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

BULLETIN 229 FEBRUARY 11, 1938.

1. APPELLATE DECISIONS - RICKER and BAUER vs. WEST NEW YORK.

JOHN J. RICKER and WILLIAM P. BAUER,

Appellants

-vs-

BOARD OF COMMISSIONERS OF THE TOWN OF WEST NEW YORK,

Respondent.

ON APPEAL

CONCLUSIONS

Alfred Brenner, Esq., Attorney for Appellants
Irwin Rubenstein, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This appeal is from a three-day suspension of appellants' plenary retail consumption license.

The Town of West New York forbids the conduct of business on plenary retail consumption premises after 3:00 A. M. Appellants admittedly violated this curfew hour by remaining open for business on June 18, 1937, until 3:25 A. M. Thereafter, local disciplinary proceedings were instituted, resulting in the aforesaid suspension.

The hearing in that proceeding was held, not before the Board of Commissioners of West New York, but before one of its members, the Director of Public Safety, under Section 13 of a resolution adopted by the Board on December 15, 1933:

> "The hearing (for suspension or revocation of license) shall be held before and conducted by the Director of the Department of Public Safety. Upon completion of said hearing, the said Director shall present a stenographic transcript of the proceedings before him and report his findings of fact to ... the Board of Commissioners of the Town of West New York, who shall determine what action, if any, shall be taken."

Appellants voluntarily appeared at that hearing and entered an admission of guilt. Nothing further being offered, the Director announced that decision would be made by the Board of Commissioners; closed the hearing; and transmitted to the Board of Commissioners a complete record of the proceedings before him, including the charges preferred and a stenographic transcript of the hearing. The Board, acting upon this record and without further notice to appellants, accepted their admission of guilt and imposed the present suspension.

Appellants now protest that the hearing before the Director, in place of the Board of Commissioners, was unauthorized by the Control Act and that they therefore were not afforded the hearing required by that Act. In answer, much may be said for the argument that appellants waived their right to object to the validity

of the hearing before the Director, cf. Hudson County vs. Civil Service Commission, 8 N.J.Misc. 645 (Sup. Ct. 1930), aff'd 108 N.J.L. 195 (E & A 1931), and for the further argument that their guilt having been admitted, appellants can not show, on this appeal, any prejudice. I shall rest, however, upon the fundamental ground that the above-quoted procedure set forth in Section 13 of the local resolution, and actually followed in the present case, meets the requisites of the Control Act.

R.S.Secs. 33:1-24 and 33:1-31 (Control Act, Secs. 21 and 28) contain the pertinent provisions. The first states that it "shall be the duty" of the local issuing authority "to conduct public hearings on ... revocations", including, of course, disciplinary proceedings which result in only suspension; the second provides that the local issuing authority for cause "may suspend or revoke any license issued by it", but that no suspension or revocation shall be made until the licensee is "afforded a reasonable opportunity to be heard". Also see R.S. Sec. 33:1-35 (Control Act, Sec. 32) empowering the local issuing authority to subpoena and examine witnesses in its various proceedings.

There is nothing in the statute which expressly either forbids or permits the local issuing authority to delegate any of its functions relating to the suspension or revocation of license. It is settled, however, that a municipal board, in absence of statutory provision to the contrary, may ordinarily delegate those of its functions which are of an administrative or ministerial nature but may not delegate those which are of a discretionary character. Burlington vs. Dennison, 42 N.J.L. 165, 167 (E. & A. 1880); Friedman vs. Maines, 8 N.J.Misc. 703 (Sup. Ct. 1930), aff'd 110 N.J.L. 454 (E. & A. 1933); Harcourt vs. Asbury Park, 62 N.J.L. 158 (Sup. Ct. 1898); Schwartze vs. Camden, 77 N.J.Eq. 135 (Ch. 1910).

The revocation of a liquor license is, in its nature, a judicial function. It can only be exercised by the issuing authority upon notice and hearing. There must be legal investigation and adjudication. A governing board or body can neither by ordinance delegate the exercise of the power of revocation or suspension (which is a partial revocation) to a Police Judge nor declare antecedently that a conviction before such a Judge for a violation of an ordinance shall have the operation and effect of a revocation or suspension. The penalty of revocation provided by such an ordinance became an inseparable part of the judgment, upon conviction, as much so as if it had been literally expressed in the adjudication of the Police Judge. Such an unauthorized result arising from the conviction renders it and the proceedings out of which it grew illegal. Lambert vs. Rahway, 58 N.J.L. 578 (Sup. Ct. 1896).

In Salmon vs. Haynes, 50 N.J.L. 97 (Sup. Ct. 1887), the Common Council of Newark, although by charter the sole judge of a contested election of a councilman, appointed a committee to take testimony in such a contest and to report the facts and evidence to the Council. In declaring this procedure to be proper, Justice Magie stated at p. 100:

> "The common council, by the charter, is made the sole judge of the election, returns and qualifications of its members. They were thus required to adjudicate upon the contest raised by O'Connor's petition. The

> duty of making that adjudication could not be delegated to any committee. But that is not what the common council did in this case. The duty imposed on the committee was simply to take testimony, and to report the facts they found, with the testimony taken. This is the well-known course of proceedings in every body having power to judge of the election of its own members, in case an election is contested. No other course seems practicable, and no injury is thereby done to the contestants, for the adjudication is made, upon the facts and testimony presented, by the whole body."

Cf. Morgan vs. United States, 298 U.S. 468, 478, 481 (1936); and see 2 Dillon, Municipal Corporations (5th ed. 1911), sec. 537, p. 869.

By a parity of reasoning, I have held that the license issuing function cannot be delegated. Re Cliffside Park, Bulletin 65, item 6:

> "The statute provides that the governing body shall constitute the authority for the administration of the issuance of licenses except in such municipalities as have created Municipal Boards of Alcoholic Beverage Control pursuant to said Act. No right exists to delegate this function otherwise than to the extent expressly mentioned. In your municipality, there being no Municipal Board, no licenses may be issued except upon affirmative action of the Mayor and Council."

Re Guttenberg, Bulletin 66, item 8:

> "Section 3 of the resolution of December 11, 1933 authorizes the chairman of the License Committee and the Town Clerk to sign and issue licenses. If all that this means is that these officers are to perform the ministerial acts of signing and delivering licenses after the Mayor and Board of Council, sitting as the governing body, have specifically adjudicated in each individual instance that they should be issued, well and good. If it is meant to delegate to or confer upon these officials the power to decide whether or not a particular license shall be issued, it is not valid."

Re Mt. Ephraim, Bulletin 98, item 13; Re Ewing Township, Bulletin 108, item 1:

> "The discretionary function expressly delegated to your Township Committee cannot in turn be redelegated."

Re Asbury Park, Bulletin 192, item 7:

> "Section 12-(g) is disapproved. As drawn, it gives the Municipal Alcoholic Beverage Inspector a veto power over applications if he does not 'approve' the licensed premises. No such power may be delegated to the Inspector. Applications may be granted or denied only by the Council. Re Guttenberg, Bulletin 66, Item 8. Likewise, the provision that for failure to 'abide by any directions for a change in the premises

about to be licensed' the application shall be denied, is also bad. So also, the reservation of power to revoke a license for alteration of the premises 'in any way contrary to the directions' of the Inspector, goes entirely too far. Licenses may be revoked only for good and sufficient cause."

So, by the same token, it was held in Re Hackensack, Bulletin 93, item 10 that the power to fix hours of sale was not delegable. Section 6 of the Hackensack Ordinance provided that "the City Manager is hereby empowered to extend the closing hours on special occasions where application is made for such special permits." I there said:

"It is an established principle of law that a discretionary function expressly delegated cannot in turn be redelegated; that the discretionary administration of a function vested by statute exclusively in a particular person or body cannot be conferred in turn by that person or body upon some other person or body. The statute, Section 37, confers upon the governing board or body of each municipality the authority to limit, by ordinance or resolution, the hours between which the sale of alcoholic beverages at retail may be made, and to fix, by ordinance or resolution, the hours of closing for licensed premises. It goes no farther. There is no power conferred enabling the governing body to delegate same, as your section provides, to the City Manager. The hours of sales or closing in Hackensack may be determined only by the City Council."

The same principle has been applied to special conditions imposed upon the issuance of licenses. In Re Friberger, Bulletin 113, item 11, a resolution of the Township Committee authorized the issuance of a license to a tavern "subject, however, to written certification of the Plumbing Inspector that the said applicant has installed to his entire satisfaction, the sanitary equipment deemed necessary and proper for the conduct of a tavern at the said above mentioned premises." I there said:

"When imposing special conditions upon the issuance of licenses, the issuing authority should word them to indicate as closely as possible the specific requirements upon compliance with which the issuance of the license depends. The applicant should know exactly what is required of him. When no standards are set, there is no way he may know what to do. The only question that should be left in abeyance is whether reasonably satisfactory compliance shall have been made with the conditions imposed by the Board. Re Haney, Bulletin 66, item 7. Special conditions must be prescribed as definitely as the nature of the case will permit. Re Bailey, Bulletin 92, item 2.

"While I realize that this cannot be carried to an impracticable extent such as specifying T-joints,

> elbows, or nozzles, nevertheless it is entirely too indefinite to require the applicant to install equipment 'deemed necessary and proper' to a plumbing inspector's 'satisfaction'. No one, except the inspector, knows what it means - not even a plumber. Nothing is determined by the Township Committee. Everything is deputized to the plumbing inspector. The power to impose conditions and decide just what they shall be cannot be delegated to any inspector."

Cf. Re Friberger, Bulletin 118, item 7. Also see, to the same effect, Re Wuytack, Bulletin 154, item 10, where it was held that the measure of what toilet facilities should be is what the municipal plumbing code and health ordinance requires, rather than what a health inspector might deem to be necessary or should approve. See also Re Fidelity & Harmony Beneficial Ass'n. of South Plainfield, Bulletin 162, item 14:

> "The requirement that the new location shall be 'suitable to the Police Committee' is objectionable if it means an attempt to delegate the power of the governing board to one of its committees. Re Guttenberg, Bulletin #66, Item #8. Approval by the Police Committee may well be an appropriate preliminary to final determination by the Mayor and Council of the Borough, but it is not a proper substitute for it. To the extent of the words last quoted, the condition is disapproved."

The case of Miner vs. Larney, 87 N.J.L. 40 (Sup. Ct. 1915) is not out of line. All it holds is that a municipal governing body cannot delegate to a "license Committee" the duty of determining whether a challenge to the jurisdiction of the governing body over a license application was well founded or not. In that case it appeared that some of the remonstrants attended the Committee hearing but no oral hearing was had. The Committee did not call for evidence of the facts set up in the remonstrance nor was any evidence offered. The applications and remonstrances were reported back to Council without recommendation; the report stated that "signers were checked by the engineer"; that the report was subsequently received by the Council and a motion to grant the license was put and carried without hearing and without debate. Mr. Justice Parker said:

> "Apparently the council considered its duty to have been performed by the session of the committee, and that no further public hearing was called for.
>
> "This action of the council in delegating its authority to a committee cannot be supported. By the express language of the charter, the power and the responsibility are theirs and theirs alone. In Green v. Cape May, 41 N.J.L. 45, 48, the award of a contract of purchase through a member of a committee was supported on the sole ground of a subsequent ratification by the council itself. In Foster v. Cape May, 60 Id. 78, a contract for street lighting was set aside on the ground that council could not delegate its charter authority to a committee. A similar decision was rendered by the Court of Errors and Appeals in American Heating Co. v. Board of Education, 81 Id. 423, where the board undertook to delegate its power of contracting to the president and clerk. A similar rule should, a fortiori, apply to proceedings judicial and quasi-judicial; and in fact was applied by this court in a case of revocation of a license for violation of an ordinance.

> Lambert v. Rahway, 58 Id. 578, where a number of cases are collected. There is no substantial difference, for the application of this principle, between a proceeding to revoke a license by adjudging a forfeiture, and an ascertainment by the licensing body having jurisdiction of the subject-matter, whether jurisdiction of the proceeding has been conferred by the existence of the statutory conditions precedent. It was the duty of the council, therefore, upon a challenge of its jurisdiction of the application, itself to afford a hearing and itself to hear and decide the matter, and not to attempt to delegate to a subordinate body the duty of making an investigation essentially judicial in its character."

There was no delegation of judicial power in the present case. Section 13 of the resolution of December 15, 1933, merely provides that the Director of Public Safety shall, in place of the Board of Commissioners, conduct the hearing at which the case for and against the accused licensee is presented; and that he shall transmit to the Board of Commissioners his findings, together with a stenographic record of the entire proceedings, for the Board's final determination of the facts, its adjudication on the charges, and its imposition of penalty, if any. The function of presiding at such a hearing is merely ministerial and administrative and not discretionary in character. The party charged has full opportunity to be heard. If the Hearer erroneously rejects evidence that should be admitted or admits something that should be rejected no prejudice is worked because the defendant may demand that the Board of Commissioners as a whole shall pass on the alleged erroneous admission or rejection of evidence. The Board is in nowise bound by what the Director did or by his findings of fact. After all is said and done it is the Board's own decision which is finally reached. It is the merits of such final decisions which count, not the mechanics by which they were reached.

I therefore hold that the hearing before the Director of Public Safety satisfied the requisites of the Control Act.

Appellants charge, however, that the curfew regulation has been a "dead letter" in the municipality and that the Board of Commissioners singled out appellants for enforcement of this regulation because of personal motives. The evidence does not present the clear and convincing proof requisite to sustain such a charge. Cf. Levitt vs. Liberty, Bulletin 169, item 4. Although one of the appellants testified that he has witnessed many instances of violation of the curfew hour, there is no evidence which shows that the Commissioners knew of and condoned these other violations but discriminated against appellants for some ulterior purposes. The Director of Public Safety, also Mayor of the Town, testified that the Board, in the past, has warned licensees on a first and second violation of the curfew hour, but that appellants committed more than two violations, and that the present disciplinary proceedings were therefore instituted.

Appellants last contend that, since their violation of the curfew hour occurred under their previous license, the penalizing suspension of their present license is illegal. R.S., Sec. 33:1-31 (Control Act, Sec. 28) empowers the local issuing authority

to suspend or revoke for cause "any license issued by it." There is no restriction that the license be the one in existence when the cause for suspension or revocation occurred. In fact, the wording of the section negatives any such intent. It expressly provides that "the surrender of a license shall not bar proceedings to revoke such license."

The purpose of revocation is to punish for violation. The purpose cannot be served unless proceedings can be brought against renewal licenses. The mere expiration of a license does not abate prosecution for criminal conduct. If it did, in many cases it could operate to save a licensee from prosecution for violation committed shortly before the expiration of his license at the end of the fiscal year, solely for the reason that charges could not be preferred and hearing held in time. Any such conclusion would render nugatory the salutary provisions of the law enabling revocation for violation. State Regulations No. 15 expressly provide that licenses may be suspended or revoked for proper cause, notwithstanding that such cause arose during the term of a prior license and that where revocation proceedings are instituted and the license thereafter expires and is renewed, such proceedings shall be carried through to completion and the order of suspension or revocation shall apply to the renewal. Pamphlet Rules, January 1938, Page 57. The principle has been consistently applied. Re P. & P. Transportation Co. Inc., Bulletin 201, Item 3; Gimbel vs. Pennsauken, Bulletin 116, Item 6; Re Simandl, Bulletin 84, Item 16. Cf. Re Brennan, Bulletin 113, Item 1.

The action of the respondent is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: February 4, 1938.

2. MINORS - DRINKING - EDITORIAL.

The following editorial is taken from the Bergen Evening Record of February 3, 1938:

"SUICIDE.

"Perhaps no one thing brought about the first Prohibition more persuasively than the exposure of children to the evils of the liquor traffic. Many of the crusading cartoons of the Pre-Prohibition era depicted the horror of youth brought to the gutter by the curse of drink. They may be amusing now. They were mightily effective then.

"When Commissioner Burnett says that drinking by minors in Bergen County has become what amounts to an open scandal it is time for liquor dealers and tavern-keepers themselves to take the situation in hand. Police intervention, however laudable, is by its very nature too late.

"Taverns on Route 4 have been the most consistent violators, but they are by no means alone. In any popular saloon in Bergen County on a Saturday night a boy or a girl under 21 is likely to be among the customers.

"The State law provides that it shall be a misdemeanor for a customer to misrepresent his or her age. The State law also provides swift penalty for any liquor dealer serving a minor. Both

are at fault when a minor is served; but the tavernkeeper is under implied obligation to doubt every customer's age.

"Nothing will cause quicker or more effective agitation for a return of Prohibition than tolerance of drinking by youngsters in public places. Whether or not it is moral sin or physical detriment does not enter into the situation so far as the liquor traffic itself is concerned. What is at stake may turn out to be the industry itself.

3. DISCIPLINARY PROCEEDINGS - SALE AND SERVICE OF ALCOHOLIC BEVERAGES BY LICENSEE IN GLASSES FOR CONSUMPTION ON PREMISES NOT LICENSED - TWO DAYS SUSPENSION APPROPRIATE FOR FIRST OFFENSE OF THIS KIND.

February 4, 1938.

Mr. William A. Miller,
City Manager,
Clifton, New Jersey.

Dear Mr. Miller:

I have staff report and your certification of the proceedings before the Municipal Council of Clifton against John E. Hartman, t/a Old Homestead Hotel, charged with having sold and served alcoholic beverages in glasses for consumption off the licensed premises in violation of the terms of his license.

I note the licensee pleaded guilty to the charge and that the license was suspended for a period of two days.

The penalty seems appropriate for a first offense of this kind.

Please thank the members of the Council for their steady cooperation.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

4. APPELLATE DECISIONS - TALIAS vs. NEWARK.

MICHAEL TALIAS, trading as VARSITY PHARMACY,

Appellant,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK,

Respondent.

ON APPEAL

CONCLUSIONS

Nathaniel Alper, Esq., Attorney for Appellant

Joseph Susskind, Esq., Attorney for Objector, Madison Construction Co.

Joseph B. Sugrue, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail distribution license for a drug store, #700 Sanford Avenue, Newark.

The general area surrounding appellant's store is residential in character. However, a small group of neighborhood stores has arisen on the block where appellant's shop is located. Appellant's side of the street is totally occupied by mercantile establishments which respectively include appellant's drug-store, a delicatessen, a florist shop, a barber shop, a beauty parlor, a tavern, an "A & P", and an ice cream parlor. Across the street there are residences. On the next block there are five or six neighborhood stores, one of which is a tavern within 500-600 feet of appellant's store.

In addition to the aforementioned taverns, there are some six or seven consumption establishments within a radius of one-third of a mile of appellant's store. Four distribution establishments are also located at varying points within that radius, one being one-third of a mile to the southeast, another 1,000 feet or less to the west, a third approximately the same distance to the south, and a fourth approximately one-third of a mile to the northeast.

Respondent assigns as one of the reasons for denial of the present application its belief that an additional distribution establishment is unnecessary to service the vicinity in question.

A local issuing authority may validly deny a municipal retail license, whether consumption or distribution, if a sufficient number of establishments are already outstanding in the area. As to distribution licenses, see Grieb vs. Metuchen, Bulletin 217, Item 3, and cases therein cited. The burden rests upon appellant to demonstrate that respondent's judgment in this respect has been arbitrary or unreasonable, or that the public necessity and convenience require that the license applied for be granted. Grieb vs. Metuchen, supra. As I said in Colonna vs. Montclair, Bulletin 39, Item 8, and reaffirmed in Grieb vs. Metuchen, supra:

> "The burden of proof requisite to demonstrate that a community needs or will be more properly or conveniently serviced by another liquor store is difficult to sustain, especially in the case of a distribution license for off-premises consumption. For, with telephone and transportation facilities, such a store can properly service an area of much greater ambit than a consumption license. It is very largely a matter for the exercise of sound discretion by the governing body of the particular municipality. Its decision may be reversed if it fails in the ultimate test of public necessity and convenience."

The only evidence produced by appellant to show that respondent's judgment was arbitrary or unreasonable or to show public necessity or convenience for the license being applied for, is testimony that appellant has been engaged in the drug-store business for six and a half years in the vicinity in question and that various of his patrons have inquired why he has not obtained a distribution license. There is no showing, however, that any of these patrons will be seriously inconvenienced by making their purchases of liquor at the aforementioned distri-

bution establishments. Grieb vs. Metuchen, supra. Furthermore, as I said in Burdo vs. Hillside, Bulletin 191, Item 10;

> "The mere fact that the issuance of a distribution license would benefit appellant is not a sufficient reason for the issuance of such license. Moran vs. West Orange, Bulletin 145, Item 8. The test to be applied is whether or not the general welfare of the community and the needs of those residing therein require the issuance of another license."

I find that appellant has not sustained the requisite burden of proof with respect to this issue. It is therefore unnecessary to consider the additional reason assigned by respondent in justification of its denial in this case.

The action of respondent is therefore affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: February 5, 1938.

5. ENTERTAINMENT - CLEAN FUN - A TAVERNKEEPER MAY AND SHOULD BAN ANY ENTERTAINMENT HE FEELS IS UNDESIRABLE - HEREIN OF BEING MADE THE BOGEYMAN.

February 7, 1938.

Mr. Thomas T. O'Flaherty,
Irvington, N. J.

Dear Mr. O'Flaherty:

I have your letter informing that your employer, Daniel W. Snyder of the Club Royalle, Union, obliged you to discontinue your pantomime of a lady taking a bath. His reason, you allege, is that I had objected to your act, and you inquire my grounds.

I know nothing about it - in fact never heard of you or your act.

However, I do not mind being made the bogeyman if Mr. Snyder believes that such entertainment is improper. He is the master of and responsible for what goes on in his tavern. He may and he should ban everything he feels is undesirable.

His judgment seems good. It is only an imitation lady who would take even an imaginary bath at a public performance.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

6. ENFORCEMENT DIVISION ACTIVITY REPORT FOR JANUARY 1 to 31, 1938, INCL.

To: D. Frederick Burnett, Commissioner

ARRESTS: Total number of persons - - - - - - 56
Licensees - 3 Non-Licensees - 53

SEIZURES: Stills - total number seized - - - - - 20
Capacity 1 to 50 gal. - 5
Capacity 50 gal. and over - 15

Motor Vehicles - - total number seized - - 4
Trucks - 1 Passenger Cars - 3

Alcohol
Beverage alcohol - - - - 318 Gallons

Mash - total number of gallons - 22,550

Alcoholic Beverages
Wine 737 Gallons
Whiskeys and other hard liquors - - - 179 "

RETAIL INSPECTIONS:
Licensed premises inspected 1,845
Illicit (Bootleg) liquor - - - - 5
Gambling violations - - - - - 70
Sign violations - - - - - - - 89
Unqualified employees- - - - - 90
Other violations - - - - - - - 73

Total violations found - - - - 327

Total number of bottles - - - - - - - - - 11,330

STATE LICENSEES:
Plant Control Inspections completed - - - 109
License applications investigated - - - - 15

COMPLAINTS:
Investigated and closed - - - - - - - - - - 348
Investigated, pending completion- - - - - 87

LABORATORY:
Number of samples submitted - - - - - - - 112
Number of analyses made - - - - - - - - - 112
Number of poison liquor cases - - - - - - 0
Number of cases of denaturants- - - - - - 3
Acetone cases - 3
Isopropyl " - 0
Number of cases of alcohol, water and artificial coloring - - - - - - - - - 10
Number of cases of moonshine (home-made finished product of illicit still) - - 20

Respectfully submitted,

E. W. Garrett,
Deputy Commissioner.

7. APPELLATE DECISIONS - TREZZA and LONGO vs. ORANGE.

FRANK N. TREZZA and EMANUEL LONGO, Appellants,	:	ON APPEAL
-vs-	:	CONCLUSIONS
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL of the CITY OF ORANGE, Respondent.	:	

Ralph E. Giordano, Esq., Attorney for Appellant.
Louis J. Goldberg, Esq., Attorney for Respondent.

BY THE COMMISSIONER.

Appellant, Frank N. Trezza, is the holder of a consumption license for premises located at 120 Hickory Street, which are owned by appellant Emanuel Longo.

Respondent suspended the Trezza license for sixty days, but made no decision which rendered the licensed premises ineligible to become the subject of any further license. The appeal as to the owner, Longo, was, therefore, discontinued, and Trezza remains as the sole appellant.

Trezza's license was suspended because of an alleged violation of an ordinance entitled "An Ordinance to Regulate the Sale and Distribution of Alcoholic Beverages and Fixing a Penalty for Violation of the Provisions Thereof", of the City of Orange, which ordinance was adopted on July 6, 1936 and remains in full force and effect. Section 10 provides:

> "*** nor shall any licensee, his servant, agent or employee suffer or permit the storing or caching of any gambling device, lottery or number slip or slips in and about the licensed premises, and no licensee, his servant, agent or employee shall have possession of, ownership or custody of any gambling device, lottery or number slip or slips."

Section 17 provides:

> "In addition to the power, authority and right now or hereafter vested and possessed by the Municipal Board of Alcoholic Beverage Control of the City of Orange, to suspend or revoke any license issued by it, the said Board may suspend or revoke any license issued by it for any violation or violations of any of the provisions of this Ordinance."

The facts are as follows: On July 10, 1937, at approximately 11:00 A.M., an investigator employed by the City of Orange entered the licensed premises. At the hearing on appeal he testified that one Walker Calloway was then behind the bar, dressed in a white coat; that the investigator told Calloway that he desired to place a bet; that the two of them walked to a rear room where Calloway took a book from a closet; that the investigator mentioned certain numbers he wished to play and gave Calloway

five cents a number, after which Calloway wrote the numbers in the book; that the investigator then left the licensed premises. Shortly thereafter a police officer entered the barroom and saw Calloway in that room, although he was not then behind the bar. The officer entered the rear room where he found a book of lottery slips in the top part of the closet heretofore mentioned. Calloway was arrested and subsequently fined $50. for possession of lottery slips. It is not contended that the licensee, Frank Trezza, was on the licensed premises at the time the alleged violation of the ordinance occurred.

Appellant contends that he had no knowledge of the violation and, hence, that respondent's finding was improper. He argues that previous decisions of this Department, such as In Re Antico, Bulletin #195, Item 9, holding licensees responsible for the acts of their employees upon the licensed premises, are not in point because of the wording of Section 10 of the ordinance. The case against appellant, however, would seem to be stronger than the cases which he claims are not in point. In those cases the liability of the licensee was based upon the legal doctrine of respondeat superior, i.e., that the master is responsible for what his servant does in the scope and course of his employment. Here, however, Section 10, by its very terms, expressly prohibits both the licensee and his servants, agents or employees from suffering or permitting the acts set forth in that Section. The express authority to suspend or revoke the license for any violation of the ordinance is found in Section 17. Hence, it is immaterial whether the licensee knew of the violation. His license is subject to the terms of the ordinance and his license may be suspended or revoked for violation of the terms thereof. The Control Act, Section 28, so provides.

Appellant argues further that Calloway was not acting as his employee at the time the violation occurred. It is not disputed that Calloway was in the general employ of Trezza for a period of approximately two years, but Trezza contended that Calloway's hours of employment were between 3:00 P.M. and 2:00 A.M. and, hence, that he was not actually employed at 11:00 A.M. on July 10th. The argument proves too much. If it were sound, then the moment Calloway worked overtime for his master he would not be an employee. The relationship of master and servant doesn't depend upon the normal hours of employment but upon whether the alleged servant was doing the master's work at the particular time. The investigator says that Calloway was actually behind the bar shortly before the lottery book was discovered. There is sufficient evidence to show that Calloway was an employee of Trezza at the time the violation occurred. There was no evidence to show that Calloway, admittedly in the hire of Trezza, had been fired, or had resigned, or had ceased for any reason to be an employee.

The action of respondent in suspending the license was proper.

The only point remaining is the question of the penalty which, appellant argues, is excessive. The good character of appellant is admitted. He has been a licensee at his present address for three and one-half years and has resided all his life in the City of Orange. No charges have ever been preferred against him. In Re Cullen, Bulletin #182, Item 8, I suspended a license for ten days for book-making on the premises. Since this is a first offense and there is no allegation or proof that appellant himself participated in or knew of the violation of the ordinance, I feel that the penalty inflicted in this case is excessive, especially so in view of the moderate penalties imposed by the same Board in other cases of graver import. Cf. Mutual Wine Stores, Inc. vs. Jersey City, Bulletin #130, Item 10. I dislike to

moderate any penalty inflicted by any issuing authority and will do so only in those cases where it clearly appears that the penalty imposed is excessive. It does so appear in the present case. Allowing reasonable latitude for difference of opinion, fifteen days is enough for an offense of this kind.

The action of respondent in suspending the license is affirmed. The period of suspension is hereby reduced to fifteen (15) days.

D. FREDERICK BURNETT,
Commissioner.

Dated: February 8, 1938.

8. DISCIPLINARY PROCEEDINGS - DRUNKEN DRIVING BY A LICENSEE - THE OFFENSE, HOWEVER DEPLORABLE, IS NOT OF ITSELF CAUSE FOR REVOCATION OF HIS LIQUOR LICENSE BUT MAY BE CONSIDERED ON A RENEWAL APPLICATION IN DETERMINING WHETHER HE IS A FIT PERSON TO HOLD SUCH A LICENSE.

Dear Commissioner:

The question has been raised as to whether or not a person who is the holder of a retail distribution license can have his license revoked because of his conviction for drunken driving before the Recorder. I have not been able to find any authorities on the subject and for this reason request an expression from you if the same is in order.

Respectfully yours,
Samuel Backer,
City Solicitor.

February 1, 1938

Samuel Backer, Esq.,
City Solicitor,
Atlantic City, N. J.

Dear Mr. Backer:

Licenses may be revoked for any of the reasons set forth in Section 28 of the Control Act. The only ground mentioned in said Section which might have application to the case you mention is: " *** any other act or happening occurring after the time of making of an application for a license which if it had occurred before said time would have prevented the issuance of the license."

A conviction for drunken driving, however, would not prevent the issuance of a license since such conviction does not necessarily involve moral turpitude. Case No. 133, Bulletin 170, Item 7. Hence, such a conviction, however deplorable, of itself would not be cause for revocation of his liquor license.

This applies only to revocation of the license. On an application for renewal, an issuing authority may consider this conviction with other facts, in determining whether applicant is a fit person to hold such a license.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

9. LICENSES - INCORPORATION OF LICENSEE'S BUSINESS - NECESSITY FOR TRANSFER TO THE CORPORATION.

Dear Sir:

A client of mine operating a tavern in Passaic holds a retail consumption license. He desires to incorporate his business. If the business is turned over to the corporation at that time, will it be necessary to formally transfer the license to the corporation or may the corporation wait until July first to make application for the new license. I do not want the corporation acting under the individual's license unless same shall meet with the approval of your Department.

Very truly yours,
Thomas E. Duffy.

February 1, 1938

Thomas E. Duffy, Esq.,
Passaic, N. J.

Dear Sir:

If a license is issued to an individual, it may be exercised only by that individual. It cannot be exercised by a corporation even though the individual is a member thereof.

Hence, if your client incorporates it will be necessary to apply for a transfer of the license to the corporation and comply with all requirements concerning transfers. Until such transfer is granted and the license properly endorsed, the corporation cannot conduct the licensed business.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

10. LICENSES - TRANSFER - A TRANSFEREE OF AN ESTABLISHED BUSINESS MUST HIMSELF BE DULY QUALIFIED AS TO RESIDENCE THE SAME AS IF HE WERE MAKING AN ORIGINAL APPLICATION FOR A LICENSE.

Dear Mr. Burnett:

May I trouble you with a question which is puzzling me?

I hold a D-4 license. In the event that I might sell my business to a non-resident of the State of New Jersey and that the purchaser would be approved by the Mayor and Council, would the purchaser, notwithstanding, be barred from a transfer of license due to non-residence - and would he have to show the required period of New Jersey residence even though he buy an already established business?

Respectfully yours,
E. Boyen.

February 2, 1938

E. Boyen,
Leonia, N. J.

Dear Sir:

The Control Act provides that no retail license shall be issued to a natural person unless he shall have been a resident of New Jersey for at least five years continuously immediately prior to the submission of the application. The Control Act likewise provides that an applicant for a transfer shall comply with all the requirements of the Act pertaining to an original application for a license.

Accordingly, your license could not be transferred to a non-resident or to any individual who does not have the necessary residential qualifications. It is not a matter of the business being established, but rather who runs the business.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

11. DISCIPLINARY PROCEEDINGS - ON-PREMISES CONSUMPTION BY DISTRIBUTION LICENSEE - TWO WEEKS' SUSPENSION.

February 5, 1938

Mr. Jere J. Carew,
Borough Clerk of Rumson,
Rumson, N. J.

Dear Mr. Carew:

I have staff report and your certification of the proceedings before the Borough Council of Rumson against Harry Barkan, charged with having permitted the container of an alcoholic beverage to be opened and the contents thereof consumed on the licensed premises in violation of the terms of his plenary retail distribution license.

I note the licensee pleaded guilty to the charge and that his license was suspended for a period of two weeks.

Please extend to the members of the Council and to their attorney, William A. Stevens, Esq., my sincere appreciation for the prompt and salutary action in this case.

Very truly yours,

D. Frederick Burnett

Commissioner.