

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

BULLETIN 1818

October 7, 1968

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STATE OF NEW JERSEY
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1. DISCIPLINARY PROCEEDINGS - PROCUREMENT FOR PROSTITUTION -
PRIOR DISSIMILAR RECORD - LICENSE REVOKED.

In the Matter of Disciplinary Proceedings against)

MURPHY'S BAR AND LOUNGE, INC.)
735 East State Street)
Trenton, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-159, issued by the City Council of the City of Trenton)

Harvey L. Stern, Esq., Attorney 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 December 28, 1967, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you, through a person employed on your licensed premises, made offers to male patrons and customers thereon to procure females to engage in acts of illicit sexual intercourse and/or in acts of illicit perverted sexual relations with them, and, in furtherance of those offers made arrangements with and procured a female to engage in acts of illicit sexual intercourse and/or in acts of illicit perverted sexual relations with said patrons and customers, as aforesaid; in violation of Rule 5 of State Regulation No. 20."

The Division offered the testimony of two ABC agents in substantiation of the charge.

Agent G gave the following account: Pursuant to specific assignment to investigate "alleged prostitution", accompanied by Agent Ga he entered the licensed premises, described as a neighborhood tavern, on December 28, 1967 at approximately 12:20 p.m. The agents positioned themselves at the right front of the bar. Upon entry the patronage consisted of approximately three males and one female. Tending bar was a male known as "Grant" (further identified as John Howard). In the "far rear" he observed a male "measuring the premises for a burglar alarm system, also Mr. Murphy, who was a member of the corporation." Mr. Murphy was subsequently identified as John W. L. Murphy (vice president of the corporate licensee). He described Howard's activities in the licensed premises from 12:20 p.m. to 2 p.m. thusly: "... From the time we entered Mr. Howard was

observed to perform normal duties of bartender. He waited on us. He waited on other patrons. He made change. He was observed to empty a garbage bucket. He also was observed to accept delivery of what appeared to be orange juice, and he made payment to the vendor for the same." Howard obtained the money to pay the vendor from the cash register. From 12:20 p.m. until 2 p.m. no one else performed any services behind the bar. Although the patronage changed, it never exceeded more than two or three persons.

The agents and Howard (who was behind the bar) engaged in general conversation for a period of "about 45 minutes to an hour." During the course of the conversation at approximately 1:30, 1:40 p.m., G informed Howard that they had "time to kill" and then asked, "If you were out for a good time where would you go?" Howard responded, "What are you looking for?" G mentioned "Pussy." Howard laughed and said, "Oh, I can get a girl for you." During the course of the conversation he continued to serve patrons. On one occasion, upon returning to where the agents were positioned, Howard took out his wallet, extracted a slip of white paper which appeared to have a telephone number written on it, and informed the agent that he had the telephone number of a girl and that he would call the girl for them. At two o'clock a male identified as Mr. Matlock relieved Howard behind the bar. Howard joined the agents on the patrons' side of the bar, at which time he mentioned that he was the proprietor of a steak house in the area and that "after we were done with our business in town to join him at the steak house, he would have a girl for us there." At approximately 2:20 p.m. the male taking the measurements for the burglar alarm system was departing and Howard got up and departed from the premises with him. The agents departed from the premises almost immediately thereafter. The agents called the local Police Department and two local detectives and met them in the area. The ABC agents followed by the detectives proceeded to the steak house. Upon finding the steak house closed, G called the licensed premises from a telephone booth, spoke with Matlock and asked if Grant (Howard) was in the tavern. Grant then responded and said, "Oh, come on back to the tavern, I've got a girl here for you."

The two ABC agents re-entered the tavern at approximately 4 p.m. and positioned themselves at the bar as heretofore. G had in his possession five marked ten-dollar bills. Howard was seated next to a female identified as Mattie ---across the bar from the agents. Upon noting the presence of the agents, Howard said, "Come on over." The agents moved over to Howard's position at the bar. At this point the questioning revealed the following:

"Q Did you meet this young lady?

A Yes. Mr. Howard introduced her to us as 'Mattie.' He said, 'This is the girl I said I would call for you.' We acknowledged the introduction and said 'Hello' to Mattie, and she said, 'I am the girl' -- she said, 'I am going to take care of you.'

Q Did she say how she happened to be in the tavern?

A Yes. She said, 'John called me.'

Q Did you ask her anything?

A Yes. After this I asked her what she charges. She said she charges \$15 one way. Then in conversation we asked her what else she did. She said she will

go half and half for \$20. We agreed to half and half for \$20.

Q Does the expression 'half and half' have any significance to you as an agent?

A Yes, it does.

Q What?

A It would imply normal intercourse and something other than normal.

Q Like what?

Mr. Ross: Oral?

A Yes, oral stimulation.

Q When she said twenty dollars did you say anything to anybody about that?

A I turned to John, Mr. Howard, seated at my right, and I said, 'Is that her prices?' He said, 'Whatever she says.'

The agents, Howard and Mattie departed from the tavern at approximately 5 p.m. Mattie said, "I'll take you to my apartment." The group eventually arrived at Mattie's apartment after making a stop for a bottle of whiskey. At Mattie's suggestion that she likes her drinks mixed with milk, Ga and Howard left the apartment and returned with milk. After giving her a drink Mattie asked, "Do you have the money?" G handed her two of the marked ten-dollar bills. Mattie put the bills in her purse, entered the bedroom leaving the door open, placed the purse on a dresser, disrobed and put on a negligee, came out again and proceeded to consume her drink. Ga left the apartment to go to the car followed by Howard. Ga returned shortly thereafter with a uniformed policeman and the two local detectives. Howard did not return. After all parties identified themselves, Mattie (at the request of the detectives) retrieved the two marked ten-dollar bills from her purse. The bills were received in evidence. The ABC agents returned to the licensed premises and informed Matlock of the alleged violation.

The agent's testimony remained unchanged on cross examination. Additionally he testified that the name of John Howard did not appear on the list of employees kept in the licensed premises. Further, he testified that, when he first entered the premises, he observed Murphy and the male measuring for the burglar alarm system in a room at the extreme rear of the premises.

It was stipulated that Ga's testimony on direct examination would be the same as the testimony offered by Agent G.

In defense of the charge John W. L. Murphy testified that on the morning of the day in question he "opened up the bar at 10" and at approximately 11:30, 11:45 a.m. the burglar alarm man (Mr. Cort) came in, at which time there were "1 or 2 people" in the barroom. While occupied in the rear room with Mr. Cort he observed the two ABC men enter the premises. He then testified as follows:

"The two guys the ABC agents looked awkward.... I am watching to see what their move going to be. The burglar alarm man was showing me, and I told Howard to watch the bar for me, and he said 'O.K.' He proceeded to the opening and stood there watching. Evidently they must have sat down at that point. I am talking to the burglar alarm man. What went on outside in the bar from that point on I couldn't tell you, you know, because I am like trying to talk to the burglar alarm man and looking at the opening all at the same time."

Murphy further testified that Howard is not employed by the corporate licensee. His name is not listed as an employee on the Employer's Quarterly Federal Tax Return. He resides in the area and comes into the barroom daily. He had instructed Howard, "If anybody come in, like these guys come in, but I didn't know what they wanted, if anybody come in and wanted a drink to call me. He was doing me a favor."

It is significant to point out that on cross examination the witness testified as follows:

"Q" In other words, on this date of December 28, 1967 that was the first time he helped you behind the bar, wasn't it?

A I would say, 'No, it wasn't the first time.'

Q It was not the first time?

A No.

Q How many times had he helped you behind the bar before?

A I couldn't say.

* * * * *

Q You were there from 12:20 when the agents came in to 2 o'clock when Matlock came on. Who was tending bar from 12:20 to 2 o'clock?

A John Howard.

Q Did he serve you?

A No. I don't drink.

Q You saw him serve other people?

A Yes.

Q Take money from the register? He was performing services on your behalf and giving change; is that right?

A Yes.

Q You permitted him to do that? It was done with your consent?

A I didn't stop him."

In rebuttal G testified that upon entering the barroom Howard was already behind the bar.

After reviewing the factual complex I perceive that two basic issues are presented for adjudication. First, was Howard employed by the corporate licensee as construed by Division precedents and, second, has the Division met the burden of proving the licensee guilty by a fair preponderance of the credible evidence.

In considering the second question first, I observe that it is a firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. 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. 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).

The general rule in these 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.

In reviewing the testimony I find that Howard made an offer to male patrons on the licensed premises to procure a female to engage in an act of illicit intercourse, including illicit perverted sexual relations, within the proscription of Rule 5 of State Regulation No. 20.

The testimony of ABC Agent G, corroborated by Ga, concerning the offer made by Howard, was not only explicit and convincing, but was also uncontradicted by the licensee. It is also uncontradicted that the offer was followed up by the action of the female directing the agents and Howard to her apartment.

In adjudicating the first question I have taken note that Murphy admitted on cross examination (which I have detailed) that he requested Howard to perform the duties commonly performed by a bartender on irregular but recurring occasions.

In Re Jacobs, Bulletin 935, Item 3, it was held that salary or compensation is not a requisite to employment. This holding was followed in the recent case of Re Neim, Bulletin 1772, Item 2, wherein it was held that the question of compensation is irrelevant to the determination of employment.

In Kravis v. Hock, 137 N.J.L. 252, the court considered this very issue. In that case it was alleged that certain females employed on licensed premises were engaged as independent contractors. In considering the matter of employment the court stated (p. 255):

"Webster defines the word 'employ:' 'To use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose.' The Commissioner, since the adoption of this regulation in November, 1940, has consistently construed the word 'employed' as used in said regulation to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship.' Such a construction seems to be a logical one. Our courts have held that administrative interpretations of long standing given a statute by the official charged with its enforcement will not be lightly disturbed by the courts. Mr. Justice Perskie has emphasized this judicial determination in Cino v. Driscoll (Supreme Court, 1943), 130 N.J.L. 535, 540, where he said:

"Moreover, the legislature charged with the knowledge of the construction placed upon the Alcoholic Beverage Law, as evidenced by these rules, has done nothing to indicate its disapproval thereof. Cf. Young v. Civil Service Commissioner, 127 N.J.L. 329, 22 Atl. Rep. (2d) 523."

I therefore find that Howard was a person employed within the intendment of the Division rules and regulations and his conduct is the responsibility of the licensee. It is a well

established and fundamental principle that a licensee is responsible for the misconduct of persons employed and is fully responsible for their activities during their employment on licensed premises. In re Olympic, Inc., 49 N.J. Super. 299; In re Schneider, 12 N.J. Super. 449; Rule 33 of State Regulation No. 20. Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); F. & A. Distrib. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961).

After carefully considering and evaluating all of the evidence adduced herein, and the legal principles applicable thereto, I conclude 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 herein.

Licensee has a previous record of suspension of license by the local issuing authority for three days effective February 19, 1968, for permitting minors on the premises, in violation of a local regulation.

I further recommend that, considering the nature of the offense, i.e., procurement for prostitution, as well as the prior record of suspension for dissimilar violation within the past five years, the license be revoked. Re 300 Club, Inc., Bulletin 1806, Item 1.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, the licensee has filed exceptions and argument with respect to the Hearer's recommended findings. The points raised are (1) the licensee did not "allow, permit or suffer" the prohibited immoral activity since there was no proof that the actions of Howard (conceded to be an employee of the licensee in the factual setting herein) were known to the licensee "in the person of John W. L. Murphy, Vice President of the Corporate Licensee", (2) the licensee was not afforded an opportunity to submit character testimony or affidavits and (3) the recommended penalty is excessive.

Under Rule 33 of State Regulation No. 20, Howard's guilt is attributable to his employer (the licensee) notwithstanding that its vice president (Murphy) did not actively participate in the violation and was not aware of the violation, and even if Howard's action had been contrary to instructions from Murphy. In re Cross Keys Hotel and Restaurant, Inc., Superior Court (App.Div.), decided on June 3, 1968, not officially reported; Mazza v. Cavicchia, 15 N.J. 498, 504-509 (1954). Once Howard is found to be the licensee's employee, his acts or failure to act in the circumstances herein bind the employee to the same extent as any officer or agent of the employer.

As to the claim that the licensee was precluded the opportunity to submit character testimony or affidavits, the record discloses that it was in fact afforded this opportunity (more than two months elapsed between the date of the hearing, when the licensee was granted this opportunity, and the issuance of the Hearer's report), but failed to do so. The licensee's request at this late date is hereby denied, particularly since its stated purpose is merely to explain its prior disciplinary

record and to establish the "reputation" of the licensee.

With respect to the severity of the penalty recommended by the Hearer, I have examined the cases cited by the licensee and find that they are either cases involving revocation of license or involve suspension of license where the violations were dissimilar to the violation in the instant proceeding. In one of the latter cases (Re Kirby, Bulletin 1792, Item 1, which included solicitation for prostitution on licensed premises wherein neither the licensee nor his employees procured the prostitute), the following language appears:

"It has long been held that the solicitation for immoral purposes and the making of arrangements for sexual intercourse cannot and will not be tolerated on licensed premises. The public is entitled to protection from these sordid and dangerous evils. Re 17 Club, Inc., Bulletin 949, Item 2, aff'd In re 17 Club, Inc., 26 N.J. Super. 43, 52 (App.Div. 1953). In fact, where it has been established that the licensee or his employees actually procured a female or made offers to male patrons to procure a female to engage in acts of illicit sexual intercourse with them and made arrangements therefor, this Division has unhesitatingly revoked the license. Re Tiny's Bar and Grill, Inc., Bulletin 1718, Item 1; Re Baines & Gray, supra; Re Soto Pruna, Bulletin 1713, Item 1. This dimension is not embodied in the charge against this licensee."

No recent case has been cited in which the violation, as here, involved procurement by the licensee or his agent and the penalty was less than revocation. In this connection I find that the recommended penalty herein is fully warranted independently of the previous record of the licensee.

Having carefully considered the entire record herein, I concur in the findings and conclusions of the Hearer and will adopt his recommendation that the license be revoked.

Accordingly, it is, on this 21st day of August 1968,

ORDERED that Plenary Retail Consumption License C-159, issued by the City Council of the City of Trenton to Murphy's Bar and Lounge, Inc., for premises 735 East State Street, Trenton, be and the same is hereby revoked, effective immediately.

JOSEPH M. KEEGAN
DIRECTOR

2. TRANSPORTATION - NOTICE TO TRANSPORTATION LICENSEES RE EFFECT OF AMENDMENT OF R.S. 33:1-2 -

SPECIAL PERMITS - REQUIRED FOR EVERY IMPORTATION OF ALCOHOLIC BEVERAGES BY CONSUMERS TRANSPORTED BY TRANSPORTATION LICENSEES.

STATE REGULATIONS - REGULATION NO. 18, RULE 4 - SUPERSEDED IN PART BY AMENDMENT OF R.S. 33:1-2.

TO ALL TRANSPORTATION LICENSEES:

On September 9, 1968, R.S. 33:1-2 of the State Alcoholic Beverage Law was amended effective 30 days thereafter by the enactment by the Legislature of Chapter 298 of the Laws of 1968 to reduce from one gallon to two quarts the maximum amount of alcoholic beverages other than beer, ale, porter and wine which may within any consecutive period of 24 hours be transported by vehicle into New Jersey for personal consumption by individuals without the necessity of obtaining a special permit from this Division. The amendment additionally, for the first time, requires that such transportation be "by the owner thereof, in a vehicle other than that of the holder of a transportation license".

Accordingly, all transportation licensees are hereby notified that, effective October 9, 1968, the delivery by such licensees to any consumer in the State of any alcoholic beverages imported into this State by or on behalf of such consumer will be prohibited by the new law unless the consumer obtains a special permit from this Division. Such prohibition particularly includes the delivery to New Jersey residents of all orders of alcoholic beverages caused to be brought into this State by unlicensed out-of-state mail order firms (which firms were the subject of my public release of March 18, 1968, reprinted in Bulletin 1785, Item 1), regardless of how such orders were solicited or placed. Rule 4 of State Regulation No. 18 is deemed superseded to the extent part of it is in conflict with the new law.

Violation by any licensee of the above statute as amended is cause for the suspension or revocation of the violator's license.

JOSEPH M. KEEGAN
DIRECTOR

Dated: October 2, 1968

3. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALER - SUPPLEMENTAL HEARING ORDER.

HOFFMAN IMPORT & DISTRIBUTING COMPANY, a corporation,)

Petitioner,)

v.)

S. S. PIERCE CO., a corporation,)

Respondent.)

CONCLUSIONS AND ORDER

Saltzman and Swartz, Esqs., by Edward H. Saltzman, Esq.,
Attorneys for Petitioner.

Norman Bruck, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Petitioner Hoffman Import & Distributing Company (hereinafter Hoffman) is a duly licensed wholesaler of alcoholic beverages, with its principal offices in Jersey City, New Jersey. Respondent S.S. Pierce Co. (hereinafter Pierce) is a distributor and importer of nationally advertised alcoholic beverages, primarily wines and spirits, and has its principal offices in Boston, Massachusetts.

On February 17, 1965 Hoffman was appointed and has been engaged as the primary distributor in New Jersey of respondent's alcoholic beverage products. The petition filed herein alleges that on or about February 23, 1967 such authorization was terminated by Pierce who advised Hoffman that National Wine & Liquor Company of Passaic (a licensed New Jersey wholesaler) was then appointed as primary distributor of Pierce products. On April 3, 1967 Hoffman sent an order to Pierce for the purchase of certain alcoholic beverages. On April 4, 1967 Hoffman was advised by telephone that "said order was not acceptable as Hoffman was no longer authorized to distribute S.S. Pierce Co.'s alcoholic beverages in New Jersey." Hoffman contends that Pierce discriminated against it in the sale of alcoholic beverages and requests relief under the provisions of R.S. 33:1-93.6-11 which prohibit discrimination by importers, blenders, distillers, rectifiers and wineries to duly licensed wholesalers who are authorized by them to sell such nationally advertised brands in New Jersey.

The statute here involved (c. 59 of the Laws of 1966, effective June 2, 1966) is a supplement to Chapter 1 of Title 33 of the Revised Statutes, and repeals Chapter 264 of the Laws of 1942 (R.S. 33:1-93.1-5). It provides as follows:

"33:1-93.6. There shall be no discrimination in the sale of any nationally advertised brand of alcoholic beverage other than malt alcoholic beverage, by importers, blenders, distillers, rectifiers and wineries, to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders, distillers, rectifiers and wineries to sell such nationally advertised brand in New Jersey.

"33:1-93.7. In the event any such importer, blender, distiller, rectifier or winery shall refuse to sell alcoholic beverages other than malt alcoholic beverages, to any such individual wholesaler or comply with the provisions of this act, then such wholesaler shall petition the director setting forth the facts and demanding a hearing thereon to determine whether or not said refusal to sell was discriminatory.

"33:1-93.8. If the director shall determine that said refusal to sell is discriminatory and shall be satisfied with the ability of the wholesaler to pay for such merchandise as ordered, he shall order the importer, blender, distiller, rectifier or winery to complete said sale of alcoholic beverages other than malt alcoholic beverages, to the wholesaler.

"33:1-93.9. In the event said importer, blender, distiller, rectifier or winery refuses to complete said sale or to comply with the terms of the director's order, the director shall issue an order to every licensed wholesaler prohibiting purchase by such wholesaler of any alcoholic beverages other than malt alcoholic beverages, of said importer, blender, distiller, rectifier or winery directly or indirectly until there is strict compliance by said importer, blender, distiller, rectifier or winery with the order of the director.

"33:1-93.10. The director shall adopt and promulgate such rules and regulations as may be necessary to carry out and insure compliance with the provisions of this act."

Pierce appeared pro se, and filed an answer in letter form in which it admits that it notified Hoffman of its withdrawal of its authorization to distribute its products and that "the distributorship was being given to National Wine & Liquor of Passaic on an exclusive basis." It defends that its decision to make this change was based upon its belief that (1) its volume of sales in New Jersey did not warrant "more than one distributor for its brands;" (2) it requires a wholesaler who employs salesmen and petitioner neither employs salesmen nor services the entire State; (3) a "decline in billings to Hoffman in second full year of operation" indicates to respondent that an increased volume of sales can be obtained only through a wholesaler "who employs an adequate, trained sales force making regular calls upon the retail trade."

The essential facts necessary for determination of the issues herein, as reflected in the testimony of the witnesses, are as follows:

Harold Hoffman, secretary-treasurer of Hoffman, testified that by letter dated February 17, 1965, Pierce designated Hoffman as its primary distributor in New Jersey and sent a notification to that effect to this Division. Hoffman was authorized to file both wholesale prices and minimum consumer prices for all brands owned by Pierce and listed with this Division for shipment into New Jersey. When Hoffman accepted this distributorship it had no inventory of Pierce's products but

has maintained an inventory of approximately \$15,000.

During the period from March 1, 1965 to December 31, 1965, Hoffman purchased from Pierce for distribution in New Jersey approximately \$51,500 worth of wines and spirits; from January 1 to December 31, 1966, it purchased approximately \$50,000 worth of Pierce's products, and from January 1 to March 31, 1967, \$16,000 worth of wines and spirits, making a total purchase during its period of distributorship of \$117,500.

On February 23, 1967 Hoffman was advised that its distributorship was terminated and, as hereinbefore noted, its order of April 3, 1967 was refused by Pierce, since which time Pierce has refused to sell its nationally advertised wines and liquors to Hoffman.

The witness further testified that Pierce's alcoholic beverage products were advertised in buses in New Jersey, Life magazine and the Saturday evening Post, as well as in newspapers in principal cities throughout the country, during 1966. He also asserted that Hoffman employs three salesmen who solicit licensees both personally and by telephone throughout the entire State. The witness further testified that Hoffman spent considerable sums in promotional advertising of Pierce's products during the period of its distributorship.

Walter Gellner (a retail liquor licensee) testified that he was advised by a sales representative of National Wine & Liquor Company that Hoffman was no longer authorized to distribute Pierce's products and that Hoffman would not be able to fill his orders for Pierce products.

James F. Barnes (vice president of Pierce) testified that Pierce distributes alcoholic beverages throughout the New England States, New York, New Jersey, Delaware, Maryland and Washington, D.C.; advertises in regional editions of Life magazine, Sports Illustrated, and the Saturday Evening Post, and in the Boston Sunday Herald magazine section. He admitted that the Boston Herald is a newspaper which is distributed throughout the United States. Pierce is not only a distributor and importer of alcoholic beverages, but is widely known as a national distributor of canned groceries.

He explained that the decision to terminate Hoffman's distributorship was "fundamentally a business decision on our part" for the reason that "the S.S. Pierce line is not big enough ... to warrant more than one distributor in the State of New Jersey;" that his company cannot compete with other nationally advertised brands "from the standpoint of merchandising and advertising;" and that its line would be valuable only to a distributor who handles it on an exclusive basis. Further, while Hoffman employs three salesmen, National Wine & Liquor employs thirty-five salesmen who make regularly scheduled calls on six thousand active accounts in New Jersey. He also felt there was an eighteen per cent. decline in volume in 1966, although "We did not expect nor did we demand anything of the Hoffman Company in the way of a required volume to retain the line. I don't believe in those tactics." However, he felt that his company's wines and whiskies were not being adequately promoted in New Jersey.

On cross examination Barnes admitted that Hoffman had no inventory at the time it took over the distributorship and that it carried an inventory of approximately \$15,000. He

further admitted that Pierce employs as its national wine representative one Franklin E. Kaplan of Livingston, who is listed with the Division as a salesman for National Wine & Liquor Company. He could not explain how Kaplan could be an employee of Pierce and at the same time be engaged as salesman for National Wine & Liquor. Finally, he admitted that volume sales of Pierce's products by Hoffman during 1966 were precisely the same as they were in 1965.

The present act is in effect an amendment to R.S. 33:1-93.1-5. I shall consider the testimony within the historical context of the present amendment and the intent of the Legislature as embodied within the four corners of the present law.

The present act is similar to R.S. 33:1-93.1 et seq. in its applicability to "nationally advertised" brands except that the present act refers to "alcoholic beverages" and specifically includes wines and wineries. The prior statute referred to "alcoholic liquors" which this Division construed to exclude wines or vinous products. Hoffman Import and Distributing Company v. Frederick Wildman & Sons, Bulletin 1682, Item 1.

I am satisfied from the evidence herein that the brands of alcoholic beverages, primarily wines, which Hoffman ordered from Pierce were nationally advertised brands. I find from the record that these brands have been advertised nationally by Pierce.

There is also no dispute, and I conclude, that Hoffman is able to pay for such merchandise as ordered, in accordance with R.S. 33:1-93.8.

Although the point was not raised by Pierce in its answer, there is implicit therein the contention that, since Pierce has notified Hoffman of the termination of its authorization, Hoffman was therefore no longer authorized by Pierce to sell its nationally advertised brands in New Jersey at the time its petition was filed.

The term "authorized" is an amendment to the prior act and must be read within the context of the statute in order to determine the true meaning thereof. If we were to consider the word "authorized" in its literal meaning, without reference to the intent of the Legislature, it would mean that the protection of the statute extends only to those with whom the importer wishes to deal. Implied in this construction is the argument that, if the importer may authorize dealings, it may also withdraw authorization. Under this construction an importer might withdraw authorization to a wholesaler to deal in its products and could thereafter refuse to sell to the wholesaler. Thus the wholesaler would never be entitled to a determination by the Director on the issue of discrimination because the wholesaler would, upon removal of authorization, cease to be a party entitled to the protection of the statute. The withdrawal of such authorization must result in a dismissal of any petition since, by the time the matter is set for hearing, the petitioner has effectively been de-authorized.

In the interpretation of statutes the legislative will is the all-important or controlling factor. Indeed it is frequently stated in effect that the intention of the Legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the Legislature, and carry such intention into effect to the

fullest degree. A construction adopted should not be such as to nullify, destroy or defeat the intention of the Legislature. 50 Am. Jur. Statutes, sec. 223. Thus words or phrases may be altered where that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the Legislature.

Especially will this be done where it is necessary to prevent a law from being self-defeating, becoming a nullity. Ibid. sec. 228. Accordingly, if a statute is fairly susceptible of two constructions, one of which will give effect to the act while the other will defeat it, the former construction is preferred. Ibid. sec. 357. Statutes regulating the liquor business are to be construed according to the rules which are applicable in statutory interpretation in general, unless particular principles for their construction have been ordained by law. Except as to the penal provisions thereof, which are to be construed strictly, the liquor control laws are to be construed liberally in order to effectuate their purposes. 48 C.J.S. Intoxicating Liquors, sec. 192(b).

In construing the word "authorized" within the historical context of the prior act and the present applicable statute, it will be noted that in the interpretation of the prior statute there was a conflict in interpretation between the majority and minority of the Supreme Court in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., 28 N.J. 444. In that matter Justice Francis, in his concurring opinion, expressed a minority view "that all wholesalers duly licensed by the Director of Alcoholic Beverage Control have an equal right to purchase the products of distillers operating in New Jersey, and that if they have the financial capacity to pay therefor, they cannot be refused arbitrarily." The majority view, however, disagreed with this construction and held that the statute gives the Director authority to determine whether a refusal by a distiller to sell to a wholesaler is arbitrary or not. The majority recognized that there is an area in which a distiller may justifiably refuse to sell to a wholesaler even though the latter is financially responsible.

A fair and reasonable construction of the 1966 statute would seem to restrict the right of a distiller, rectifier, importer or winery in the general area of authorization. Thus it is my view that the Legislature intended to limit its applicability to those wholesalers who were authorized as of the date of the enactment of this amendment or who are thereafter invested with such authorization. Such precise legislative limitation clarifies and reaffirms the majority view reflected in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., *supra*, with respect hereto, and is consistent with the ultimate goal sought to be attained by the statute (see 28 N.J. 444, at p. 455). To effectuate this end, both the statute and the authority delegated by it to the Director will be liberally construed. See Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 384 (1956); 3 Sutherland, Statutory Construction (3rd Ed. 1943), sec. 7203; R.S. 33:1-73.

Moreover, it is clear that any contracts or agreements between wholesalers and importers, distillers or wineries with respect to the distribution of the products of the said importers, distillers or wineries are not relevant in the determination under this act. Cf. Hoffman v. Hock, 8 N.J. 397.

I therefore find that Hoffman was duly authorized under the provisions of this act and is entitled to seek relief herein.

The central and decisive issue in this matter is whether there was discrimination against Hoffman in the refusal by Pierce to honor Hoffman's order for alcoholic beverages. According to the testimony offered by Pierce, it decided to terminate Hoffman's distributorship and place the sole distributorship of its products in New Jersey with National Wine & Liquor Company. The reason given was that this was a business policy decision based in part upon its contention that Hoffman had had an eighteen per cent. decrease in 1966 sales, that Hoffman does not have any salesmen in New Jersey to adequately represent Pierce, and that National Wine & Liquor employs a large staff to promote and handle Pierce's products. Hoffman, on the other hand, established that its sales for 1966 did not decline but, based upon the original inventory, in fact represented an increase. Hoffman also established that it has in its employ three salesmen and that Pierce's products are adequately promoted and sold to its accounts throughout the State of New Jersey.

It is significant that the present act eliminated the word "arbitrary" when it discussed the matter of discrimination. "Discrimination" means "in general, a failure to treat all equally; favoritism." Black's Law Dictionary, 4th Ed., 553; "showing partiality (in favor of) or prejudice (against)." Webster's New World Dictionary. See, with respect to validity of the State's regulation of alcoholic beverages, and discrimination, 30 Am. Jur. Intoxicating Liquors, sec. 31, p. 546. Thus, in its most basic sense, any refusal to sell a nationally advertised brand to any authorized wholesaler would be discriminatory. However, the Legislature clearly did not intend that "discrimination" be defined in its broadest sense in sections 93.6-8; it is not an absolute term. Section 93.8 requires the Director to determine that a particular refusal to sell is discriminatory and it is, therefore, apparent that a refusal to sell was not intended to be discriminatory per se. Essentially, our courts have held that, once a wholesaler such as Hoffman proves a refusal to deal on the part of the distiller or winery, the burden of proof shifts to the distiller who must then justify the refusal to deal by reference to an objective standard reasonably related to the legitimate business goals sought to be achieved by the distiller and consistent with the purposes and objectives of the Alcoholic Beverage Law. Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., supra; James M. McCunn & Co., Inc. v. Fleming & McCaig, Inc., 81 N.J. Super. 97.

"Arbitrary" means "depending on will or discretion", that is, not governed by any fixed rules or standards. A discrimination made without adequate principles is arbitrary. "Arbitrary" has also been defined as "independent of law or rule; discriminatory; capricious." Since the statute has eliminated the word "arbitrary", it must be assumed that the intent of the Legislature was to narrow the definition of "discrimination." Therefore it would seem that the burden of Pierce to show that it has not discriminated against Hoffman becomes greater. Although Pierce may decide to reside its distributorship in one wholesaler, it cannot discriminate against other wholesalers who comply with the provisions of the applicable statute.

In the instant case I do not find that there is satisfactory proof that the termination of the authorization by Pierce is based upon any proof of decrease in sales, nor am

I satisfied that Pierce has established any valid criteria consistent with the purposes and meaning of the statute. I thus conclude that Pierce's action was clearly discriminatory as against Hoffman.

It might be well to point out, in conclusion, that the introducer's statement contained the following:

"the purpose of this bill is to insure an equitable basis for competition between supplier franchised wholesalers of alcoholic beverages in New Jersey."

As the Director stated in F & A Distributing Co. et als. v. Canada Dry Ginger Ale, Inc., Bulletin 1205, Item 1:

"Each case (including the case in question) must be decided upon its own particular facts."

Under all of the facts and circumstances herein, it is recommended that an order be entered determining that the action of Pierce is discriminatory, and directing Pierce to sell alcoholic beverages to Hoffman on terms usually and normally required by Pierce; and that, in the event Pierce refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.9.

Conclusions and Order

Pursuant to Rule 5 of State Regulation No. 15A, exceptions to the Hearer's report were filed by respondent, then represented for the first time by counsel. Answering argument to the exceptions has been filed by the petitioner.

The exceptions of respondent take issue with the fact that the Hearer precluded respondent from cross-examining petitioner's witnesses and also dispute the factual findings of the Hearer, particularly the finding that respondent's products are "nationally advertised."

It appears from the record that James F. Barnes, vice-president of respondent, appeared on behalf of respondent at the hearing held herein but, because respondent was a corporation and he was not an attorney, he was not permitted to cross-examine petitioner's witnesses. He was, however, otherwise permitted to participate fully in the conduct of the hearing. Respondent seeks to reopen the hearing for the purpose of cross-examining petitioner's witnesses.

Respondent initially contends that Rule 5 of State Regulation No. 15A specifically authorizes a corporate party to appear at a hearing pro se and to cross-examine witnesses. It further argues that respondent's lack of opportunity to cross-examine is violative of due process, regardless of the construction of said Rule 5.

Rule 5 of State Regulation No. 15A in pertinent part provides:

"Hearings shall be conducted by the Director or a duly designated hearer. Each party may be represented by an attorney admitted to practice in

the courts of this State and shall have the right to present his case by oral and documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

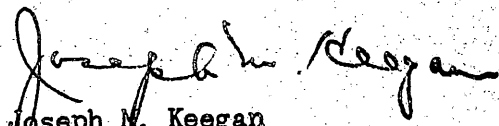
The quoted language is not intended specifically to authorize a corporate party to appear at contested hearings pro se, although this has, in fact, been the Division practice. See Bruce Zane, Inc. v. Division of Alcoholic Beverage Control, 99 N.J. Super. 196, 201-2 (App. Div. 1968). It only grants the right of all parties to be represented by counsel, but does not attempt to cover the situations, if any, in which a party must be represented by counsel.

However, aside from the provisions of said rule, I have concluded that supplemental hearing must be held to afford respondent the right to cross-examination of which it was improperly denied. At such hearing, the parties may also introduce additional testimony on the question whether respondent's products are "nationally advertised", particularly as to (1) the actual geographical area of distribution of the editions of the Boston Herald newspaper, Life magazine, The Saturday Evening Post and Sports Illustrated which carried its advertisements of the products in question, (2) the particular products so advertised and (3) the period of time these products were so advertised.

As to the effect of the statutory amendment (P.L. 1966, ch. 59), I agree with the Hearer's interpretation of the term "authorized" and invite the parties to submit briefs on the construction to be given the word "discrimination" in view of the elimination of the word "arbitrary" from the statute.

Accordingly, it is, on this 21st day of August, 1968,

ORDERED that supplemental hearing be held as hereinabove provided.


Joseph M. Keegan
Director