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

BULLETIN 1579 September 10, 1964

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ITEM

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

BULLETIN 1579

September 10, 1964

1. APPELLATE DECISIONS - CASCIO v. ROSELLE PARK.

JOHN CASCIO, t/a BUSINESS MENS INN,

Appellant,

v.

BOROUGH COUNCIL OF THE BOROUGH OF ROSELLE PARK,

Respondent.

ON APPEAL
CONCLUSIONS
AND ORDER

Robert W. Wolfe, Esq., Attorney for Appellant.
William Boffa, Jr., Esq., Attorney for Respondent.
Dughi & Johnstone, Esqs., by Jeremiah D. O'Dwyer, Esq., Attorneys for Objectors.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Appellant challenges by this appeal the action of the Borough Council of the Borough of Roselle Park (hereinafter Council) whereby it, by resolution dated February 13, 1964, refused to amend a resolution theretofore adopted by the said Council on December 12, 1963, granting a place-to-place transfer of appellant's plenary retail consumption license C-10 from premises 101 East Westfield Avenue to 400 Seaton Avenue, Roselle Park. Thus by its action it in effect denied the application for such transfer after it had been granted.

The facts presented upon this appeal, which were substantially stipulated by counsel for both appellant and respondent, are as follows: Appellant, a holder of a plenary retail consumption license for many years, made application for a transfer of his license from his place of operation at 101 East Westfield Avenue to a building, which he owned and which was not as yet fully completed, at 400 Seaton Avenue, Roselle Park. The application was based primarily upon the fact that his lease at his presently operating premises had terminated; that his landlord had kept him on a month-to-month basis and had insisted upon his vacating the said premises. It may be well to note at this point that the appellant finally vacated these premises on May 15, 1964, and is unable to continue his business therefore at the present time.

The application was proper in its form, fees were paid, notice of application was duly advertised, and the plans and specifications were filed and all other requirements were met preparatory to a hearing thereon which took place before the Council on December 12, 1963. At that time a full opportunity to be heard was given to all parties -- the applicant, objectors and their counsel. At the conclusion of this hearing a resolution was adopted by a vote of four-to-two granting the said transfer in the following language:

"That the application received from Mr. John Cascio for the transfer of his Plenary Retail Consumption License No. C-10 from 101 East Westfield Avenue to 400 Seaton Avenue be granted."

On December 16, 1963, the municipal clerk notified this Division of its action and added:

"Since the premises at 400 Seaton Avenue have not yet been completed, the license has not been endorsed with the transfer."

On December 27, 1963, this Division, through its Deputy Director in charge of licensing, responded by letter to the municipal clerk in part as follows:

"Everything is O.K. except the motion which was passed on December 12th. The Mayor and Council should proceed, promptly, to adoption of a corrective resolution reading in the following manner:

'BE IT RESOLVED that a motion passed on December 12, 1963 purporting to grant transfer of John Cascio's License C-10 from 101 East Westfield Avenue to 400 Seaton Avenue, Roselle Park, N.J., is hereby amended to provide that the application for said license transfer is granted, as of December 12, 1963, subject to the special condition that the transfer shall not be endorsed and effective unless and until the premises at 400 Seaton Avenue are first duly completed in keeping with the filed and approved plans and specifications.'"

It further appears that on or about December 27 counsel for the objectors contacted "someone" in this Division who informed him that the action of Council on December 12 was invalid because the resolution omitted the clause "subject to the special condition that the transfer shall not be endorsed and effective unless and until the premises at 400 Seaton Avenue are first duly completed in keeping with the filed and approved plans and specifications." Therefore, counsel for the objectors represented at this hearing that he advised his clients not to file an appeal from the action of the Council in granting the applicat for transfer on December 12, 1963.

On January 1, 1964, two newly elected councilmen replaced two councilmen who were defeated for re-election; the two replaced councilmen had voted in favor of the December 12 resolution. Pursuant to the procedure suggested by this Division, this matter was again considered by the newly constituted Council on February 13, 1964, without prior written notice to the appellant and without any further hearing thereon. A motion to approve the corrective resolution then introduced was defeated by a vote of four-to-two. The effect of this action was to override the earlier resolution of December 12, 1963, and to deny the application for transfer made by the appellant.

In the petition of appeal filed by the appellant he contends that the action of the Council on February 13, 1964, in disapproving the application for transfer was improper for the following reasons: (a) that the action of the respondent on

December 12, 1963, was valid and proper; (b) the appellant received no notice of any action or any hearing to be held by the respondent on February 13, 1964, and only learned about the same in a newspaper published on the following day; (c) that the appellant "is being evicted by his landlord since the landlord rented the premises after learning of the action of the Respondent granting the transfer on December 12, 1963;" (d) that appellant is near construction and near completion of work at proposed new premises at 400 Seaton Avenue, Roselle Park.

Respondent filed an answer to the following effect: (a) that the resolution of December 12, 1963, was determined by this Division to be defective and of no legal force and effect; (b) that the resolution suggested by this Division was rejected on February 13, 1964, because it determined that such transfer was "not in the best interest of the citizens of the Borough of Roselle Park, and will not serve the public necessity and convenience," and (d) it relied upon the determination of this Division with respect to the December 12 resolution.

Counsel for the appellant on this appeal advocated that the action of the Council on December 12, 1963, constituted a final and binding act on its part; that the omission of the clause suggested by this Division was purely procedural in nature and not substantive, and that therefore the action of the respondent on February 13, in overriding the earlier resolution, was illegal.

Also at this hearing counsel for objectors appeared, although no answer was filed on their behalf. He took the position that (a) he agrees with the position taken by the respondent Council that the omission was substantive and not procedural and, therefore, the action of the Council on February 13, 1964, was in all effects valid and binding; (b) that, since he was advised by someone in this Division in December that the resolution was defective, he did not file a notice of appeal from such action; (c) that, if it should be determined on this appeal that the resolution of December 12, 1963, was in fact a valid and final action, he should be permitted to introduce testimony at this hearing as if he had filed a timely appeal on behalf of objectors from such action. The testimony would bear upon the matters raised by these objectors at the time of the hearing on December 12, 1963, before the Council, namely, that there was no need and necessity for the issuance of the proposed transfer.

The hearing on this appeal was de novo, pursuant to State Regulation No. 15. Hearings were held at this Division on April 8, 1964 and April 27, 1964, after which written summations were submitted by counsel for both the appellant and the respondent. Thus a full opportunity was afforded counsel to present testimony under oath and cross-examine witnesses. Sideroff et als. v. Jersey City and Niebanck, Bulletin 1310, Item 1. In the consideration of this matter the following questions must be examined:

(1) Was the action of the Council on December 12, 1963, a final action;

(2) Was the resolution as passed on that date procedurally or substantively defective. In other words, would the corrective resolution as suggested by this Division be a procedural correction or a substantive one;

(3) If it is determined that the requested correction is a procedural one and thus the action of the Council on February 13, 1964, was inefficacious to rescind the prior grant of the transfer, did the Council act in the proper exercise of its discretion on December 12, 1963, in approving the said application.

As a further corollary to this, and in order to protect the interests of all parties concerned, I indicated at this hearing that, in view of the possibility that it might be determined that the resolution of December 12, 1963 was a valid and final action and was only procedurally defective, I would permit the objectors to present testimony in support of their objections to such action.

I

The testimony of the councilmen conclusively supports the appellant's contention that the action taken by Council on December 12, 1963, was intended as a final and dispositive one. This matter was discussed and thoroughly argued at the December 12 hearing. The attorney for the appellant presented his arguments in support of the application; petitions were filed both on behalf of and against the said application; the objectors were given a full opportunity to be heard and they were permitted to present full arguments in opposition to the said application, and at the conclusion of the hearing the Council voted four-to-two in favor of granting the said application. These councilmen were specifically asked by me at the hearing on this appeal de novo whether they understood that this was a final action and without reservation. Each of the councilmen who participated at the December 12 hearing stated affirmatively that it was their intention to so vote. Thus, for example, Councilman John W. Whitmeyer was asked:

"The Hearer: Just let me ask you this, Councilman, did you consider that the vote of December 12th was a final vote?
The Witness: I certainly did.
The Hearer: And did you consider that there was anything to be done after the vote in order for the licensee to obtain his license?
The Witness: No, sir, I did not.
The Hearer: Well, you knew that the building hadn't been constructed.
The Witness: Yes, sir, I did.
The Hearer: Was there any discussion among the councilmen at that time with respect to the construction of the building?
The Witness: No, there was no discussion, your Honor, I think most of us knew the building was not complete.
The Hearer: Was it the intention of the council to hold the license until the building was completed?
The Witness: Well, I don't say it was the intention of council but certainly I would feel that it would not become effective until the building was complete."

This was the general sense and feeling of all of the Council who voted hereon.

It has long been established that, where an issuing authority reaches a final determination on an application for a license or renewal thereof, in the absence of mistake of law or fact or fraud perpetrated upon the issuing authority (not claimed herein), it may not reconsider its action. Ashen v. Elizabeth, Bulletin 1553, Item 2; Essex County Retail Liquor Stores Assn. v. Newark et al., Bulletin 1457, Item 3; Kaighn et al. v. Union Beach, Bulletin 1217, Item 1; Lantz v. Hightstown, 46 N.J.L. 102; White v. Atlantic City et al., 62 N.J.L. 644. This doctrine has been followed in this Division since the beginning of its administration of alcoholic beverage control. See Re Hendrickson, Bulletin 47, Item 10; Plager v. Atlantic City, Bulletin 80, Item 11; Tyler's Country Club, Inc. v. Woodbridge, Bulletin 1311, Item 1. I therefore conclude that the vote of December 12, 1963, was a final and decisive vote on the application for renewal and that its effect in granting the transfer could not be aborted by Council's refusal to adopt the requested corrective resolution.

II

Respondent contends, however, that, since the building was not yet completed, the omission of the condition in the resolution, namely, that "The transfer shall not be endorsed and effective unless and until the premises at 400 Seaton Avenue are first duly completed in keeping with the filed and approved plans and specifications," rendered the resolution fatally defective, and required an entirely new action on the part of the issuing authority. In support of this the respondent points to the Division letter dated December 27, 1963, wherein it was suggested that corrective action be taken by the Council in the form of a new resolution embodying the suggested condition. It should be noted, however, that nowhere in that letter is express statement made that the resolution is void because of the absence of the said condition or that the absence of such condition was a substantive defect. (I am mindful, however, of the Division letter of February 27 (after the action taken on the February 13, 1964 meeting) in which was expressed an opinion that this was a substantive omission. Of course, this was an ex parte opinion, subject always to reconsideration in the event of an appeal, as here.)

The testimony of all of the councilmen clearly indicates that they understood that the mere approval of the application of December 12 did not mean that the license would actually be endorsed and transferred; this would happen only upon the actual completion of the building in compliance with the plans and specifications therein filed. Thus, as Councilman Whitmeyer expressed it: "Personally, I would have considered it effective when the building was complete."

The fact of the matter is that the license was never actually endorsed for transfer because the building has not been completed, but the intention of the Council was very clearly delineated in the testimony of Mrs. Victoria Crane (the municipal clerk) who stated that she did not endorse the license and had no intention of endorsing the same until the building was completed in accordance with such plans and specifications. The witness further testified that the applicant had complied fully with the statutory prerequisites prior to the hearing. She was then asked the following question by me:

> "The Hearer: Well, if this building were completed at any time after December 12th, do you feel that you would have had to go back

to the Council to have a new resolution passed giving you the authority to endorse that application?

The Witness: Now, let me just think about this because this has never been brought up before. Now, the application itself was for a transfer of a license to these premises when they were completed and I would naturally assume that, since the motion was made that the transfer be granted, that was council's intent that I endorse the resolution or that I endorse the license when the building was completed, so that was my thought."

This Division has always sought to achieve substantial justice, and to provide such justice in fairness to all parties to litigation. Thus it has consistently given effect to the intent of resolutions and has often supplied obvious formal omissions to carry out such intent. Accordingly it has sought to avoid construction which would result in unreasonableness or in absurd consequences. The failure to express the subject condition, which was clearly in the minds of the Council on December 12 was obviously due to a misunderstanding of the formal requisites of the resolution. Cf. Re Salter, Bulletin 184, Item 8.

This Division recently has had an opportunity to express itself upon this very subject in a similar situation resulting from the omission of such clause in the resolution. In the recent case of Besser et als. v. Mullica and Jocris Company, Inc., Bulletin 1552, Item 1 (decided January 21, 1964), it was stated as follows:

> "This Division, in numerous cases, has taken a liberal view with respect to the inclusion of this particular provision in the granting resolution, when the fact of the prior acceptability of such plans has been determined by the municipal issuing authority. The mere failure to make the magic statement has not been considered to be sufficient cause fatally to defeat such resolution. This Division has always been interested in fair play and substantial justice, rather than in mere form. Cf. Wilson v. Schnettler, 5 L. Ed. (2d) 620 (U.S. Sup. Ct. 1961). If urgent need be, the resolution may be amended nunc pro tunc."

In other words, granted that it is a substantive matter that plans and specifications be filed when application is made for licensing of a building to be constructed, so that the issuing authority and possible objectors will be apprized of the nature of the building and its suitability for licensing, it does not follow that it is equally substantive that the granting resolution recite that the license may not be issued or the transfer endorsed until construction is completed in accordance with plans and specifications filed and approved. It should be added, however, that better procedure would normally dictate the inclusion of the said condition in the resolution.

One further point: Between the date of the original hearing of this appeal on April 8, 1964, and April 27, 1964, Council adopted another resolution at its regular meeting on April 23, 1964, in a form proposed and prepared by the attorney for the objectors. The operative portion of this resolution states:

"NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council of the Borough of Roselle Park that they do hereby state as and for a matter of record that in express reliance upon the information contained in the communications received from the Division of Alcoholic Beverage Control, the Council refused to take action in amending or correcting the deficient resolution, it being their intention, understanding and desire that the aforesaid transfer not be made valid or effective..."

The passage of this resolution was, of course, entirely gratuitous in view of the pendency of the appeal and the hearings thereon.

III

In view of my recommended finding that the December 12, 1963 resolution is valid and binding, there remains for consideration the objections raised by the objectors to the said transfer on the ground that there is no present need or necessity for the same. As I pointed out hereinabove, the hearing before me was continued in order to enable the objectors on this appeal to present their objections and to be heard fully thereon even though no formal appeal was filed by the said objectors from the action of the Council on December 12, 1963. The assigned reason for failing to take such appeal was that counsel for objectors had been informed that the said December 12, 1963 resolution was defective.

The applicant testified that he received notice from his landlord to vacate the premises and his application for transfer was primarily based on hardship. This fact is dramatically emphasized by his present predicament in which he finds himself. He has been evicted from his premises and is presently out of business.

James R. Power (a councilman) testified that he voted in favor of the application for transfer because it was his feeling that such action would be in the best interests of the public and the licensee and all concerned that the application be granted. On cross examination he admitted that he had voted against a prior transfer application of this applicant, filed in 1962, because there appeared to be some expression "that there would be a colored problem, that is, the customers who might come in to the tavern might be colored and the people of the neighborhood mentioned that."

This was one of the considerations for his voting against the resolution at that time. Another consideration at that time was the fact that it was within a block or so from a Catholic church. However, he had since spoken to Rev. Father Chiego who assured him that the said transfer would not interfere with his church, his parish or his work. The Pastor also told him that the fact that children might pass the tavern should be of no consideration because "if passing by a tavern was going to corrupt children, then there were people all over the country today who are in such circumstances and he rejected the idea that this could be corrupted to the people." He also considered the fact that there was a funeral parlor across the street and two other business houses in the area. He concluded that this would not be detrimental to the area.

Councilman John W. Whitmeyer testified that he listened

carefully to the objections presented at the meeting at which the December 12 resolution was considered and, after considering the same, he voted in favor of the said transfer. He has lived in this community for over fifty years and felt that such action would be in the best interests of the community.

Councilman Joseph S. Rixon, who also voted in favor of the resolution, expressed his reasons for so voting in the following language:

> "I felt that this man had every moral and legal right to ask for and be granted the transfer, and I felt that the man personally was a credit to his community. After many, many years of having a very clean record, I felt that he would not be a detriment, his business would not be a detriment to his new neighborhood any more than he had been to his old."

He also insisted that any prior action of the Council in former years should not bind the Council's hand upon this application.

Councilman Salvatore Cacosa testified that he voted against the application on December 12, 1963, because he felt that there was no change in the circumstances presented from the application made by Cascio in 1962. His reason for voting against the transfer was that he was anxious to keep the location of taverns on main thoroughfares and felt that the transfer would be to a residential area. Also he felt that it was about a block-and-a-half or two blocks to a school. He also felt that there was insufficient parking facilities. On cross examination he admitted that he discussed this matter with the Pastor of the nearby Catholic church located about two blocks from the proposed site and was advised by the Pastor that "it's up to the people to decide, it's up to the governing body to decide." He admitted that there was a full and complete hearing on this application, the vote was four-to-two in favor of granting said application, and that it was a final action on the part of the Council.

Mayor Herbert M. Barnes testified that he was present at the December 12 meeting and listened to the testimony then presented at which there was a vote for approval of said application. He did not vote thereon. He stated, however, that he was opposed to the transfer in 1963 just as he was opposed to the transfer in 1962 because he felt that no tavern should be transferred from place to place from Westfield Avenue to a residential area. In addition, he also was concerned with the parking problem at the proposed new premises and such move would "set a poorprecedent relative to Roselle Park because it would encourage, perhaps, others with similar problems to make application for the transfer of a license of their respective licenses off of Westfield Avenue into areas that they deemed more conducive."

On cross examination he conceded that the area immediately contiguous to the proposed site is a railroad area and not entirely residential. He also admitted that a funeral parlor and a TV repair shop were operating directly across the street from the site in question. With respect to the propsed building as compared to the other buildings in the immediate area

he stated, "As particularly in comparison to the building that is cater-corner across the street, it is much more esthetic in appearance to myself personally." He added that there are other commercial enterprises, such as a greenhouse, contiguous to the funeral parlor.

The two newly elected councilmen testified that they voted to deny the application at the February 13 meeting and admitted that no testimony, either in support of or in opposition to the said application, was presented at this meeting. It is important to note that neither of these councilmen participated in the deliberations of the Council on December 12, 1963.

Although this hearing was continued for the specific purpose of permitting the objectors to present testimony similar to that presented at the hearing before the Council, not a single neighboring resident appeared or testified. The only witness (other than the councilmen) called by the attorney for the objectors was Saul Schachter, an appraiser and consultant, who produced a sketch and pictures of the area immediately surrounding the proposed new site. It was his opinion that the existing character and development of this neighborhood is multi-family residential, with most houses in good condition. Much of his testimony was concerned with distances from the proposed site to schools and churches. However, he was unfamiliar with the statutory method of measurement applicable in alcoholic beverage matters.

In considering whether the Council at its December 12 meeting acted in the sound exercise of its discretionary authority in approving the application for transfer, it may be well to restate the basic operative principles in order to present the guidepost for an evaluation and determination of such action. The burden of establishing that the action of the respondent issuing authority was erroneous and should be reversed rests with the objectors. Rule 6 of State Regulation No. 15.

No one has a right to the issuance, renewal or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct. 1946); Biscamp v. Teaneck, 5 N.J. Super. 172 (App.Div. 1949). The decision as to whether or not the license will be transferred to a particular locality rests within the sound discretion of the local issuing authority in the first instance. Hudson-Bergen County Retail Liquor Stores Association v. North Bergen et al., Bulletin 997, Item 2. As Mr. Justice Jacobs pointed out in Borough of Fanwood v. Rocco et al., 33 N.J. 404, at p. 414:

> "Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for ... license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him .... Under the settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable...."

My examination of the testimony in this case persuades me that the Council acted reasonably and in the public good in granting the transfer application. I am also convinced that the

Council considered all the matters raised by the objectors, including the character of the neighborhood and the vital question of public necessity and convenience. They found, from the testimony, that the neighborhood is obviously not exclusively residential in character and the proposed building would not be a detriment to the immediate vicinity. In fact, there is affirmative expression that it would be an esthetic improvement.

The Council also properly favorably considered the good character of the applicant and the hardship circumstances which have become more acute at this time because of the fact that the applicant has now been evicted from his old premises. Cf. Watson and Hardeman v. Camden et al., Bulletin 1010, Item 1. There is no evidence before me on this appeal of any improper motivation on the part of any member of the Council nor has the same been suggested.

Under all the facts and circumstances, I find that the objectors have failed to carry such burden of establishing that the action of the Council in granting the transfer was erroneous and should be reversed.

In conclusion, it should be emphasized that, although the municipal resolution inadvertently omitted the conditional clause limiting the actual endorsement of the license until the building is completed in accordance with the plans and specifications theretofore filed (cf. Re Murphy, Bulletin 389, Item 11), it is unarguable that the obvious intention of the Council was to impose such limitation. This was understood not only by the Council and the municipal clerk, but by the applicant as well. In fact, the transfer of the license has not been actually endorsed so that no harm was caused to any of the parties.

I therefore recommend that the action of the Council, in effect reconsidering and denying by its resolution of February 13, 1964 the application for transfer previously granted by the resolution of December 12, 1963, be reversed; that the grant of the transfer by the resolution of December 12, 1963 be affirmed; and that the transfer be endorsed on the license certificate when the premises at 400 Seaton Avenue are duly completed in keeping with the filed and approved plans and specifications.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's Report and written argument in support thereof were filed with me by the attorney for the appellant. Answers to the exceptions and written argument in support thereof were thereupon filed with me by the attorney for respondent.

After careful consideration of the record herein, including the transcript of the testimony, the exhibits, the arguments of counsel, the Hearer's Report, the written exceptions and argument thereto, and the answers and exceptions to the argument thereto, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

I have considered each of the exceptions filed and find that there is no basis in law or fact in the same. I particularly want to point out that the issue of res adjudicata raised in the said exceptions is not applicable because of the time element herein and the unusual factual and legal ramifications of the

present application. In this connection it is well to quote the applicable language of Justice Burling in Russell v. Board of Adjustment of the Borough of Tenafly et al., 31 N.J. 58, at p. 66 (1959), where he noted that the issue before the Board was "whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the application" and "the board did not abuse its discretion in considering the second application on its merits."

In a well reasoned and definitive discussion of the issue of res adjudicata in Lubliner et al. v. Board of Alcoholic Beverage Control for the City of Paterson et als., 33 N.J. 428 (1960), Justice Jacobs points out that:

> "Municipal issuing authority's function in determining whether additional liquor licenses shall be allowed in municipality or in particular area is primarily a policy determination on basis of facts which are generally undisputed, and where authority reasonably entertains opinion that it is in public interest to do so, it is free to alter an earlier policy determination ...."

This is particularly applicable in the situation sub judice. All licenses under the Alcoholic Beverage Law are annual licenses which may be renewed annually upon due application and approval. R.S. 33:1-26.

Since, as stated hereinabove, the facts and circumstances differed on the subsequent application considered by the local issuing authority, the doctrine of res adjudicata was not applicable. This Division has always recongized the right of a municipal issuing authority to alter in the reasonable exercise of its discretion its earlier policy. My function on appeal is not to substitute my personal opinion for that of the local issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of my own personal opinion. Hudson Bergen County Retail Liquor Stores Association v. North Bergen et al., Bulletin 997, Item 2.

Accordingly, it is, on this 22nd day of July 1964,

ORDERED that the action of the respondent Council, in effect reconsidering and denying by its resolution of February 13, 1964 the application for transfer previously granted by the resolution of December 12, 1963, be reversed; that the grant of the transfer by the resolution of December 12, 1963 be affirmed; and that the transfer be endorsed on the license certificate when the premises at 400 Seaton Avenue, Roselle Park, are fully completed in consonance with the filed and approved plans and specifications.

JOSEPH P. LORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (SOLICITATION FOR PROSTITUTION) - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against Eula Hardy t/a Hardy's Rendevous 146 Mulberry Street Newark, N. J. Holder of Plenary Retail Consumption License C-628, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark	CONCLUSIONS AND ORDER

Elias I. Cohen, Esq., Attorney for Licensee
Edward F. Ambrose, Esq., Appearing for the 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 Friday, March 20, 1964, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., solicitation for prostitution and the making of overtures and arrangements for acts of illicit sexual intercourse; in violation of Rule 5 of State Regulation No. 20."

Four ABC agents participated in an investigation of the licensed premises which resulted in the preferment of the charge herein. The primary testimony was given by Agent S and, by stipulation, counsel for the licensee agreed that the said testimony on direct examination would be corroborated by Agents Sc and C, with leave, of course, for cross examination of these agents.

The testimony may be briefly summarized as follows: At 8:50 p.m. on Friday, March 20, 1964, in the company of Agent Sc, Agent S entered the licensed premises and seated himself at the bar. Shortly thereafter, they were approached by a female called Fran (later identified as Sharon T) and, at her request, the agents purchased several drinks for her and her male companion (later identified as Lee McCall).

McCall suggested to the agents that this female was amenable to have intercourse with them, but that they would have to arrange for her charge for same directly with her. Agent S spoke

to Sharon while being served a drink by a bartender known as Birdie (later identified as James Monroe), who was standing in front of the two agents at the business side of the bar within a few feet of them during this conversation.

Sharon told them that her charge would be $15 for each agent, plus $3 for the use of McCall's room. The agent related this information to Birdie, who replied, ""I don't want to know nothing' and raised his hands." Shortly after that, Sharon went to the ladies' room and, before her return, had a discussion with Birdie at the far end of the bar. When she returned to the seat next to Agent S, he inquired as to her conversation with Birdie; she informed him that she had asked Birdie whether "we were okay, and Birdie put the okay on myself and Agent Sc." She also volunteered that Birdie told her that "if I wasn't okay, he wouldn't let us sit with her. And if she lines up a fellow inside the tavern and he's not okay, Birdie lets her know about it."

Arrangements having been concluded, Agent S told Birdie that he would accompany Sharon to McCall's apartment in Newark. Pursuant to their arrangement, Sharon left the tavern and he followed her within a minute or two.

Sharon entered the car driven by Agent Sc and the two agents accompanied her to the apartment, as prearranged, with Agent S going into the apartment first alone with Sharon. When he entered the apartment, he delivered to her at her request two bills in the total sum of $15, the serial numbers of which had been previously recorded. Shortly thereafter, ABC agents, accompanied by Newark police officers, entered the room, found Sharon lying naked in the bed, and questioned her with respect to her activities.

She admitted that she had come to the apartment for the purpose of having sexual intercourse with the agent, and the two marked bills were produced from her purse.

The agents returned to the licensed premises and questioned Nathaniel Hardy, the manager of these premises and the brother-in-law of the licensee, who denied that such activity had taken place at the tavern. They also questioned Birdie, who admitted that he had served them drinks and that he had had a conversation with them. When they confronted him with the charge of solicitation for prostitution, he said "I don't want to get involved in that business", although he admitted that he had spoken to Sharon when she emerged from the ladies' room, as heretofore testified to.

On cross examination, Agent S reiterated that the bartender knew what had occurred. He also stated that Sharon had given to the Newark police and ABC agents a voluntary unsigned statement, in which she admitted the gravamen of this charge.

Agent Sc, on cross examination, asserted that the bartender Birdie spent most of the time with the two agents because there were very few drinks being sold at that time.

Agent C participated in this investigation to the extent that he remained on the outside of the premises at a point of observation; and he was the one who recorded the serial numbers of the marked bills. At 10:20 p.m. Agents S and Sc emerged from the tavern; and this witness noted that Sharon, who had preceded them, walked toward them and said, "Pick me up at the corner." After she got into the car, he followed it in his own vehicle to the appointed apartment. He notified the police officers and, in their company, entered the apartment and corroborated the scene as hereinabove described.

Eula Hardy, the licensee, testified that she was not on the premises on the night in question but had given specific instructions to her employees with respect to the behavior of men and women at the bar. "If they come in and sit with the men in the bar, and if they didn't come in with them don't let them buy them a drink, and don't allow them to hang around and beg for drinks, and no soliciting." On cross examination, she admitted that Birdie, her bartender, is still employed on the licensed premises and that her brother-in-law, Nathaniel Hardy, is the manager there. So far as she is concerned, she left everything to her brother-in-law.

Nathaniel Hardy testified that he accepted a drink offered by Agent S, and that he did not see anything unusual in the behavior of any of the patrons. This was true particularly of Sharon, who, he noted, came into the bar on several occasions prior to the date in question. He also observed that Sharon did not leave with the agents.

On cross examination, the witness insisted that Sharon entered the tavern on previous occasions with her boy friend and and he did not know that she was a prostitute. He knew her only as a patron.

James Monroe, the bartender on this occasion, denied overhearing any conversation between Agent S and Sharon because he was busy tending bar. He insisted that the only conversation between the agents and himself was with respect to his nickname "Birdie", and on no other subject. He was questioned at length concerning the conversation among the agents, Sharon and McCall and his consistent answer was, "I don't remember." He could not recall when the agents left or when Sharon left, or what was said by anyone immediately prior to their leaving.

Although I urged this witness to recall the conversation on the return of the agents to the premises, he could not recall any conversation with the agents nor could he remember whether the agents had asked him about the conversation he had had with Sharon, as heretofore testified to. He insisted that "this has been a long time. A lot of things--". I reminded him that this incident had happened only two months ago, to which he answered, "That's considered a long time. I just couldn't think about this thing, because there is nothing there not ordinary that I could see." Further, he insisted that the only conversation he had had with the agents was their inquiring of him as to his name and address. He finally admitted that the agents did ask him about Sharon and the incident and he answered, "I don't know anything about it."

I have carefully evaluated the testimony presented herein, both on behalf of the Division and on behalf of the licensee, and have also given full consideration to the written memorandum submitted by the licensee's attorney in summation. I am persuaded that the narrative of the agents is a forthright and credible one; that, in contrast, the defense offered by the licensee through her agents is incredible and unbelievable. I am singularly unimpressed with the testimony of Monroe, the bartender whom the agents placed at a few feet from them during the entire conversation they had with Sharon. If their testimony is to be believed, and I do believe it, he knew exactly what was occurring. This is substantiated by Sharon's statement to the agent that unless those whom she solicited were "okay" with Monroe, he would not permit her to solicit them.

I am also convinced that Nathaniel Hardy was well aware of what was going on on the premises at the time and did nothing to prevent such conduct. The mere fact that the licensee was not on the premises does not relieve her from responsibility for the con-

duct of her agents and employees. Stein v. Passaic, Bulletin 451, Item 5. Licensees may not avoid the responsibility for the conduct of the licensed premises merely by closing their eyes and ears. On the contrary, licensees and their employees must use their eyes and ears, and use them effectively, to prevent improper use of the premises. Re Ehrlich, Bulletin 1441, Item 5; Bilowith v. Passaic, Bulletin 527, Item 3.

In this case, the licensee's agents and employees knew, or should have known, of Sharon's activities and, by their conduct, permitted and suffered the occurrence of this violation. The licensee therefore is clearly inculpated by the profligacy of the deliberate misconduct of her employees. Such conduct constitutes a grave threat to the public health, welfare and morals and, unless eliminated, tends toward abuse and abasement. Kravis v. Hock, 135 N.J.L. 259 (Sup. Ct. 1947); In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

There is no question that Sharon had entered this tavern unaccompanied by anyone and that she left that way. However, the testimony is clear that the agents followed her out according to a prearrangement. I am also persuaded that while the testimony is not conclusive that the licemsee's employees actually participated in making the precise arrangement, the overtures to Sharon were at least encouraged by them. This is sufficient support for the charge that the licensee allowed, permitted and suffered lewdness and immoral activity upon her licensed premises, viz., the solicitation for prostitution and the making of overtures and arrangements for acts of illicit sexual intercourse. Essex Holding Corp. v. Hock, 136 N.J.L. 28. Cf. Re Ritchie's, Inc., Bulletin 1426, Item 1.

The Division has proved its charge by a fair preponderance of the believable evidence and I recommend a finding of guilty of said charge.

Licensee has a record of suspension of license by the municipal issuing authority for thirty days, effective March 30, 1964, for permitting the sale and service of alcoholic beverages to a minor and conducting the licensed place of business as a nuisance in that she permitted lewdness and immoral activity therein on August 5 and 6, 1963. That suspension is the subject of an appeal to this Division and hearings thereon have been concluded. However, the appeal is still unresolved since no order has yet been entered by the Director with respect thereto. Cf. Re Alaburda, Bulletin 1488, Item 8.

The record of suspension disregarded because the effective date thereof was subsequent to the date of the alleged violation herein, and because of the pendency of the appeal, I recommend suspension of this license for a period of sixty days. Re C. & S. Tavern Corp., Bulletin 1549, Item 1; Re Club Harlem, Inc., Bulletin 1539, Item 2.

Conclusions and Order

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 6 of State Regulation No. 16.

Having carefully considered the transcript of the proceedings, the exhibits introduced into evidence at this hearing, the oral argument of counsel and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

This matter was determined concurrently with an appeal by the licensee from a suspension of license by the municipal issuing authority. In the said appeal, I affirmed the finding

of guilt with respect to one of the charges involving a dissimilar violation. However, since the effective date of the suspension imposed by the Municipal Board was subsequent to the date of the alleged violation in this matter, the said suspension will not be considered as a prior record for the purpose of the imposition of penalty herein.

Accordingly, it is, on this 27th day of July, 1964,

ORDERED that Plenary Retail Consumption License C-628, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Eula Hardy, t/a Hardy's Rendevous, for premises 146 Mulberry Street, Newark, be and the same is hereby suspended for sixty (60) days, commencing at 2:00 a.m. Thursday, August 13, 1964, and terminating at 2:00 a.m. Monday, October 12, 1964.

JOSEPH P. LORDI
DIRECTOR

3. STATE LICENSES - NEW APPLICATIONS FILED.

Popper Morson Corp. (New Corporation)
38-40, 42, 44-46 Essex Street and
41-47 Morris Street
Jersey City, N. J.
Application filed September 9, 1964 for person-to-person transfer of Rectifier and Blender License R-4 from Popper Morson Corp. (Old Corporation).

Popper Morson Corp. (New Corporation)
48-52 Essex St. & 41-47 Morris St.
Jersey City, N. J.
Application filed September 9, 1964 for person-to-person transfer of Plenary Wholesale License W-40 from Popper Morson Corp. (Old Corporation).

Popper Morson Corp. (New Corporation)
48-52 Essex Street
Jersey City, N. J.
Application filed September 9, 1964 for person-to-person transfer of Warehouse Receipts License WR-1 from Popper Morson Corp. (Old Corporation).

Joseph P. Lordi
Director