

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2218

March 10, 1976

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1. APPELLATE DECISIONS - FRAN-MORT, INC. v. SADDLE BROOK.

Fran-Mort, Inc., t/a Saddle Brook Bar, Wines & Liquors, Appellant, v. Township Council of the Township of Saddle Brook, Respondent. On Appeal CONCLUSIONS and ORDER

Allen Zavodnick, Esq., by Lawrence A. Leven, Esq., Attorney for Appellant
Ferro, Lamb & Kern, Esqs., by Walter M.D. Kern, Jr., Esq., Attorneys for Respondent Township
Samuel J. Davidson, Esq., Attorney for Objectors

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the respondent Township Council of the Township of Saddle Brook (hereinafter Council) which, by a vote of four to two, adopted a resolution denying appellant's application for a place-to-place transfer of its plenary retail consumption license from premises 329 President Street to Saddle Brook Mall, Route 46, Saddle Brook.

Appellant alleges that the action of the Council was erroneous in that: (a) it was not based upon any competent proof or testimony; and (b) appellant was denied due process and a fair hearing since it was not confronted with or given the opportunity to cross-examine objectors.

In its resolution and in its answer, the Council based its defense on the following stated reasons:

"(a) Samuel J. Davidson, Esq., attorney for objectors, Hudson-Bergen Package Stores Association and Center Delicatessen, holder of Township Plenary Retail Distribution License D-2, appeared and objected to the transfer of Appellant's license.

(b) Respondent has received expressions of concern from citizens and neighboring property owners, including owners of residential buildings adjoining the shopping center in which the proposed transfer

is to be located. Some fifteen (15) neighboring residents having expressed their concern about the location of the proposed transfer and said shopping center presently constituting a nuisance to these residents because of debris being thrown and strewn upon their properties and trespasses being committed by teenagers coming from the shopping center, said nuisance will be intensified by the consumption of alcoholic beverages with the transfer as proposed by the Appellant and by the littering of bottles and cans from the Appellant's proposed package store and tavern.

(c) The proposed transfer of license to the shopping center will engender youths congregating in the shopping center for the purpose of drinking and loitering posing difficulties of police regulation of private property with the site of the proposed transfer being a shopping center removed from the public highway and conflicting with commercial establishments which attract people to shop from other communities.

(d) Definite security problems will arise with individuals drinking alcoholic beverages in the shopping center's parking lot and adjacent areas as well as the proposed situs of the transfer.

(e) Police will have difficulty responding in time to handle situations that will arise because of the geographical location of the premises and the number of vehicles which will be parked in the vicinity of the shopping center.

(f) Individuals who have been drinking at the proposed situs of the transfer and becoming inebriated pose a potential harassment to other shoppers going to other stores, particularly with respect to the physical location of the proposed transfer in a shopping center which has a series of stores adjacent one to another with a common, connecting, enclosed corridor leading from various stores in which all shoppers will be traveling.

(g) Because of the location of the shopping center, adjacent to a residential area, general noise and din emanating from the proposed transfer would result in rowdiness and noise which would constitute a nuisance to the residents in the area.

(h) One Joseph Opera represented at the hearing that he has an interest in the business which is seeking to transfer the C-1 license which is contrary to the signed application filed with the Respondent, which discloses no interest on the part of Mr. Opera."

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for counsel to present testimony and cross-examine witnesses. A transcript of the proceedings before the Council was admitted into evidence in accordance with Rule 8 of State Regulation No. 15. This was supplemented by the receipt into evidence of various exhibits.

It appears from the testimony of Anthony Ribarro, the Township building inspector, and from an examination of the site plan map received in evidence, that the proposed liquor outlet would be located in the Saddle Brook Mall. The Mall contains a large supermarket, a large department store, and approximately twenty smaller stores including drug, shoe, clothing stores and a bank. Entrance to the stores is gained through an enclosed mall, sixteen feet in width.

The one entrance and exit to the entire complex is on U.S. Route 46. A fence surrounds the perimeter of the Mall. In addition to the fence, a natural waterway twelve to fifteen feet wide and natural foliage separates the Mall from the sole residential section which lies to the north thereof. The construction of the Mall, in accordance with the filed plans, had the legal sanction of the Township authorities.

Peter A. Brandenburg, project manager for the builder and owner of the subject Mall, whose activities are national in scope, testified that he has worked in the development of shopping centers and malls for the past thirteen years.

The hours of operation of the stores in the Mall are established by the Merchant's Association. The witness was not certain whether the hours were from 9:30 a.m. to 10:00 p.m. or from 10:00 a.m. to 10:00 p.m. The appellant must necessarily abide by the established hours. The Merchant's Association which is comprised of all of the merchants in the Mall has authorized the employment of uniformed security police. Such guards are employed by the association.

On the one occasion that a fight occurred within the Mall to his knowledge, the security force immediately contacted the police. Parts of the fence have been torn down. None of the tenants of the Mall tore down the fence. The Mall operators complained to the police relative to the fence being ripped down.

He has no knowledge of any complaints made by any residents concerning debris, loitering or disturbances; nor has he received any notice thereof from the police or sanitation departments.

It was the witness' opinion that the operation of a liquor establishment at the Mall would serve the public convenience.

Joseph A. Opera testified that he appeared at the meeting held by the Council on April 2, 1975 to consider the application for the place-to-place transfer. At the conclusion of the hearing, the Council President asked if there was anyone in the audience who

would like to express an opinion. Thereupon, Opera gave the following statement:

"I'm trying to open up a business, I'm trying to conduct myself as a businessman. There are a lot of moneys that is going to be invested. It's very important for me for the transfer to go through as I have saved every penny and I have scraped up every penny and I have to put into this venture and I just appreciate you gentlemen giving me an opportunity to conduct the business and be a good citizen of this country. That's all I'm asking for."

At the de novo hearing, Opera who is a nephew of Dominick Merlo, president and fifty percent stockholder of the corporate applicant, explained that his uncle had promised him a position as a manager in charge of the liquor establishment in the event that the proposed transfer to the shopping center is approved. Because of that promise he terminated his employment of nine years as manager of a clothing outlet. He further explained his relationship to the appellant:

"Well, basically if I can just explain one thing to the court. My uncle Dominick has been almost like a father to me. My father is deceased and my uncle's lived next to me all my life. What I had meant is I had left the job and I was unemployed in April and I had moved from South Amboy, New Jersey to help my uncle get this business off the ground and as far as the saving the pennies and -- when I was speaking of the I person I really meant my uncle did, but actually as to myself I had moneys invested in the business, but it was a future for me at the time and it was very difficult for me as far as what was going on at the council meeting and I felt as though we were being treated unfairly. The gentlemen of the council were trying to be good citizens, but I felt that there were a lot of things that were said that were untrue and I felt it became almost a mockery and I stood up and I was heated and I was upset and I saw my uncle who worked 50 years of his life very hard and seeing something like this go down the drain because of council and I spoke out of line."

The examination of Opera continued, as follows:

"Q Have you placed any securities, by that I mean a bond or a note or anything to any member of the stockholder as far as a security in this interest or an interest in this business?

A No, I have not.

THE HEARING OFFICER: Other than becoming a salaried employee, do you have any interest in this licensee corporation?

THE WITNESS: No, sir. The only thing, like I stated, I just wanted to bring out the relationship between myself and my Uncle Dominick. It's a very close family. I come from a large Italian family and my Uncle Dominick has been a father to me and our last names are not the same, but there is a very close relationship here between myself and my uncle.

Q When you say you saved and scraped every penny in relationship to what?

A Well, I had just made a move from South Amboy, New Jersey, to Hasbrouck and that's it and I had just left my job. That's basically what I meant."

The witness explained that appellant would prefer to primarily conduct a package goods operation. It would comply with the Mall regulations pertaining to opening and closing hours, and would not have music or live entertainment.

Opera denied that he had spent any of his personal funds in connection with expenses incurred by the appellant attendant to the proposed transfer; and denied that he was an officer or stockholder of the corporate appellant, or had any financial interest or investment therein.

Andrew J. Gulban, a resident of Saddle Brook for the past fifteen years, and the operator of a heating and air conditioning business therein, testified that he is familiar with and had patronized the site of appellant's premises which is presently not being operated. It was his opinion that the grant of the transfer would be advantageous to the community because it would alleviate a traffic and parking problem at its present location; and the transfer to a shopping mall would provide one-stop shopping.

Gulban has been acquainted with Merlo for twelve to fifteen years and has done work for him in the past. He has not been requested to perform any work at the proposed location.

Preliminarily, I observe that the transfer of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon. Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was arbitrary and unreasonable, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1; Bonwell v. Newark, Bulletin 1639, Item 1. The instant case is comparable to and governed by the case of Bivona v. Hock et al., 5 N.J. Super. 118 (App. Div. 1949). As the court pointed out in that case:

"...the issue is, not whether a discretionary power has been improperly exercised, but rather whether in the exercise of the power respecting transfers, R.S. 33:1-26, authority existed in the local body to refuse a transfer of a license for the reason upon which the refusal was based." Cf. *South Jersey Retail Liquor Dealers Association v. Burnett*, 125 N.J.L. 105 (Sup. Ct. 1940).

In order to arrive at a fair determination of the issues herein, I have examined each of the reasons stated in the resolution adopted by the Council denying the transfer.

In paragraph (a) above it was recited that the attorney for the objectors Hudson-Bergen Package Stores Association and Center Delicatessen, holder of a package goods license appeared and objected to the proposed transfer of the license. No licensee appeared at either the hearing held by the Council or at the hearing in the Division to offer reasons for objecting to the proposed transfer. A perusal of the transcript reveals that the attorneys involved and members of the Council merely engaged in colloquy. No proofs were submitted, and there was no factual basis for any determination.

Furthermore, neither of the liquor licensees closest to the Mall, one of whom is located on Route 46, a short distance to the north of the Mall and the other on the opposite side of Route 46 (which contains a median separating the east and west bound lanes), appeared to articulate their objections, if any, to the transfer.

The Mall was built with the blessing of the official bodies of the municipality. It was conceded that the construction thereof would enure to the benefit of the community. It is unarguable that malls located on main highways attract people from outside of the community. The addition of a liquor outlet to the Mall would make possible a desirable one-stop shopping.

I conclude that the weight to be given to the bare statement expressed in paragraph (a) of the resolution and answer is greatly diluted for the reasons above stated.

In paragraph (b), it is recited that neighboring residential property owners "having expressed their concern about the location of the proposed transfer and said shopping center presently constituting a nuisance to these residents because of debris being thrown and strewn upon their properties and trespasses being committed by teenagers coming from the shopping center, said nuisance will be intensified by the consumption of alcoholic beverages with the transfer as proposed by the Appellant and by the littering of bottles and cans from the Appellant's proposed package store and tavern."

General objections or expressions of concern are not in themselves sufficient reason for denying a transfer. Piccirillo v. Lyndhurst, Bulletin 1578, Item 3; Pistilli v. Barnardsville, Bulletin 1030, Item 2.

There was not a scintilla of evidence produced in substantiation of the contention that the shopping center constitutes a nuisance to the residents because of debris allegedly being thrown upon their properties if the transfer were granted.

Likewise there was not a shred of evidence to substantiate the fears expressed in (c) through (g). At best, all of the fears expressed concerning the effect that the transfer would have, if granted, are conjectural. In any event, it must be assumed that appellant is well aware of the fact that an application for the renewal of the license must be made annually. If the premises are conducted in a law-abiding manner (and it must be assumed that such will be the case), residents of the area have nothing to fear. If, however, the licensed premises will be operated in violation of the Alcoholic Beverage Law, the licensee would subject its license to suspension or revocation. Tagliaferro v. Newark, Bulletin 1710, Item 1; Jesswell v. Newark, Bulletin 1847, Item 5; Monmouth County Retail Liquor Stores v. Middletown et al., Bulletin 1572, Item 1.

The question raised in paragraph (h) concerning the possible interest, if any, of Joseph Opera, a nephew of the principal officer and stockholder of the corporate appellant has been effectively resolved by Opera's testimony at this hearing, which I find to be credible and unequivocal. Again, it must be assumed that the appellant is aware that if anyone does have an undisclosed interest in a liquor license, the licensee would subject itself to appropriate disciplinary action.

My evaluation of the entire record herein, including the exhibits and the argument of counsel, leads to the conclusion that the fears expressed in the resolution adopted by the Council by a split vote were unfounded on the record.

This case is unlike Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292 (1970) wherein numerous individual objectors, petitions, clergymen and organizations including a hospital which contained a school of nursing appeared to voice their strenuous objections to a place-to-place transfer occasioned by a premises-enlargement. In Lyons Farms Tavern, much of the locality was devoted to residences. Area residents and hospital employees (male and female) had been molested. In Lyons Farms, the Supreme Court affirmed the local Board's denial of the place-to-place transfer and held that the Board's finding that the paramount equities favored the objectors was reasonably grounded. None of these factors or the other factors considered by the Court in Lyons Farms are present in the matter sub judice.

In reviewing the record herein, including the exhibits and the testimony presented, I find no factual or legal foundation to support the Council's action, and find that the action of the Council was unreasonable and arbitrary.

For the reasons stated, I conclude that the appellant has sustained the burden imposed upon it under Rule 6 of State Regulation No. 15. It is, therefore, recommended that the Council's action be reversed, and that an order be entered directing the Council to grant the application for transfer, in accordance with the application filed therefor.

Conclusions and Order

Written exceptions to the Hearer's report were filed on behalf of the objectors, and a written answer to the said exceptions was filed on behalf of the appellant pursuant to Rule 14 of State Regulation No. 15. Significantly, no exceptions to the said report were filed by the respondent Township Council of the Township of Saddle Brook.

In its exceptions, the objectors argue that the Hearer "arbitrarily determined that the refusal by the Township Council to grant the subject transfer was unreasonable and arbitrary." Thus, they maintain, the Hearer substituted his personal judgment for that of the local issuing authority, contrary to the principle set forth in Lyons Farms Tavern, Inc. v. Newark, supra, and Lubliner v. Paterson, 33 N.J. 428, 446 (1960).

While, as a general rule, it has been held that the action of the local issuing authority may not be reversed by the Director unless he finds "its action was clearly against the logic and effect of the presented facts", Hudson-Bergen Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502 (E. & A. 1942). The converse fundamental principle is equally applicable, namely: that, where it appears that the denial was arbitrary and unreasonable, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1; Bomwell v. Newark, Bulletin 1639, Item 1. The Hearer has set forth the specific reasons upon which he makes recommended findings that the action of the Council was, indeed, unreasonable and contrary to the logic and effect of the presented facts. Fanwood v. Rocco, 33 N.J. 404 (1960).

I have evaluated and assayed the reasons set forth by the Council for its action and find that they are either factually unsupported in the record, or are based entirely upon conjecture.

As the Hearer correctly noted, no residents appeared before the Council to articulate objections to the transfer. Nor was there any community sentiment expressed against the proposed transfer by substantial number of persons in the locality, as was present in Lyons Farms Tavern, Inc. v. Newark, (55 N.J. at p. 306). In fact, no resident appeared to voice an objection to the said transfer, nor was there a scintilla of evidence adduced to substantiate the reasons set forth in the Council's resolution.

The Council was apparently apprehensive about the potential for future violations. It must be assumed, however, that the appellant will conduct the licensed business in a lawful manner, and in compliance with the Alcoholic Beverage Law and the rules and regulations of this Division. The appellant is pointedly advised that, in the event the licensed business is not conducted in a lawful manner, it would be subject to disciplinary proceedings leading to a possible suspension or revocation of its license privilege.

I have carefully considered the exceptions and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit. I find that the reasons upon which the denial of the transfer were grounded are an impermissible and invalid basis for the denial of the place-to-place transfer. Thus, I find that the action of the Council was unreasonable, arbitrary and an abuse of its discretion.

Having carefully considered the entire record herein, including the transcripts of testimony, the exhibits, the Hearer's report and the exceptions filed with respect thereto and the answer to the said exceptions, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein. Thus, I conclude that the appellant has sustained its burden of establishing that the action of the Council was erroneous and should be reversed. Rule 6 of State Regulation No. 15.

Accordingly, it is, on this 18th day of December 1975,

ORDERED that the action of the respondent Township Council of the Township of Saddle Brook be and the same is hereby reversed; and it is further

ORDERED that the Council is hereby directed to grant appellant's application for a place-to-place transfer of its plenary retail consumption license in accordance with the application filed therefor.

Leonard D. Ronco
Director

2. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary)
 Proceedings against)
 Hudson Liquor & Food Corp.)
 6317-6319 Hudson Avenue)
 West New York, N.J.,)
 Holder of Plenary Retail Distribu-)
 tion License D-11, issued by the)
 Board of Commissioners of the)
 Town of West New York.)

CONCLUSIONS
 AND
 ORDER

Victor P. Mullica, Esq., Attorney for Licensee
 Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded "not guilty" to the following charge:

"On Monday, April 14, 1975, 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 eighteen (18) years, viz., Walter K ----, age 14; in violation of Rule 1 of State Regulation No. 20."

At the first of two hearings in this matter, ABC Agent C testified that, pursuant to a specific assignment to investigate alleged sales of alcoholic beverages to minors, he visited the premises accompanied by ABC Agents D and P, on April 14, 1975, at approximately 7:05 p.m.

From his motor vehicle, which was parked in front of the premises, he observed two males, who appeared to him to be minors, enter the premises. He thereupon followed them into the premises and observed the alleged minor go to a beer cooler, take a quart of Miller beer and a quart of Budweiser beer and bring them to the counter. The clerk, later identified as Mrs. Delia Rey, accepted payment and this minor left the premises. The agents then followed them and identified themselves. The minor, later identified as Walter K----, first stated that he was seventeen years of age.

The agents seized the alcoholic beverages and together with the minor returned to the premises where they confronted Mrs. Rey and her husband. Mrs. Rey admitted the sale.

He explained that Walter had been in the premises earlier that day and had made a purchase of beer. At the earlier visit he produced some type of false identification. The minor, thereafter, admitted to the agents that he was, in fact, only fourteen years of age.

On cross examination, the agent asserted that at the time of the confrontation with Mr. and Mrs. Rey, the minor insisted that he was not asked his age, did not show them any identification, nor was he requested to produce any.

ABC Agent D testified in substantial corroboration of that given by Agent C. This witness stated that, although the minor at first stated that he was seventeen years of age, he later admitted that he was fourteen and that his birthday was on June 5, 1960.

Jorge Rey testifying on behalf of the corporate licensee gave the following account: he is the president and that he and his wife own the entire corporate stock herein. The minor, Walter visited these premises three times on the date in question. He first entered the premises at about 4:00 p.m. and asked for a bottle of beer. He was asked to produce some identification and showed a driver's license which indicated that the true owner of that license was born in February of 1957. Based upon that representation, he sold him the bottle of beer.

The minor then returned at 5:30 p.m. and purchased two more bottles of beer. At that time the witness again insisted upon his producing identification. Finally, he returned at 7:30 p.m. that day accompanied by another boy. At this time his wife accepted payment and sold the bottles of beer to him.

I questioned him why he felt it was necessary for the minor to exhibit identification on his second visit, since he had already produced it in the first visit. He answered that he wanted to "make sure. This boy look eighteen. I want to make sure." Finally, the witness acknowledged that the minor was neither requested to nor did he make a written representation at or before the sale of the beer that he was eighteen years of age or over.

John Janulis, the owner of the building in which the licensed premises are located, testified that he was present at the time of the confrontation, as described hereinabove, and Rey said to him that the minor showed him some identification.

Mrs. Delia Rey testified that before making the sale to the minor she asked her husband whether she should do so, and he replied "yes, he showed twice the license."

At the second hearing, Walter, in testifying on behalf of the Division, said that he was born in West New York, New Jersey on June 5, 1960. He visited the licensed premises twice on the date charged herein. His first visit was made in the afternoon at which time he purchased alcoholic beverages. He was not asked how old he was nor was he requested to produce any identification.

He returned to the premises at about 7:30 p.m. and purchased two quarts of beer. He was not asked for identification at that time. When he left the premises, he was confronted by the two agents and first told them he was seventeen years of age. In the premises, he then stated that he was fourteen. On cross examination he denied that he wore a beard.

This is a disciplinary proceeding which is civil in nature, and not criminal in re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus the proof must be supported by a fair preponderance of the credible evidence. Butler Oak Tavern v. Div. of Alcoholic Bev. Control, 20 N.J. 373 (1956). The guiding rule in these matters is that the finding must be based on competent legal evidence, and that it must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, Sec. 1042.

I have had the opportunity to observe the demeanor of the witnesses as they testified at this hearing and I am persuaded that the testimony of the minor was forthright, concise, and accurately depicted what actually transpired. It is abundantly clear and admitted that no written representation was made by the minor prior to the sale to him of alcoholic beverages.

Appendix 5 (page 89) of the Division Rules and Regulations sets forth that, in disciplinary proceedings involving alleged sales of alcoholic beverages to a minor in violation of Rule 1 of State Regulation No. 20, the licensee may establish the defense provided by N.J.S.A. 33:1-77 by affirmatively showing all of the following: (a) that the minor falsely represented himself in writing to be of age; and (b) that the minor's appearance was such that an ordinary prudent person would believe him to be of age; and (c) that the sale was made in reliance upon such written representation, and appearance, and in the reasonable belief that the minor was of age.

Hence, it is not a defense that mere verbal inquiry may have been made as to the age of the minor, or that the minor had verbally misrepresented his age, or that the minor had displayed a driver's license which represented his age as over eighteen. The representation in writing required by the Alcoholic Beverage Law is a writing made by the minor at or prior to the time of sale or service. Sportsman's 300 v. Nutley, 42 N.J. Super., 488, 492, (App. Div. 1956).

As the court there pointed out: "The agency (this Division) has not, however, considered that 'a false representation in writing by the minor' was intended to embrace such writings as a driver's license, a draft card, or a social security card." And further, "Administrative interpretations are accorded significance and are not lightly overruled."

Counsel for the licensee, however, cites the case of Laurino v. Div. of ABC, 81 N.J. Super. 220 (App. Div. 1963), in support of his contention that the licensee has successfully established the necessary elements to provide a complete defense to a charge herein.

In Laurino two female minors (ages twenty and sixteen) sought employment on licensed premises. Both girls orally represented themselves to be twenty-one years of age and submitted what purported to be genuine baptismal certificates reciting dates of birth indicating their ages to be twenty-two and twenty-one respectively. The licensee thereafter escorted the two young ladies to local police headquarters where they were fingerprinted, issued proper identification and certified by the local Police Department as having complied with the provisions of the local ordinance respecting ages of employees on licensed premises.

In a subsequent disciplinary proceeding against the licensee on charges alleging employment of the said minors and sale of alcoholic beverages to them, the then Director concluded that each minor's appearance was such that an ordinary prudent person would not believe them to be of age. Hence the defense failed.

On appeal the Appellate Division reversed. The court said inter alia:

"...We discern no greater efficacy in a false representation in writing as to age made to the licensee on a recommended ABC form at the time of the sale, upon which he honestly relies in making the sale, than in a similar written false representation made only a few weeks anterior to sale on a form prescribed by the local liquor control board, upon which both the local board and the licensee relied in good faith...."
(emphasis added) Laurino, supra, at p. 225.

The facts in the instant matter are quite distinguishable. The licensee herein did not obtain the requested written representation, which would entitle him to the defense upon which he relies. Furthermore, this Division has interpreted Laurino to be limited to the particular circumstances and facts therein. See Sportsman's 300 v. Bd. of Com'rs. of Town of Nutley,

supra, as the expression of established and prevailing principles relative thereto.

Moreover, I have carefully observed the minor's appearance and find it difficult to believe that he could be mistaken for a person of the age over fifteen. He had an extremely young appearance and I doubt whether he could have grown a beard (as testified to by Rey) even if he wanted to. In fact, the minor even joked about his abortive ability to grow any amount of facial hair that could be recognized as a beard.

Considering all of the facts and circumstances herein, it is obvious that the sale herein was not made in compliance with the requirements of the applicable law and regulation of this Division.

Accordingly, I find that this charge has been established by a fair preponderance of the credible evidence, indeed, by substantial evidence, and recommend that the licensee be found guilty of the said charge.

Absent prior record, it is, further, recommended that the license be suspended for sixty (60) days.

Conclusions and Order

Written exceptions, in the form of a written summation heretofore submitted, were filed on behalf of the licensee, and a written answer to the said exceptions was submitted on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

The licensee takes exception to the Hearer's finding that the licensee has produced no evidence that any written representation was made by the minor at the time of sale and service; however, they insist that he did produce some type of false identification upon which they relied.

The minor insisted that, at no time was he required to, nor did he produce any identification at any time prior to his purchase of the alcoholic beverages, nor did he make any written representation with respect to his age.

Licensee, thus, has completely ignored N.J.A.C. 13:2-39.12, a pertinent part of which states:

"Hence it is not a defense that mere verbal inquiry may have been made as to the age of the minor or that the minor had verbally misrepresented his age or that the minor had displayed some document (such as driver's license, birth certificate,

military identification card, selective service registration certificate, or any other similar document) which represented his age as over 21. The representation in writing required by the Alcoholic Beverage Law is a writing made by the minor at or prior to the time of sale or service."

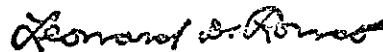
This section more fully defines the requirements for a complete defense, as set forth in N.J.S.A. 33:1-77. See Sportsman's 300 v. Nutley, supra. Any intimation to the contrary based on Laurino v. Div. of Alcoh. Bev. Contr., 81 N.J. Super 220 (App. Div. 1963), is misplaced, for the reasons articulated in the Hearer's report. This contention is, therefore, rejected.

I have examined the other matters set forth in the exceptions and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit. The licensee's request for further oral argument before me is unwarranted, and is hereby denied.

Therefore, having carefully considered the entire record herein, including the transcripts of testimony, the exhibits, the Hearer's report, the written exceptions thereto, and the answer to the said exceptions, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein. I find the licensee guilty as charged.

Accordingly, it is, on this 15th day of December 1975,

ORDERED that Plenary Retail Distribution License D-11, issued by the Board of Commissioners of the Town of West New York to Hudson Liquor & Food Corp., for premises 6317-6319 Hudson Avenue, West New York, be and the same is hereby suspended for sixty (60) days, commencing 3:00 a.m. on Monday, January 5, 1976 and terminating 3:00 a.m. on Friday, March 5, 1976.


Leonard D. Ronco
Director