whereby it denied an application for a place-to-place transfer of appellants' plenary retail distribution license from 7 East Broad Street to 514-520 North Pearl Street, Bridgeton.

The seven members of respondent Council voted unanimously to deny the transfer of the license.

Appellants contend, inter alia, in their petition of appeal that (a) where, as here, the zoning ordinance permits a liquor outlet at the proposed site, the local issuing authority is divested of discretion in the matter of a place-to-place transfer; (b) the action of respondent was arbitrary, capricious and unreasonable as the only objections made were based upon moral grounds; and (c) the proposed premises are more than 200 feet distant from a school or church.

Respondent's answer denies grounds (a) and (b) and admits ground (c). Furthermore, respondent asserts that denial of the transfer was a proper exercise of its discretion.

Carmine Sassi (one of the appellants herein) testified that the reasons appellants desire to transfer their license are because of the lack of parking facilities at the present premises, and that the said premises are inadequate in size, making it necessary to use the basement for storage of the stock of liquor.

William A. Kirby (city engineer) testified that appellants' present licensed premises is "roughly about a mile and a half" from the proposed location; that Monroe Street school is approximately 650 feet distant from the proposed premises, and that the nearest church is about three and one-half blocks from said proposed site; that there is a "package goods store on North Laurel" Street which is "about 1300, 1400 feet" away; that the "Glass Bar" is on the

corner of North Laurel Street and Charles Street, a distance of 900 feet from the site in question; that the area wherein the proposed licensed premises is located is zoned for business.

Leslie Bender (residing at 126 American Avenue) testified that for approximately four years he has resided near the proposed premises and that, in his opinion, it would be an improvement to the area if the license were transferred; that he does not believe there would be any traffic hazard as a result thereof because a policewoman is on duty to assist children across the street.

Lewis Totoro (president of respondent Council) testified that he voted against the transfer as he "felt there was, obviously if there were 100 people there from one locale they were against this. Apparently the public did not want this and I was selected to represent the people. Therefore, I voted the way I felt the people wanted us to vote." Moreover, he testified that, in his opinion, keeping and concentrating all liquor licensed establishments in the downtown business district afforded better police protection because the said area "is better more easily, more easily patrolled by the police."

Mayor Thomas A. Dailey testified that although he did not vote on the question of transfer, it was his opinion that at the present time there were sufficient liquor outlets in the Fifth Ward where the proposed premises is located, and emphasized that the said ward has one-tenth of the population of the municipality and twenty per cent. of the liquor licenses.

Barbara J. Gentile (a patrolwoman) testified that for the past three years she has been assigned as crossing guard at Pearl and Monroe Streets (corner to which the proposed licensed premises is requested) to assist the children crossing to and from Monroe Street school; that "the through traffic is very dangerous, but we have a good number of traffic that comes down Monroe Street."

Reverend William C. Howard, minister of the Wesley Memorial Methodist Church, testified that the church is located two blocks from the proposed premises; that he opposes the transfer of the license because "alcoholic beverage, any place as such was the reason. They felt it was better able to be policed down in the lower part of town where it is already located and that because we are in a home area." Reverend Howard also objected to the transfer because of the children crossing at the corner to attend Monroe Street school.

George T. Morris (a member of respondent Council) testified that the reason he voted to deny the application for transfer of appellants' license was that he was "against moving this liquor license out of the downtown area where we have police protection. I was afraid we would create another slum area like we have downtown. I figured that this was safer for the children, even though we have children pass the liquor store downtown, but they are high school children and junior high school children, not small children. A lot of these people who are uneducated, who drink in cars are offensive and our court records show, and I did not want to inflict the people of the 5th Ward or any Ward with this if I could help it where there are places where they could gather. The school ground up in Monroe Street is an open area. It has no fence

around it. Very easy to drive up and back or under or alongside of."

Amiela Annarilli, residing at 59 Monroe Street, in the vicinity of appellants' proposed premises, testified that she objects to the transfer because it is not conducive to the best interests of the area.

None of respondent's witnesses expressed any objection in so far as the personal fitness of the respective applicants was concerned.

The fact that a section of the municipality has been zoned for commercial or business establishments does not preclude the local issuing authority from exercising proper discretion with reference to an application for transfer of a liquor license to said area.

No person is entitled to a transfer of a license as a matter of right. "If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial." Fanwood v. Rocco, 59 N.J. Super. 306 (App. Div. 1960). If a transfer of a license is denied on reasonable grounds, such action will be affirmed. Andrew C. Kless Enterprises, Inc. v. East Orange, Bulletin 1588, Item 2.

The Legislature has entrusted to municipal issuing authorities wide discretion in the grant or denial of place-to-place transfers of liquor licenses. Such action may not be reversed by the Director unless he finds the "act of the board was clearly against the logic and effect of the presented facts." Hudson-Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502.

In Ward v. Scott, 16 N.J. 16 (1943), the Supreme Court, dealing with an appeal from a zoning ordinance, set forth the following general principle:

"Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications for variance. And their determinations should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: 'Universal distrust creates universal incompetence.' Graham v. United States, 231 U.S. 474, 480 34 S.Ct. 148, 151, 58 L.Ed. 319, 324 (1913)."

The testimony presented to support appellants' case was quite meager. The only resident testifying on behalf of appellants stated that he was a friend and at times helped the owner of the premises sought to be licensed.

Thus it has not been satisfactorily shown that there is a need or necessity for a license at the proposed site. The burden to prove such need or necessity rested upon appellants herein.

There was no evidence presented that the members of respondent Council in any manner were improperly motivated when arriving at the decision to deny the application for the transfer.

After consideration of all of the evidence adduced herein

and the memoranda submitted by the attorneys for the respective parties, I conclude that appellants have failed to sustain the burden imposed upon them in establishing that the action of respondent was arbitrary, unreasonable or constituted an abuse of its discretion. Rule 6 of State Regulation No. 15. See Richmon v. Trenton, Bulletin 1560, Item 4; Hopkinson v. Passaic, Bulletin 1612, Item 1.

It is recommended, therefore, that an order be entered affirming respondent's action and dismissing the appeal.

Conclusions and Order

Written exceptions to the Hearer's Report were filed with me by the attorney for the appellants, and written answers thereto were filed by the attorney for the respondent. Oral argument before me is deemed unnecessary and unwarranted and, accordingly, the request therefor by the appellants' attorney is hereby denied.

In the brief filed in behalf of the appellants the following reasons are set forth from the testimony at the hearing as the only possible assigned reasons for denial fo the transfer application:

1. The negative vote was based primarily upon public opinion.
2. Congestion or traffic.
3. Moral issues.
4. Proximity to a school.
5. Proximity to a church.
6. The concentration of liquor establishments in the downtown area would lend itself to better police protection.
7. The existence of an alcoholic beverage establishment would have an ill effect upon children.
8. There is a general sentiment against liquor establishments in the City of Bridgeton.
9. There are already five licenses in the Fifth Ward.
10. Liquor is a basis for the increase in crime.
11. The people in the area are generally against the granting of the transfer sought.
12. There is a desire to reduce the number of licenses in the City.

Contending that none of the stated reasons bears any legal validity and constitutes no supporting basis for a quasi-judicial determination denying the application, the brief continues:

"It is the further contention of the Petitioners [appellants] that the Bridgeton Zoning Ordinance has

divested the Respondent of the discretionary power to deny the ... application unless the property to be used is in contravention of other statutory requirements. In the alternative, it is urged, that if the Zoning Ordinance does not divest the Respondent of its discretion, then the refusal to grant approval of the transfer of the Petitioners' [appellants'] business to a proper zone, where the presence of such a business does not violate any statute or ordinance respecting alcoholic beverage establishments, constitutes an abuse of discretion."

The City's zoning ordinance (No. 726) sets forth in Section 502 among the permitted uses within the Commercial C-2 District the following:

- "(8) Miscellaneous dealers and suppliers, retail and wholesale:
 (b) Beer, wine and spirits."

In the exceptions to the Hearer's report it is contended that the Hearer erroneously applied the doctrine of Ward v. Scott, 16 N.J. 16 (1954) (incorrectly cited as "1943") inasmuch as that case deals solely with the question of the right to a variance. The exception is well taken but does not bear upon the end result.

A further exception set forth that the Hearer committed error in applying the doctrine of public necessity inasmuch as this is not a case involving the issuance of license contrary to R.S. 33:1-12.14 and public necessity is therefore not a factor for consideration in the case sub judice. The contention is without merit. The decisions are replete with holdings as to the matter of public necessity and convenience in cases of applications for place-to-place transfer of retail licenses.

Very important, among the exceptions, is the reference in the Hearer's report to the testimony of the City Engineer that "the area wherein the proposed licensed (sic) premises is located is zoned for business" but without mention of the engineer's testimony to the effect that the premises are located in an area specifically zoned for "beer, wine and spirits, wholesale and retail." Admittedly, the report should have included the indicated additional testimony and mention of the specific provision of the zoning ordinance (introduced in evidence) for the special reason that, as hereinabove pointed out, in their efforts to obtain a reversal of the denial of the transfer application the appellants place principal reliance upon the fact that the premises sought to be licensed are not in an area zoned just for business generally but in an area expressly permitting the engaging in a beer, wine or spirits business. The strait issue with respect to the liquor licenses appears to be one of first impression in New Jersey.

The brief for the appellants quotes from McQuillin, Municipal Corporations, Vol. 8, p. 40:

"... an applicant is entitled to a certificate of this nature (liquor license) and may compel its issuance by mandamus or other appropriate remedy where there is no zoning regulation prohibiting such sale or where the only regulation applicable is invalid." (parenthesis and emphasis added.)

The brief for the appellants then reads:

"Not only is it contended that the establishment of specific zones, under an ordinance, deprives the governing body of further discretion, but such an ordinance also prevents the subjugation of the applicant or property owner to the whim and caprice of his neighbors. Attention is again directed to § McQuillin Municipal Corporations, 349, which states:

'In some cases the courts, including the United States Supreme Court, have held such legislation void as an unconstitutional delegation of legislative power, making rights to use property subject to the whim and caprice of other property owners or residents....'"

Further, the exceptions to the Hearer's report quote from 6 McQuillin, Municipal Corporations, p. 707:

"However in the absence of prohibition the liquor business is legitimate and to be protected under the law the same as any other lawful business and one engaged in the liquor business so long as he respects and obeys the law is entitled to enjoy the protection of the law and to have his legal right adjudicated under established legal principles without bias or prejudice. A place of business where liquor is sold has been pronounced not a nuisance per se."

Far more to the point (re references to the Treatise by this Authority on the general subject) is a citation to McQuillin, Municipal Corporations, 2nd Edition, Cumulative Supplement, § 1026, citing Marchesi v. Selectmen of Winchester, Supreme Judicial Court of Massachusetts, Middlesex (June 24, 1942), 42 N.E. (2nd) 817. Applications were made for licenses to conduct two bowling alleys -- one within an industrial district and the other within a business district -- both permitted by the town's zoning by-law. The selectmen denied the applications. They believed that the proposed locations were unsuitable for bowling alleys and that there was nothing the applicants could do to overcome the objections of persons living or owning property in the neighborhood. The petitions were heard in the Superior Court and were dismissed, whereupon the petitioners excepted to the refusal of requests for rulings. In the Opinion by the Supreme Judicial Court (Ronan, Justice) appears the following:

"The fact that the Zoning by-law permitted bowling alleys in the districts in which they were to be located did not authorize their use in the absence of a license from the selectmen That such use was permitted by the Zoning by-law could be given such weight, if any, as the respondents thought it was entitled to in conjunction with the various other matters involved in coming in to an honest and impartial decision. The general aim both of the Zoning by-law and of the licensing statute is the promotion of the public welfare, but each is independent of the other and seeks to accomplish its purpose by different means The refusal of a license was not, as the Petitioner contends, violative of any rights secured to him by the Fourteenth Amendment to the Constitution of the United States...."

The request for a writ of mandamus was refused, and the petitioner's exceptions overruled.

In the exceptions to the Hearer's report it is stated:

"On p. 4 of the Findings, the Hearer has in four lines disposed of the entire essence of Appellants' argument when he states that the zoning for commercial or business establishments does not preclude the issuing authority from exercising proper discretion with reference to the application for transfer."

The Hearer was right. The appellants confuse merely permissive with compulsory. If their contention were legally sound, the Council would be constrained to locate all twenty-seven of the City's alcoholic beverage licenses in this small district if the owners so desired.

Certain cases cited in the brief for the appellants relate to zoning ordinances which were found to be invalid, but the Bridgeton zoning ordinance in the instant case has not been brought under attack.

Of the other cases cited in the brief for the appellants, none is in point save Fanwood v. Rocco, 33 N.J. 404, which is staunchly in point except that no zoning ordinance was there involved. Among such other cases, particular attention is directed to the following which are clearly distinguishable from the case before me.

DuPont et al. v. Liquor Control Commission, Supreme Court of Errors of Connecticut, December 12, 1949, 71 A. 2d 84. The Court of Common Pleas sustained an appeal from the State Liquor Control Commission's denial of an application for a liquor package store permit and directed the Commission to issue the permit. The Town of Stratford appealed, and the Supreme Court of Errors held that the ordinance making consent of 50% of the owners of property within a certain area of the premises sought to be licensed was essential to granting of the permit and was unconstitutional. The pertinent language of the Supreme Court's decision (Brown, Judge) reads:

"In the view which we take of the case, the decisive question is whether the ordinance, in so far as it requires as a condition precedent to the granting of a Permit the prescribed consent of the property owners other than the applicant, violates the constitution of this state and the Fourteenth Amendment to the Constitution of the United States. We confine our discussion to this issue. The practical effect of the mandatory requirement that the plaintiffs obtain the consent of 50 per cent of the owners specified is apparent. It means that a refusal by 51 per cent of those owners can effectively destroy the privilege of a liquor use, even though in all other respects the property conforms to the requirements of the Zoning Laws. In effect, therefore, the consent clause confers upon the 51 per cent the power to determine, in this particular, the use the plaintiffs may make of their property. It accomplishes this by enabling the 51 per cent to prevent the board (Planning Board) from hearing the application. Unless the board granted the application, the use would be prohibited under the ordinance and the commission could not grant a Permit. General Statutes, § 4262. Furthermore, since no standard whatever is prescribed to guide, limit or control the reactions of those comprising the 51 per cent, a decision by them based

upon whim, fancy, prejudice or other ill-founded motive would suffice under the ordinance. Whatever term may be applied to designate the power of consent so accorded, it cannot be questioned that if such an unrestricted power was conferred upon a duly constituted administrative board it would be unconstitutional for lack of adequate standards. *State v. Stoddard*, 126 Conn. 623, 628, 13 A. 2d 586; *Devaney v. Board of Zoning Appeals*, 132 Conn. 537, 540, 45 A. 2d 828. A fortiori the same holds true of the grant to those property owners of a discretion to prevent the use of the plaintiffs' premises for a package store."

Rule 6, State Regulation No. 15 (referred to in the Hearer's report) provides as follows:

"All appeals shall be heard de novo ... but the burden of establishing that the action of the respondent issuing authority was erroneous and should be reversed shall rest with the appellant."

Since Repeal, in many hundreds of pertinent appeals in New Jersey the standard applied with respect to merits of municipal action granting or denying application for retail license or retail license transfer has been the standard or test of reasonableness. (See Hudson-Bergen County Retail Liquor Stores Association v. Hoboken, supra.)

Township Committee of Lakewood v. Brandt, 38 N.J. Super. 462. In the Superior Court's decision, delivered by Clapp, S.J.A.D., is the following language (466):

"But we need not pursue the point because the Township Committee of Lakewood was not really concerned with the question whether there was any public necessity for having a tavern at the proposed location. As the Director of the Division found, 'the Township Committee was motivated primarily by a desire to have the license "die."'"

Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561. The Superior Court's decision, delivered by Goldman, S.J.A.D., contains the following language (564):

"... This is not a case where the licensee voluntarily seeks to move to a more advantageous business location. The fact is that Hedy's Bar was forced to relocate by a public agency, the Hightstown Housing Authority It was the Director's considered opinion that the transfer was denied in order to reduce the number of licenses in the community, and he so found. That conclusion was justified not only by the inference which could reasonably be drawn from the testimony, but from the testimony actually given."

The appellants were granted a 1965-66 renewal for the premises at 7 East Broad Street. There is nothing in the record to indicate that the denial of 1964-65 license transfer was based principally or in part upon the Council's desire to reduce the number of licenses.

Special attention is now directed to that portion of the exceptions to the Hearer's report contending that objections to grant of the license transfer were "predicated upon moral issues

and these issues as a general proposition died with the repeal of the Volstead Act."

In strong refutation of that contention is language by Justice Jacobs in Fanwood v. Rocco, supra (p. 415):

" ... The record leaves no room for doubt that widespread local sentiment favors keeping the area free of taverns and package stores and it matters little that this sentiment may have resulted in part from moral precepts and in part from the general objections voiced in the testimony of the councilmen. The fact is that the sentiment does exist and in honoring it the governing body did not act at all unreasonably. The interests of effective liquor control are best advanced where the municipal licensing program displays fair regard not only for the convenience of residents who purchase alcoholic beverages but also for the sentiments of residents who are unsympathetic or hostile to their sale."

I have given careful consideration to the entire record before me, including the testimony and exhibits, the Hearer's report, the briefs of the respective attorneys, and the exceptions to the Hearer's report and the answers thereto. I agree with the recommendation of the Hearer. I find merit particularly in one ground of denial -- the strong objection to the transfer by some one hundred residents of the neighborhood. With respect to the proximity of a proposed licensed premises to a church or school, albeit farther than two hundred feet therefrom, a municipal issuing authority may properly consider such proximity in deciding whether or not a license or license transfer should be granted. (See Re Alexander Konke, Linden, Bulletin 212, Item 6, citing Rafalowski v. Trenton, Bulletin 155, Item 8.) I find and conclude that the zoning ordinance did not divest the respondent of discretion in acting upon the transfer application; that no need was shown for a license at the proposed site; that no improper motivation on the part of the respondent was shown; that there was nothing unreasonable in the denial of the application, and that the appellants have failed to sustain the burden of establishing that the denial of the application was erroneous and should be reversed.

Accordingly, it is, on this 9th day of September 1965,

ORDERED that the action of the respondent City Council be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed.

JOSEPH P. LORDI,
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against
 Nick's Highway 46 Bar and Grill, Inc.
 t/a La Casa Mia
 77 Route #46
 Lodi, N. J.
 Holder of Plenary Retail Consumption License C-19, issued by the Mayor and Council of the Borough of Lodi

CONCLUSIONS AND ORDER

 Licensee, by Crescenzo Cutillo, President, Pro se.
 David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on August 20, 1965, it sold drinks of beer to four minors, three ages 17 and one age 19, in violation of Rule 1 of State Regulation No. 20.

Licensee has a previous record of suspension of license by the Director for five days effective May 24, 1965, for possessing an alcoholic beverage not truly labeled. Re Nick's Highway 46 Bar and Grill, Bulletin 1621, Item 3.

The prior record of suspension of license for dissimilar violation occurring within the past five years considered, the license will be suspended for thirty days, with remission of five days for the plea entered, leaving a net suspension of twenty-five days. Re Mueller, Bulletin 1538, Item 2.

Accordingly, it is, on this 13th day of September, 1965,

ORDERED that Plenary Retail Consumption License C-19, issued by the Mayor and Council of the Borough of Lodi to Nick's Highway 46 Bar and Grill, Inc., t/a La Casa Mia, for premises 77 Route #46, Lodi, be and the same is hereby suspended for twenty-five (25) days, commencing at 3:00 a.m. Monday, September 20, 1965, and terminating at 3:00 a.m. Friday, October 15, 1965.

JOSEPH P. LORDI,
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against)

Edward A. McCormick t/a Park House 100 Elcock Avenue Boonton Township PO RD #1, Boonton, N. J.,)

CONCLUSIONS and ORDER

Holder of Plenary Retail Consumption License C-1, issued by the Township Committee of the Township of Boonton)

Okin and Okin, Esqs., by Charles S. Okin, 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 April 24, 1965, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Frank ---, age 18, and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20."

To substantiate the charge the Division produced three minors -- Frank ---, Marilea --- and Thomas ---, and Agent D.

Succinctly stated, the testimony of the minors shows that they had visited the licensed premises previous to April 24, 1965, the date of the alleged violation herein; that on said date, between 8 and 8:30 p.m., Frank, 18 years of age at the time, Marilea, age 18, and Thomas, age 17, drove to the licensee's premises and parked in a lot in back of the building. Frank, alone and empty-handed, in full view of Marilea and Thomas, entered the licensed premises through its rear entrance. He purchased from the bartender, who required no proof of his age, a glass of beer which he consumed on the premises, and a six-pack of Schaefer beer for off-premises consumption, for both of which he paid \$1.35. Thereafter he left the premises carrying the six-pack in a bag, and was observed by Marilea and Thomas emerging from the premises in possession of the said package. Rejoining his companions, Frank placed the six-pack in his car and drove to a neighboring State, in the course of which the three minors consumed five cans of the alcoholic beverages, keeping one can (partially filled) in the car. Upon returning to New Jersey, they were stopped by a police officer and were taken in custody.

The testimony of Frank further discloses that, subsequent to April 24 aforesaid, he returned to the licensed premises with agents of this Division on two occasions; that on the first of said visits he identified the bartender who allegedly sold him the alcoholic beverages on the date charged herein; that on his

second visit he made no such identification; that he was doubtful as to his original identification, and that at no time did he ever deny to anyone that he had purchased beer at the licensed premises.

Agent D. testified that on May 5, 1965, he and Agent N of this Division were accompanied to the licensed premises by the minors; that he, Frank and Thomas entered the licensed premises; that Frank identified the licensee as the person who allegedly sold him the beer on April 24, 1965; that on May 8, 1965, he, Agent N, Frank and Thomas returned to the licensed premises for further investigation; that en route to the same Frank stated he was not certain of his previous identification of the licensee; that present in the premises at this time were the licensee and his four bartenders; that none of the latter was in the premises on his previous visit; that Frank was unable to identify any of the group as the person who sold him beer on April 24, and that Frank made a positive identification of the licensed premises as the place where he had purchased the beer as charged herein.

Edward A. McCormick (the licensee) denied he sold any alcoholic beverages to Frank as charged herein, and further testified that he knew Frank and Thomas all their lives; that he remembered the night in question because his bartender Everitt Theriault, failed to report for work that evening because his wife had suffered a stroke earlier in the day, and that he had taken over the duties of his bartender.

On cross examination the licensee testified he is the holder of the only plenary retail consumption license in the Township; that the nearest tavern to his establishment is about two miles away (in the Town of Boonton); that he charges fifteen cents for a glass of beer and \$1.20 for a six-pack of Schaefer beer.

John A. O'Malley, called on behalf of the licensee, testified that the licensed premises bore a good reputation.

At the conclusion of the hearing the attorneys submitted on the record. With respect to the failure of Frank to identify the person who sold him the beer; 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 the minor purchased, was served, or was permitted to consume alcoholic beverages on licensed premises. Re Erlton Bowl Lounge, Inc., Bulletin 1612, Item 6, and cases cited therein.

I have carefully considered the testimony adduced herein and find that Frank, Marilia and Thomas gave accurate and truthful accounts of what transpired in this case and, by reason thereof, I find as a fact that on April 24, 1965, Frank was served and consumed a glass of beer in the licensed premises and also purchased therein a six-pack of beer to take out, in violation of Rule 1 of State Regulation No. 20.

I further find as a fact that the minors accurately identified the licensed premises as the place where Frank purchased the alcoholic beverages in question.

I do not believe that the minors entered into any conspiracy against the licensee. Moreover, the record is barren of any facts indicating that the minors had an ulterior motive to inculcate the licensee falsely. Under the circumstances I conclude that the Division has sustained the burden of the licensee's guilt by a fair preponderance of the believable evidence and I recommend, therefore, that the licensee be found guilty as charged.

Licensee has prior adjudicated record. Effective January 28, 1957, his license was suspended by the municipal issuing authority for five days for an "hours" violation. Since the aforesaid dissimilar violation occurred more than five years ago, it should not be considered in fixing the penalty herein. Re Boonton Elks Club, Inc., Bulletin 1582, Item 4.

It is further recommended, therefore, that an order be entered suspending the license for fifteen days. Re Schwartz, Bulletin 1614, Item 6.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, the licensee filed exceptions to the Hearer's report and written argument thereto.

The licensee argues (1) that the report of the Hearer was against the weight of the evidence; (2) there was no reliable evidence that the alcoholic beverages were purchased at the licensed premises; (3) that the minor Frank failed to identify the licensee, who was the only person in charge of the licensed premises on the night in question, and who testified that he knew Frank all his life, as the person who made the alleged sale of beer; (4) that the testimony of Thomas and Marilea, the other two minor witnesses, did not prove that Frank purchased the alcoholic beverages in the licensed premises; (5) that the record is devoid of any proof that the liquid found in Frank's car at the time of his arrest was beer; (6) that the beer found in Frank's car was purchased at a place other than the licensed premises; (7) that the Hearer disregarded the fact that the licensed premises bore a fine reputation; (8) that I abused my discretion in denying the licensee's application to reopen the hearing to permit further cross examination of Frank and to permit the introduction of testimony by Frank's father to the effect that Frank had informed him that he had not purchased the alcoholic beverages at the licensed premises but in fact had purchased the same in Greenwood Lake, New York, and that such testimony would have been every justification to disregard the testimony of all the minors and consequently the record would have been devoid of all reliable evidence, and (9) that a letter dated June 17, 1965, signed by Frank's father, addressed to the licensee and setting forth the aforementioned repudiatory statement of Frank should have been included in the record and made a part hereof, and that the letter was newly discovered evidence, having come into the possession of the licensee on June 17th subsequent to the date of hearing held herein.

I find that the first, second, third and fourth arguments were considered and correctly disposed of by the Hearer in his report. The fifth, sixth and seventh arguments merit no comment.

With respect to the remaining contentions, I disagree with the licensee's attorney that the aforesaid letter of June 17th should have been made part of the record; it is pure hearsay. Nor am I satisfied that newly discovered evidence appears herein upon sufficient basis to reopen the hearing. The letter (not under oath) states, "that my son Frank --- has admitted to me that he had not purchased the beer in question on the night of April 24 from you, but had bought same in Greenwood Lake, N.Y." The licensee has not submitted any affidavit stating that he was not aware of such information prior to the date of the hearing (May 28, 1965). Further, the licensee has admitted that

he knew the minor Frank's family for a number of years; with due diligence he could have acquired such newly discovered evidence before the hearing held herein.

To entitle a party to a new trial on the ground of newly discovered evidence the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since original trial and not discoverable by reasonable diligence prior thereto, and (3) of the sort which would probably change the verdict if a new trial was granted. To sustain a motion for a new trial the proffered evidence must meet all three aspects of the test. See State v. Puchalski, 45 N.J. 97, 107 (1965) and cases cited therein.

I am satisfied that the alleged newly discovered evidence has not met this test. Here the identification of the licensee's premises by Frank was corroborated by two other witnesses, neither of whom has been impeached in any way. See Re Daniels, Bulletin 1204, Item 9, where it was held that unlawful sale of alcoholic beverages to a minor may be proved by witnesses other than the minor. See also 48 C.J.S., par. 349, p. 501.

With respect to licensee's request that I reopen the hearing to permit further cross-examination of Frank, it appears that Frank was thoroughly cross examined; that the cross examination took a substantial part of one hundred thirty-nine pages of testimony; that the licensee's then attorney stated that he was given "great latitude" to present his defense. Moreover, at the hearing held herein Frank denied that he ever bought a six-pack of beer in Greenwood Lake and that he ever told anyone that he did not buy the beer in question at the licensed premises.

The application does not show that the matter the licensee hopes to elicit by additionally cross examining Frank is based on testimony produced at the hearing by the Division which could not have been reasonably anticipated by the licensee or his attorney in the preparation and conduct of the defense or that witnesses the licensee now hopes to present could not have been sought out and subpoenaed for the hearing. The proffered testimony is such that it would not affect the ultimate conclusion in this case. I am satisfied from a reading of the transcript that Frank gave a truthful and straightforward statement of the facts and circumstances as they relate to the charge herein -- a statement that was fully and completely corroborated by two other witnesses. I shall therefore affirm my denial of the application to reopen the hearing. To hold otherwise would impair the administrative process and the finality of administrative decisions.

I have carefully examined the entire record, and conclude that the charge has been established by a fair preponderance of the believable evidence adduced herein. I therefore concur in the Hearer's findings and conclusions and adopt his recommendations. I shall suspend the license for fifteen days.

Accordingly, it is, on this 8th day of September 1965,

ORDERED that Plenary Retail Consumption License C-1, issued by the Township Committee of the Township of Boonton to Edward A. McCormick, t/a Park House, for premises 100 Elcock Avenue, Boonton Township, be and the same is hereby suspended for fifteen (15) days, commencing at 1 a.m. Wednesday, September 15, 1965, and terminating at 1 a.m. Thursday, September 30, 1965.

JOSEPH P. LORDI,
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ORDER IMPOSING DEFERRED PENALTY.

In the Matter of Disciplinary Proceedings against)

Farley & Danieli, Inc.)
t/a Joli Lounge)
934 South Orange Avenue)
Newark, New Jersey)

Holder of Plenary Retail Consumption License C-168, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark, extended during the pendency of these proceedings to)

SUPPLEMENTAL ORDER

Robert E. Cowen, Receiver)

for the same premises and transferred during the pendency of these proceedings to)

Steak-Kew Inn (a N.J. Corp.))
t/a Jade East Lounge)

for the same premises)

-----)
Morton B. Zemel, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

On June 10, 1965, I entered an order herein deferring the license suspension of five days (for possession by Farley & Danieli, Inc. of an alcoholic beverage not truly labeled) because it appeared that the licensed business was not then being conducted. Re Farley & Danieli, Inc. - Cowen, Bulletin 1626, Item 2.

Report of recent inspection discloses that the licensed business is now being conducted. Consequently, I am satisfied that the deferred suspension may now be imposed.

Accordingly, it is, on this 13th day of September, 1965,

ORDERED that Plenary Retail Consumption License C-168, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Farley & Danieli, Inc., t/a Joli Lounge, for premises 934 South Orange Avenue, Newark, extended to Robert E. Cowen, Receiver, and transferred to Steak-Kew Inn (a N.J. Corp.), t/a Jade East Lounge, during the pendency of these proceedings, be and the same is hereby suspended for five (5) days, commencing at 2:00 a.m. Monday, September 20, 1965, and terminating at 2:00 a.m. Saturday, September 25, 1965.

JOSEPH P. LORDI,
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

WILLIAM G. MIRAULT
78 Stuyvesant Avenue
Jersey City, N. J.

)
)
) CONCLUSIONS
) AND ORDER
)

Holder of Plenary Retail Consumption License C-119, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.

Licensee, Pro se.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

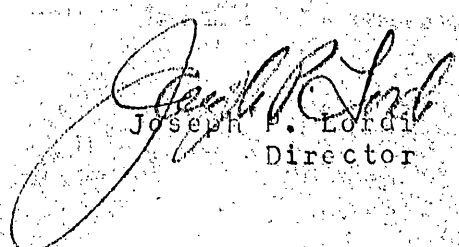
BY THE DIRECTOR:

Licensee pleads guilty to a charge alleging that on August 25, 1965 he sold six cans of beer for off-premises consumption during hours prohibited by Rule 1 of State Regulation No. 38.

Absent prior record, the license will be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Szot, Bulletin 1632, Item 7.

Accordingly, it is, on this 14th day of September 1965,

ORDERED that Plenary Retail Consumption License C-119, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to William G. Mirault, for premises 78 Stuyvesant Avenue, Jersey City, be and the same is hereby suspended for ten (10) days, commencing at 2 a.m. Tuesday, September 21, 1965, and terminating at 2 a.m. Friday, October 1, 1965.


Joseph P. Lordi
Director

New Jersey State Library