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

BULLETIN 1711 January 18, 1967

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ITEM

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

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1. DISCIPLINARY PROCEEDINGS - INDECENT ENTERTAINMENT - HOSTESS ACTIVITY - PRIOR SIMILAR AND DISSIMILAR RECORD - LICENSE SUSPENDED FOR 125 DAYS - NO REMISSION FOR PLEA ENTERED AFTER PARTIAL HEARING.

In the Matter of Disciplinary Proceedings against Beef and Bird, Inc. t/a Black Orchid Lounge 2415 Pacific Ave. Atlantic City, N. J., Holder of Plenary Retail Consumption License C-62 for the year 1965-66 and C-82 for the year 1966-67, issued by the Board of Commissioners of the City of Atlantic City.	CONCLUSIONS AND ORDER

Blatt, Blatt & Consalvo, Esqs., by Martin L. Blatt, Esq., Attorneys for Licensee; Richard Silver, Esq., Associate Counsel
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

After partial hearing, licensee pleaded non vult to charges alleging that (1) on March 26, April 16 and May 6, 1966, it permitted lewdness and immoral activity (indecent entertainment) on the licensed premises, in violation of Rule 5 of State Regulation No. 20, and (2) on March 26 and May 15, 1966, it permitted female entertainers to accept drinks at the expense of male patrons, in violation of Rule 22 of State Regulation No. 20.

With respect to the first charge, reports of investigation disclose that on the dates alleged several female entertainers performed standard striptease routines, accompanied by bumps and grinds and suggestive posturings and gesturings. With respect to the second charge, reports disclose that female entertainers drank at the expense of male patrons, specifically champagne "cocktails" (champagne over ice) dispensed by the split (6.4 ounces) of one of the cheaper domestic champagnes (retailing at 79¢) at a charge of $6.00.

Licensee has a previous record of suspension of license by the Director for ten days effective September 11, 1961, for concealment of criminal records of stockholders in its license application and for sixty days effective February 20, 1964, for permitting indecent entertainment on the licensed premises (Re Beef and Bird, Inc., Bulletin 1415, Item 5; Bulletin 1556, Item 2) and by the municipal issuing authority for twenty-five days effective November 23, 1964, for permitting hostess activity.

The prior record of the suspensions of license for similar violations in 1964 within the past five years considered, the license will be suspended on the first charge for sixty days and on the second charge for sixty days (Re Lanin Corporation, Bulletin 1601, Item 1), to which will be added five days by reason of the record of suspension for dissimilar violation occurring in 1961 within the past five years (Re Manruff Corp., Bulletin 1691, Item 1), or a total of one hundred twenty-five days, without remission for the confessive plea entered after partial hearing (Re Blue Fountain Inc., Bulletin 1647, Item 4).

Accordingly, it is, on this 16th day of November 1966,

ORDERED that Plenary Retail Consumption License C-82, issued by the Board of Commissioners of the City of Atlantic City to Beef and Bird, Inc., t/a Black Orchid Lounge, for premises 2415 Pacific Avenue, Atlantic City, be and the same is hereby suspended for one hundred twenty-five (125) days, commencing at 7 a.m. Tuesday, November 22, 1966, and terminating at 7 a.m. Monday, March 27, 1967.

JOSEPH P. LORDI,
DIRECTOR

2. APPELLATE DECISIONS - ISHMAL v. NEWARK.

Johnnie Mae Ishmal, t/a Johnnie's Club 38, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	CONCLUSIONS AND ORDER

William Osterweil, Esq., Attorney for Appellant
Norman N. Schiff, Esq., by Anthony J. Iuliani, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant, holder of plenary retail consumption license for premises 132 Orchard Street, Newark, was found guilty by respondent (hereinafter Board) of violation of Section 3.1(b) of the Revised Ordinances of the City of Newark in that she failed to have the licensed premises closed between the hours of 2 a.m. and 7 a.m. on Monday, March 7, 1966, whereupon her license was suspended for fifteen days effective September 12, 1966. She filed this appeal challenging such action, and an order was entered on September 9, 1966 staying the Board's order of suspension until the further order of the Director.

In her petition of appeal appellant alleges that the Board's action was erroneous for reasons which may be summarized as follows: (a) the decision was contrary to the weight of the evidence, (b) the findings were made on matters extraneous to the evidence.

The answer of the Board admits the jurisdictional facts contained in the petition but denies the substantive allegations therein, and asserts that its decision was based upon the "factual testimony before the Board from which it, in its sound discretion, concluded that the penalty imposed substantiated such action."

Both parties agreed to present this appeal solely upon the stenographic transcript before the respondent Board, pursuant to Rule 8 of State Regulation No. 15.

The following picture is reflected from the transcript: Patrolman Anthony B. Spera, a Newark police officer, testified that, while on duty in a police patrol car on the early morning of March 7, 1966, he and his partner Patrolman Ruggiero rode past the licensed premises, observed that the lights were on in these premises and seven patrons were emerging from the said premises. He noted that it was 2:41 a.m., and checked the time with the radio dispatcher. Leaving his vehicle, he questioned the appellant herein as to why these patrons were in the tavern and were leaving at this time after the closing hour. Her reply was that it was "none of my business." The other patrons gave him their names and addresses upon demand, but no further information was elicited from them. Under the local ordinance, the time for closing is 2 a.m.

The appellant gave the following account: She had visited several other bars in the City on that evening with her friends and returned to the licensed premises at 1:55 a.m. She went inside, took money from the register and then learned that the motor vehicle in which they were traveling could not be started. She stated that her usual policy is to put on the bright light after the closing hour, but emphatically denied that these patrons were in the tavern; insisted that the patrons were standing on the outside of the tavern at the time the police officers arrived, and that the door was locked.

Monroe Adams testified that he was with the appellant on the morning of March 7 at about 2:41 a.m.; that in fact he was standing on the outside of the tavern when the officers approached. He denied that the police officers questioned him as to what he was doing on the outside of the premises. He stated that he was with the appellant's party and that there were five or six persons with them.

Officer Spera, recalled in rebuttal, reiterated that, when he came to these premises, he saw these patrons in the premises, and they left the premises during his presence.

The applicable ordinance requires that licensed premises shall be closed between 2 a.m. and 7 a.m. on weekdays.

In construing a similar ordinance, it has been held that "closing" means "that all members of the public must be excluded." Bulletin 574, Item 7; Re Heisel, Bulletin 318, Item

12. Furthermore, for excluding members of the public, closing or locking the doors, as the appellant herein testified was the situation, is not enough. Patrons must be off the premises. Re Casarico, Bulletin 268, Item 1.

In Richards v. Bayonne, 61 N. J. L. 496, at p. 497, the court stated:

> "To 'keep open,' as applied to places of business and to public houses, is a familiar expression, constantly in use. Its meaning in the present case is clear, viz., that the proprietors of public houses shall temporarily cease to entertain the public. It does not refer to the closing of shutters or to the barring of doors. These may be done in order that the place may 'keep open.' It is not met by the mere refusal to sell intoxicating liquors. It means more. As 'to keep open' is a standing invitation that gives to the public a right of access and of entertainment, so 'not to keep open' means that this invitation is withdrawn and that all public entertainment has ceased...."

As the court stated in State v. Donovan (S.D.), 132 N.W. 698, annotated in 36 L.R.A. (N.S.) 166:

> "The object of the statute is to prevent any transaction connected with the business, in the room wherein the business is located, during the prohibited periods. The ease with which such a law may be evaded and its object defeated has inclined the courts to look with disfavor upon any excuse for the presence of the proprietor or other persons in the place at times when the business may not be lawfully conducted."

Cf. Town House, Inc. v. Montclair, Bulletin 792, Item 3.

I have carefully considered the evidence adduced herein and I find that the testimony of the police officer more accurately reflects what actually occurred on the date and at the time testified to by him. He stated that he checked the time with the radio dispatcher so that there can be no question that his observations were made forty-one minutes after the time set by the ordinance for closing. It does not seem realistic to believe that at 2:41 a.m. this large number of persons would be congregating outside the premises if in fact the appellant arrived at the premises forty-six minutes prior to the arrival of the police officers. I have, of course, not had the opportunity to observe the manner and demeanor of the witnesses as they testified. However, the Board did have that opportunity and was satisfied, as I am, with the credibility and truthfulness of the police officer.

Thus the Board in its judgment made its determination based upon its fair and objective evaluation of the testimony. It accordingly found that the premises were not closed during the proscribed hours and that the guilt of the appellant was established by a fair preponderance of the credible evidence. The test to be applied in this case is whether reasonable men, acting reasonably, could have arrived at its decision. The action of the Board may not be reversed by the Director unless he finds the action of the Board was clearly against the logic and effect of the presented facts. Cf. Hudson Bergen County Retail Liquor Stores Association et al. v. Hoboken et al., 135 N.J.L. 503.

I conclude that the appellant has failed to establish by the necessary preponderance of the believable evidence that the action of the Board was erroneous. I find, indeed, that its

action was based upon the greater weight of the credible evidence. See Katz v. East Orange, Bulletin 1345, Item 2. I recommend, therefore, that an order be entered affirming the Board's action and fixing the effective dates of the suspension heretofore imposed by the Board and stayed pending the appeal.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's report and argument in support thereof were filed by the attorney for appellant.

I find that the matters contained in the exceptions, which involve a purely factual question, had been considered in detail by the Hearer in his report and that they are without merit. A request for oral argument is deemed unwarranted and is accordingly denied.

Having carefully considered the entire record, including the exceptions filed, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of November, 1966,

ORDERED that the action of respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-113, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Johnnie Mae Ishmal, t/a Johnnie's Club 38, for premises 132 Orchard Street, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Monday, November 21, 1966, and terminating at 2:00 a.m. Tuesday, December 6, 1966.

JOSEPH P. LORDI,
DIRECTOR

3. APPELLATE DECISIONS - GOMULKA v. LINDEN.

Elsie Gomulka and Richard Gomulka, Appellants v. Municipal Board of Alcoholic Beverage Control of the City of Linden, Respondent.	)	On Appeal CONCLUSIONS AND ORDER

Leonard and Leonard, Esqs., by Charles E. Leonard, Esq., Attorneys for Appellants.
Jerome Krueger, Esq., by Richard W. Kochanski, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal challenges the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Linden (hereinafter Board) whereby on July 11, 1966, it denied appellants' application for renewal of their plenary retail consumption license for premises located at 768 Brunswick Avenue, Linden.

The basis for the respondent's action was set forth in the following statement made at the hearing before it:

> "Chairman McCrann stated that an application for these premises had been before the Board at its meeting held January 10th, 1966, which application had been approved by the Board to become effective on approval from the Building Inspector after all repairs to the building had been made in accordance with sketch submitted. He added that up to this date no acceptable plans had been submitted to the Building Inspector for these alterations and repairs.
>
> "Chairman McCrann stated that the applicants had not shown good faith since January 10th by not having submitted any plans for these repairs and Commissioner Handley stated that there was no license and in effect as of June 30th, 1966, and therefore no new license can be issued. On motion of Commissioner Handley, seconded by Commissioner Malle, on roll call, it was unanimously ordered that this application be denied."

The petition of appeal alleges that the action of respondent was erroneous for the following reasons: (1) the appellants acted in good faith by entering into an agreement for the remodeling of the said premises, and (2) the action of the respondent was arbitrary and capricious. The Board in its answer sets forth that (1) an application for a transfer to appellants

of the said license was approved by it on January 10, 1966 upon the special condition that the license was to be actually issued upon the completion of repairs and remodeling of the premises in accordance with filed plans and specifications; (2) such condition was not met because of "inactivity on [appellants'] part;" (3) since no license has actually been issued, this application was one for a new license and not for renewal, and (4) the Board was not statutorily authorized to issue such license.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for all parties to present their testimony.

The appellant Richard Gomulka testified that he purchased the existing license from Mil Bar, Inc. for the sum of $17,000, on which he made a down payment of $5,000 and entered into a mortgage for the balance of $12,000. On January 11, 1966 the Board granted a transfer of the said license on condition that the property be remodeled in accordance with the plans submitted with the said transfer application. He entered into negotiations with the Linden Lumber Construction Co., Inc. for the said remodeling and repairs to the premises, but found at that time he had no money. Nevertheless they finally entered into a written agreement on June 21, 1966 for the repairs to and reconstruction of the said premises, at a total cost to appellants of $16,328.76. At the time of the transfer Richard Gomulka was assured by the Chairman of the Board that he would be given adequate opportunity to complete the reconstruction of the building. The Board, however, refused to approve the application for renewal of the said license and set forth its reasons as aforesaid. A building permit was issued after the date of the July 11th meeting, and in fact a considerable amount of work has already been done on such reconstruction and remodeling by the Linden Lumber Construction Co., Inc.

My examination of the pleadings herein indicates that the Board refused to renew the said license upon two grounds: (1) Since the special condition had not been complied with on or before the expiration date of the 1965-66 license, it was without legal authority to approve the said application for renewal since in effect this was an application for a new license, (2) that the appellants had not acted in good faith because of their failure to comply with the said special condition and the Board, therefore, in its discretion acted reasonably in its determination not to grant the renewal.

The first reason for denial need not detain us as this thesis has been put to rest by explicit statutory provision and decisional law. It has been well established that an application for license renewal for premises not suitable for operation may properly and lawfully be granted subject to a completion-of-renovation or completion-of-alterations special condition (R.S. 33:1-32). Lethe, Inc. v. Harrington Park, Bulletin 1497, Item 1; Passarella v. Board of Commissioners of Atlantic City, 1 N. J. Super. 313, 318 (App.Div. 1949); Watson et al. v. Camden and Valentine, Bulletin 1010, Item 1; Re Harris, Bulletin 183, Item 11; Re Salter, Bulletin 184, Item 8. In the instant case, as noted, there were filed with the Board plans of the building as originally contemplated in keeping with the original requirement set forth in Re Salter, supra, and the pertinent specifications requirements of Rule 2 of State Regulation No. 2 appear to have been adequately fulfilled. There was in fact also attached to the application for renewal a copy of the written agreement entered into between the appellants and the Linden Lumber Construction Co., Inc. for the completion of the work as required

under the special condition.

It is clearly evident that the Board members misunderstood the provisions of the law regarding renewal of applications where the license has not been actually issued. There is no bar to such renewal of the application with the continuing condition that the license shall not be actually issued until the building is completed in accordance with the plans finally approved by the Board.

Commissioner Handley was clearly in error when he stated that, since no license was in effect as of June 30, 1966, no new license can be issued. Commissioner Charles E. McCrann, Jr., Chairman of the Board, testified that, if this license was not actually issued before June 30, 1966, "this license is to all intents and purposes dead" and "we cannot replace it because there are no new licenses issued." However, upon further examination he appeared to change his mind and felt that this was in fact an application for a renewal and not a new license. In any event, it was agreed by counsel that this reason was frivolous and that in fact the Board acted erroneously in basing its denial in part upon this premise. Such error would require reversal.

I shall nevertheless consider the only other basis for the Board's action, i.e., whether or not the appellants acted in good faith in seeking to comply with the special condition imposed upon the transfer of the said license, namely, that the building be remodeled and repaired in accordance with plans submitted. The Board argues that the appellants were negligent in not promptly entering into arrangements for the repair and remodeling of the said premises; that in fact they did not actually obtain a building permit up to the date of its consideration of this application for renewal and that, therefore, the Board in its discretion properly denied the said application for renewal.

The appellants, on the other hand, urge that, while it is true that they delayed for some months, they were assured by the Clerk and the Chairman of the Board that they would be given sufficient time within which to complete the said repairs; that they were in financially straitened circumstances, but that in fact an agreement was entered into with a contractor for such remodeling, which agreement, as heretofore noted, was attached to the application for renewal.

The Board reasoned that the failure of appellants to act with dispatch from January 11, 1966 to June 30, 1966 (when the then license expired) in fully complying with the special condition constituted such non-use as to evidence lack of good faith.

The general rule is that mere non-user will not of itself void a license. See Re Tarantola, Bulletin 570, Item 5. However, a municipal issuing authority should not be required to renew a license under which no business has been conducted for a protracted period and where convincing evidence in explanation and justification of non-user is not adduced. Hall v. Mt. Ephraim, Bulletin 786, Item 2. No one is entitled to renewal of a license as a matter of right. Zicherman v. Driscoll, 133 N.J.L. 586; see also Re Smith, Bulletin 784, Item 5, wherein (the fact being a six-year non-use of the license) the then Commissioner said:

> "This practice of non-user over a substantial length of time does violence to the paramount principle underlying the issuance of licenses, to

wit, that licenses shall be issued only in the interest of the public necessity and convenience."

See Empire Liquor Co. v. Newark and Rajah etc., Bulletin 995, Item 2. Obviously each case must depend upon its particular facts and circumstances. What is a protracted period and the explanation for such non-use become questions of fact upon which the ultimate question of discretion and reasonableness must be determined. Thus in Prickett v. Southampton, Bulletin 1484, Item 2, affirmed in Kalman and Prickett v. Southampton and Director, etc. (App.Div. 1963), not officially reported, reprinted in Bulletin 1527, Item 1, the period of non-user was more than six years and the evidence therein showed clearly that the last application for renewal was made not for any intention of operating under the license but solely to keep the license alive so as to permit a person-to-person and place-to-place transfer. So too, in Hall v. Mt. Ephraim, supra, there was no convincing evidence adduced in explanation and justification of the non-user, and the evidence indicated that there was no intention of operating at the premises sought to be licensed. See also Re Smith, supra, where the facts show that there was a complete lack of bona fides with six years non-user and with intention to "sell" the license and never to operate under it. A similar case to the one sub judice is Lethe, Inc. v. North Bergen, Bulletin 1537, Item 2, where there was a non-user for a period of three years. The Director found that the physical disability of the licensee was the cause of the non-use of his license, and determined that the application was made in good faith. Cf. Balzer v. Pennsauken et als., Bulletin 1064, Item 2. In the instant matter the period of non-use for the appellants was less than six months, and before the expiration of the license period the appellants entered into an agreement with a contractor for substantial consideration to complete the required work. Appellants also state that they have no intention of transferring the license, and it is their present intention to operate the license at these premises.

Richard Gomulka also stated that he has invested his entire life savings and has also made a heavy financial obligation both in the purchase of the license and in the agreement to put the premises in operating condition. This Division has consistently supported the thesis that the owner of a license or privilege acquires through his investment therein an interest which is entitled to some measure of protection in connection with renewal or transfer. R.S. 33:1-26. Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462.

From my examination I am satisfied that the appellants have acted in good faith. Fairness and justice would require that compassionate benefit of any doubt should be resolved in their favor under the circumstances presented.

Accordingly I conclude that appellants have sustained the burden of showing that the action of the Board was arbitrary, unreasonable and an abuse of its discretion. Rule 6 of State Regulation No. 15. It is therefore recommended that an order be entered reversing the Board's denial of appellants' application for a license renewal, and that the said license should be granted upon the special condition that the said license shall not actually be issued unless and until the proposed alterations and renovations to the said premises are first completed in accordance with the filed and approved plans and specifications.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the record herein, including the transcript of testimony, the exhibits and the Hearer's report, I adopt the conclusions and recommendations of the Hearer as my conclusions herein.

Accordingly, it is, on this 15th day of November, 1966,

ORDERED that the action of respondent be and the same is hereby reversed; and it is further

ORDERED that respondent be and it is hereby directed to grant appellants' application for renewal of their said license upon the special condition that the license shall not actually be issued unless and until the proposed alterations and renovations to the said premises are first completed in accordance with filed and approved plans and specifications.

JOSEPH P. LORDI
DIRECTOR

4. APPELLATE DECISIONS - MOLZON v. HOLMDEL.

RALPH H. and JANICE E. MOLZON, t/a MOLZON'S TAVERN,	)	
Appellants,	)	ON APPEAL CONCLUSIONS AND ORDER
v.	)	
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLMDEL,	)	
Respondent.	)	

De Rose & Serratelli, Esqs., by Richard C. Serratelli, Esq., Attorneys for Appellants.
Potter and Gagliano, Esqs., by S. Thomas Gagliano, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Ralph H. Molzon and Janice E. Molzon, t/a Molzon's Tavern, the holders of a plenary retail consumption license for premises at the northwest corner of Route 34 and Pleasant Valley Road, Holmdel, were found guilty by respondent in disciplinary proceedings of a charge alleging that they sold and delivered, allowed, permitted and suffered the sale and delivery of an alcoholic beverage in its original container for consumption off the licensed premises, and allowed, permitted and suffered the removal of such alcoholic beverage from the licensed premises on Sunday, March 6, 1966, in violation of Rule 1 of State Regulation No. 38. Respondent ordered the suspension of said license for a period of ten days effective July 1, 1966.

Upon the filing of this appeal challenging such

conviction, an order was entered on June 21, 1966, staying respondent's order of suspension until the further order of the Director.

In their petition of appeal appellants allege that respondent's action was erroneous and was not based upon the credible evidence adduced before it.

In its answer respondent admits the jurisdictional facts and asserts that its determination was based upon the credible evidence presented. In addition, it based its determination upon the admission by Ralph H. Molzon (the co-appellant) that he made the sale of the said alcoholic beverage on the date alleged to one Golden B. Collins, and upon the identification by the said Molzon of the bottle of vodka which was allegedly sold by him at that time.

The matter was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded counsel to present testimony under oath and cross-examine witnesses.

The testimony adduced at this plenary hearing reflects the following: ABC Agents S and B entered the subject premises at about noon on Sunday, March 6, 1966, and seated themselves at the bar. They observed a male (later identified as Golden B. Collins) enter the premises and speak to Molzon. Molzon served Collins several beers and, in the presence of the agents, placed a pint bottle of Pierre Smirnoff vodka in a brown paper bag and advised Collins that he could get it when he left; that he (Molzon) would place it in the back of the premises.

Collins left the premises followed by Agent S who noted that the paper bag was lying on the concrete sidewalk in back of the building. When Collins saw Agent S nearby, he did not pick up the bag from the sidewalk. At that point Agent S identified himself to Collins and returned with him to the premises. Molzon admitted making the sale and placing the pint of vodka in the paper bag for Collins. Collins, who at first denied the purchase, thereupon admitted it, after being advised by Molzon to cooperate. Molzon affixed his signature to the paper bag under the legend, "This bag contains one pint of Pierre Smirnoff Vodka sold to Golden B. Collins at Molzon's Tavern @ 1:35 P.M. Mar. 6, 1966, by Ralph Molzon." Collins also signed his name on the paper bag near Molzon's signature. Molzon also admitted to the agents that the alcoholic beverage was sold to Collins on credit.

On cross examination Agent S admitted that Collins did not in fact pick up the bag on the outside of the premises.

The only witness produced on appellants' behalf was Golden B. Collins, who denied that he had made the purchase of this bottle of vodka. He was then asked the following:

"Q Did you order a bottle of vodka?
A I asked Mr. Molzon could I buy one. He said, 'No' because these fellows was sitting outside."

He denied that he told the agents that he had ordered the said alcoholic beverage.

Applicable Rule 1 of State Regulation No. 38 provides:

"No licensee shall sell or deliver, or allow, permit or suffer the sale or delivery of any

> alcoholic beverage at retail in its original container for consumption off the licensed premises, or allow, permit or suffer the removal of any alcoholic beverage in its original or opened container from retail licensed premises, on Sunday, or before 9:00 A.M. or after 10:00 P.M. on any other day of the week." (emphasis supplied).

Counsel for appellants argues that there was no delivery of the alcoholic beverage since Collins did not pick up the bottle of vodka on the outside of the premises and, therefore, there was no violation of the said rule. He argues that, in order for there to be a sale, there must be a physical delivery.

R.S. 33:1-1(w) defines "sale" as applicable herein as:

> "Every delivery of an alcoholic beverage otherwise than by purely gratuitous title ... or the solicitation or acceptance of an order for an alcoholic beverage, and including ... barter, traffic in, keeping and exposing for sale ... possessing with intent to sell, and the gratuitous delivery or gift of any alcoholic beverage by any licensee." (emphasis supplied).

The fact that this transaction was a credit sale did not take the same out of the proscription of the applicable rule since there was no question in anyone's mind that Collins was required to pay for the alcoholic beverage and indeed intended to do so.

It has been held that even the mere acceptance of an order by telephone similarly constitutes a sale of alcoholic beverages. Re Gold's Drug Stores Corporation, Bulletin 231, Item 8; cf. Fran-Bo-Car, Inc. v. Englewood, Bulletin 1186, Item 3.

The rule further provides that the licensee shall not "allow, permit or suffer the removal of any alcoholic beverage in its original or opened container" during prohibited hours. Cf. Re Marinaccio, Bulletin 1688, Item 6.

It is clear, beyond peradventure of doubt, that appellants removed the alcoholic beverage from the premises and placed the same on the sidewalk outside the premises for the express purpose of having Collins pick up the bottle in consummation of the said sale.

Finally, it is empirically established, and not disputed by any testimony of the appellants, that Molzon admitted in a signed statement on the bag itself that he sold this bottle of vodka to Collins; and Collins also affixed his signature, acknowledging said sale. Collins' denial of the said purchase at this hearing lacks credibility in view of his failure to explain his signature on the paper bag.

My examination and analysis of the applicable rule generate no doubt whatever that there was in fact an offer of sale of alcoholic beverages, a completed sale and a delivery thereof by the licensee during prohibited hours. Under these circumstances I believe there has been established the necessary quantum of proof, namely, by a preponderance of the believable evidence, of appellants' guilt. I conclude that respondent acted reasonably and reached a reasonable conclusion based upon the credible evidence. Hudson Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502 (E. & A. 1947).

I therefore find that appellants have failed to meet the burden of showing that respondent's action was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15. It is recommended that an order be entered affirming respondent's action, dismissing the appeal, and fixing the effective dates for the suspension imposed by respondent.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the record herein, including the transcript of the testimony, the exhibits and the Hearer's report, I adopt the conclusions and recommendations of the Hearer as my conclusions herein.

Accordingly, it is, on this 14th day of November, 1966,

ORDERED that the action of the respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-2, issued by the Township Committee of the Township of Holmdel to Ralph H. and Janice E. Molzon, t/a Molzon's Tavern, for premises northwest corner Route 34 and Pleasant Valley Road, Holmdel, be and the same is hereby suspended for ten (10) days, commencing at 2:00 a.m. Monday, November 21, 1966, and terminating at 2:00 a.m. Thursday, December 1, 1966.

JOSEPH P. LORDI
DIRECTOR

5. APPELLATE DECISIONS - TUBE BAR, INC. v. JERSEY CITY and TARLOWE.

TUBE BAR, INC., t/a TUBE BAR, Appellant,	)	
v.	)	ON APPEAL CONCLUSIONS AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY, AND SAMUEL M. TARLOWE, Respondents.	)	

Michael Halpern, Esq., Attorney for Appellant.
T. James Tumulty, Esq., by James H. Dowden, Esq., Attorney for Respondent Municipal Board.
Cole & Cole, Esqs., by Larry M. Cole, Esq., Attorneys for Respondent Tarlowe.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) whereby on July 12, 1966, by

unanimous vote, it granted the application of Samuel M. Tarlowe for renewal of plenary retail consumption license for premises 912-920 Bergen Avenue, Jersey City, for the period beginning July 1, 1966 and expiring June 30, 1967.

Appellant, in its petition of appeal, alleges that the action of the Board should be reversed for reasons which may be summarized as follows: (1) that respondent Tarlowe does not have possession of the premises, nor did he have the right to possession as of July 1, 1966; (2) that the Board had no authority to approve said application; and (3) that such approval was arbitrary and unreasonable.

The answers filed by respondents admit the jurisdictional allegations but deny the substantive allegations of the petition. They assert that respondent Tarlowe did have possession and the right to possession of the said premises as of July 1, 1966, and does presently have possession and the right to possession thereto.

The appeal was heard de novo, pursuant to Rule 6 of State Regulation No. 15.

The pivotal and, indeed, sole issue, as stipulated by counsel, to be resolved herein is whether, in fact, Tarlowe had possession or the right to possession of the aforementioned premises. The undisputed facts, as reflected from the record, are as follows:

Tarlowe filed an application for renewal of his license for the above-described premises. The owners of these premises are Nick Basiliko and Helen Basiliko, who entered into a lease with the Cue-Tee Corporation whereby they leased the said premises to the said corporation for six years and five months from August 1, 1963. The premises were "to be used and occupied only for a bowling and billiard academy," and also for the sale of alcoholic beverages. In his renewal application, Tarlowe failed to answer Question 8(b) which asks: "If not leased or rented from owner, give name and address of person from whom premises are leased or rented."

Samuel M. Tarlowe testified that the Cue-Tee Corporation is a closed corporation, wholly owned by himself and members of his family. He owns 98% of the stock and his two sons own the other 2%. He entered into an oral understanding with the corporation for a lease of the said premises and, since he is the principal stockholder, he did not consider it necessary to enter into any written lease agreement. He operated prior licenses at the address and continues to do so at the present time.

It is well established that an applicant for liquor license must have possession or a right to possession of or an interest in the premises sought to be licensed and the complete absence thereof will deprive the issuing authority of jurisdiction to grant an application for a new or renewal license. Terlizzi v. Union City et al., Bulletin 860, Item 2; Richwine v. Pennsauken, Bulletin 1045, Item 2; Essex County Retail Liquor Stores Association v. Newark, Sabar Associates, and Home Liquors, Inc., Bulletin 1440, Item 1. However, there is no requirement as to the quantum of such interest provided the applicant has a colorable claim to possession and control of the premises. Rittenger v. Bordentown et al., Bulletin 547, Item 10.

R.S. 33:1-12.26, cited by appellant, which refers to the renewal of expired or expiring licenses, provides as follows:

"For the purposes of this act any license for a new license term, which is issued to replace a license which expired on the last day of the license term which immediately preceded the commencement of said new license term or which is issued to replace a license which will expire on the last day of the license term which immediately precedes the commencement of said new license term, shall be deemed to be a renewal of the expired or expiring license; provided, that said license is of the same class and type as the expired or expiring license, covers the same licensed premises, is issued to the holder of the expired or expiring license and is issued pursuant to an application therefor which shall have been filed with the proper issuing authority prior to the commencement of said new license term or not later than thirty days after the commencement thereof. Licenses issued otherwise than as above herein provided shall be deemed to be new licenses."

The underlying purposes and philosophy of the quoted section is to assure that the licensee has undisputed control of the premises and that there are no antagonistic or adverse claims to his right to possession, so that he may exercise his full commitment under the said license. This includes not only his privileges, but also the obligations and responsibilities thereunder.

While the Cue-Tee Corporation is a separate entity, it is, as a practical matter, wholly owned and controlled by respondent Tarlowe. Therefore, he has the full possession and control of the premises and there is no evidence of any fraudulent intent in his occupancy of these premises under these circumstances. I therefore find that the licensee does have full control and possession of the premises, consistent with the Alcoholic Beverage Law, and that the Board had the legal authority to grant his application for renewal.

Since this issue has been identified and resolved, as aforesaid, it is clear that appellant has failed to sustain the burden of establishing that the action of respondent Board was erroneous. Rule 6 of State Regulation No. 15; Helms v. Newark et al., Bulletin 1398, Item 3.

For the reasons aforesaid, it is recommended that an order be entered affirming the action of respondent Board and dismissing the appeal.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the record herein, including the transcript of testimony, the exhibits and the Hearer's report, I adopt the conclusions and recommendations of the Hearer as my conclusions herein.

Accordingly, it is, on this 15th day of November, 1966,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby affirmed and that the appeal herein be and the same is hereby dismissed.

JOSEPH P. LORDI
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - HINDERING INVESTIGATION - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
JAMES FINAN t/a Finan's Bar 4902-04 Park Avenue Weehawken, New Jersey	) CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-8, issued by the Township Committee of the Township of Weehawken	)

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

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that on September 24, 1966, he (1) sold a pint bottle of whisky and six cans of beer for off-premises consumption during hours prohibited by Rule 1 of State Regulation No. 38, and (2) hindered investigation then being conducted by Division agents (refusal to permit inspection of the back bar), in violation of R.S. 33:1-35.

Absent prior record, the license will be suspended on the first charge for fifteen days (Re Fixler, Bulletin 1693, Item 9) and on the second charge for ten days (Re Sachs, Bulletin 1668, Item 4), or a total of twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days.

Accordingly, it is, on this 16th day of November, 1966,

ORDERED that Plenary Retail Consumption License C-8, issued by the Township Committee of the Township of Weehawken to James Finan, t/a Finan's Bar, for premises 4902-04 Park Avenue, Weehawken, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Wednesday, November 23, 1966, and terminating at 2:00 a.m. Tuesday, December 13, 1966.

Joseph P. Lordi
Director