

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
1100 Raymond Blvd. Newark 2, N. J.

BULLETIN 1458

JULY 12, 1962

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"At this appeal de novo held before me, no witnesses were produced on behalf of the respondent.

"The transcript of the proceedings below contains the testimony of the minor (Charles ---, age 15 (his sixteenth birthday occurred on February 18, 1962)). He testified that around the last Saturday of January 1962 he purchased two bottles of port wine from the licensee for one dollar. He then took the two bottles of wine and walked to the railroad tracks about four or five blocks from the tavern and drank the contents of the said bottles. Thereafter he remembers nothing of what occurred on that evening.

"On cross-examination he stated that he had entered this tavern between 6:30 and 7 p.m. 'just before it started getting dark.' He stated further that he had left his house after dinner, had walked around and couldn't find any of his friends, and came to this tavern which is about ten blocks from his home. He stated that he entered this tavern because he had visited this tavern with friends during the previous summer. There were three or four patrons in the tavern at the time that he made this alleged purchase. He stated that he had no further recollection of what had happened that evening, and awoke the following day in his home. On the following Monday he was questioned by police and taken to this tavern where he identified the licensee. He was asked on further cross-examination whether he could describe the bottles of port wine and he stated that he did not know what brand it was but he believed it had a black label with gold letters. He could not state whether these bottles contained a seal.

"Catherine --- (the mother of this minor) also testified at the hearing below. She stated that her son was taken home by his friends at about 8 or 8:30 p.m. on January 27 and was in a prostrate condition, 'practically unconscious.' She stated she could smell drink on him and he was put to bed.

"On cross-examination she admitted that she did not know whether his boy friends had been with him on that evening except that they informed her that they had found him 'in a hallway.'

"The licensee and two witnesses in his behalf testified both at the hearing below and before me. The licensee (Stanley Perlowski) denied that he had sold any alcoholic beverages to this minor on the date in question; insisted further that that particular day was a very slow-business day and he had had very few sales. He stated further that most of his customers are colored; that he has very few white persons who come into his tavern and that he would have remembered if this minor had any transactions with him on that date. He admitted on cross-examination that he had had prior ABC violations, but states emphatically that he had not seen this minor until the confrontation to the place on Monday, January 29, 1962.

"Edward Jackson testified that he was in the tavern most of the day on January 27, 1962, and more particularly was present in these premises at the time of the alleged purchase. He states that he did not see this minor come into the premises on that day, and, in fact, the first time he saw him was on January 29 when the minor, accompanied by officers and agents, entered the tavern for the purpose of identifying the licensee. His story was substantially unshaken on cross-examination both at the hearing below and before me; he reiterated that during the entire day he had had two drinks and was seated in a position where he could observe all transactions in these premises at that time.

"Walter Ratyniak testified that he was a patron of this licensee on January 27, 1962, and was seated at the south end of the bar facing the doors. He entered this tavern at about 5:15 p.m. and remained there until closing time, and at no time did he see this minor enter the premises or make any purchases. The first time he saw the minor was at the time of confrontation on Monday, January 29.

"The burden of proving that respondent's action was erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15. The case herein for the respondent rests entirely upon the uncorroborated testimony of the minor.

"I have, of course, not had the opportunity to observe the demeanor of the said minor because he was not brought as a witness at this hearing and, therefore, I must base my judgment upon an evaluation of his testimony as set forth in the transcript produced herein. An analysis of his testimony indicates that there are very serious conflicts and discrepancies which cast a doubt upon the truthfulness of his testimony and upon its accuracy based upon our everyday experience.

"The minor testified that he left his home between 6:30 and 7 p.m., after dinner, 'just before it started getting dark.' (It is common knowledge that in January nightfall occurs around 5 to 5:30 p.m.) He walked around for a while, visiting the nearby housing projects and the playground. He further stated that he found none of his friends around and, so, he walked to the appellant's tavern which was located approximately ten blocks from his home. He then entered this tavern which he had had occasion to visit on at least one prior occasion with his boy friends some months before. According to his testimony, he bought two bottles of port wine at fifty cents per bottle, but was unable to describe either the brand or the type of bottle. He then walked to the railroad tracks located about five or six blocks from the tavern, and consumed the contents of the bottles. Thereafter he has no recollection of what happened until the following day. It appears obvious that he had given the police some difficulty because he states that he was placed in a straight-jacket at police headquarters, presumably immediately after his arrest and during his interrogation.

"His mother, however, testified that at about 8 or 8:30 p.m. that evening he was brought home by several of his friends in an apparently intoxicated condition, and these friends informed her that they found him in a hallway. It, therefore, appears equally susceptible of belief that this minor was in the company of friends when he consumed these alcoholic beverages and was not alone as he had testified. I cannot believe that the only circumstance that he can recall is that he was in this particular tavern on the day in question, but that he cannot recall anything else.

"An analysis of the time would make it appear that the minor's testimony is self-contradictory. If he left his home at approximately 7 p.m. and spent some time walking around at the playground and at the projects before coming to this tavern which was about ten blocks away, it appears unlikely that he would be able to make these purchases, consume the wine and then be found in a hallway less than one hour from that time. I suspect that this minor may have obtained these beverages from his friends. In any event, the bottles were not produced by the respondent, although the minor apparently told the local authorities just where he had disposed of the same.

"His testimony is contradicted by that of the respondent and two witnesses whose accounts appear to me to be forthright and credible. They denied that this minor visited these premises at the time and place aforesaid, nor did he make any purchases there.

"I am mindful of the unfortunate consequences of this minor's actions and deplore the availability of alcoholic beverages to this minor or any minor. However, this is a very serious matter with grave consequences for the appellant if he were, indeed, guilty of the offense charged, and justice and fairness require that this judgment be based upon the preponderance of the evidence.

"I find that the uncorroborated testimony of this minor is vague, contradictory and unbelievable and, considering the atmosphere in which his confrontation took place, gives a suspicion of being contrived. The evidence is such that it is not clear or convincing, nor does it meet the measure of credible proof by a fair preponderance of the believable evidence.

"The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32 C.J.S. Ev. Sec. 1042. While there is no set formula for determining the quantum of evidence required, each case being governed by its own circumstances, the verdict must be supported by substantial evidence. Cf. Walter v. Alt., 152 S.W. 2nd, 135, 141.

"The inquiry is whether there is any evidence which, if accepted and given its fullest probative force, reasonably tends to sustain the pleaded cause of action. The accepted standard of persuasion governing the trier of facts is that the determination be probably founded in truth. Riker v. John Hancock Mutual Life Ins. Co., 129 N.J.L. 508, 511.

"Thus we have the testimony of this minor standing alone and affirmatively contradicted by the testimony of the appellant and two other witnesses. Certainly their testimony should be given as much probative force, in my opinion, as that of this minor. It has been held that, where the evidence of several witnesses giving positive testimony to the same fact stands in irreconcilable conflict, the question of numbers, if the witnesses are of equal credit, becomes one of the highest importance; for, as a general rule, the evidence of the greater number is more likely to be true than that of the smaller number. Kentner v. Kline, 4 Atl. 781, 41 N. J. Eq. 422. It has been held that, where the witnesses are equally credible, the greater number must control. Katzenbach v. Holt, 43 N. J. Eq. 536, 12 Atl. 383. Professor Wigmore sums up the doctrine of preponderance of evidence pertinent herein in the following language:

'There is no measure of the weight of evidence (unless the witnesses on the evidential facts are founded) other than the feeling of probability which it engenders.' Wigmore Evid. 3rd Edition, section 2498.

I cannot say that the evidence produced by respondent is of such probative force that it has engendered that feeling of reasonable probability in these circumstances. Loew v. Borough of Union Beach, 56 N. J. Super. 93, 151 Atl. 2nd 568.

"I wish to make one final observation with respect to the evidence presented by the respondent. No apparent effort has been made to produce any of the minors who were referred to by one of the witnesses as having brought this minor home on the Saturday night. No apparent effort was made, so far as the testimony reflects, to retrieve the empty bottles. Nor is there a reasonable, satisfactory explanation of the minor's activities on the date alleged. These were, in my view, material in the development of the entire picture and their absence from the record gives rise to the evidential weakness and imbalance of the respondent's case. As Judge Jayne articulated it, in Davidson v. Fornicola, 38 N. J. Super. 365, at p. 371 (1955):

'\*\*\*In exacting proof by the preponderance or greater weight of the evidence, the law does not prescribe the necessary quantum of the overweight or the degree of excess of its superiority in credibility. A preponderance is attained where the evidence in its quality of credibility destroys and overbalances the equilibrium.\*\*\*'

"The conclusion is inescapable that the finding of guilt by the respondent is not supported by a fair preponderance of the believable evidence and I, therefore, recommend that the action of the respondent be reversed. Smallheer v. Clifton, Bulletin 1059, Item 1; Kurschner v. Newark, Bulletin 1081, Item 3; Royal Castle, Inc. v. Newark, Bulletin 1093, Item 2; Schwartz Drug Stores, Inc. v. Newark, Bulletin 1361, Item 2; Collazo v. Elizabeth, Bulletin 1410, Item 1."

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the testimony and the oral argument of the attorneys for the respective parties herein, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 9th day of May, 1962,

ORDERED that the action of the respondent be and the same is hereby reversed.

WILLIAM HOWE DAVIS  
Director.

2. APPELLATE DECISIONS - LYONS ET AL. v. ORANGE AND GRAULICH CATERER, INC.

ELLEN C. LYONS and VINCENT )  
CUCCINIELLO, )

Appellants, )

-vs- )

ON APPEAL  
CONCLUSIONS  
AND ORDER

MUNICIPAL BOARD OF ALCOHOLIC )  
BEVERAGE CONTROL OF THE CITY )  
OF ORANGE, and GRAULICH CATERER, )  
INC., )

Respondents. )

----- )  
Edward G. Gerardo, Esq., Attorney for Appellants.  
Murray and Murray, Esqs., by John R. Murray, Esq.,  
Attorneys for Respondent Municipal Board.  
Thomas E. Durkin, Esq., Attorney for the Respondent Graulich  
Caterer, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Appellants have appealed from the action of respondent Board which, on December 26, 1961, approved an application for transfer of Plenary Retail Consumption License C-19 (with restrictions hereinafter set forth) from Joseph Elia, t/a 42nd Club, to respondent Graulich Caterer, Inc., t/a 'Graulich's', and from premises 157 Parrow Street to 369 Park Avenue, Orange.

"At the hearing before respondent Board, two of the three members thereof (Rocco A. Marucci and Frank J. Fay) voted to approve the transfer in question, whereas the third member, Harry D. Meyers, was absent from the meeting.

"Respondent Board filed 'Conclusion & Resolution', which, among other things, recited:

'The Board after considerate and considerable review of all testimony and exhibits and after carefully examining the contentions of the objectors, more particularly the residents of the neighborhood, concludes that the transfer should be approved subject, however, to the limitations or conditions hereinafter set forth. It is the opinion of the Board that by the granting of this transfer the dispensing of the alcoholic beverages at the involved premise will be subject to a better and more proper policing. The Board is also compelled to the conclusion that the immediate neighborhood will not be detrimentally influenced by this approval and an objective and impassionate review establishes that in all probability this transfer will prove a definite asset to the city. The Board specifically rejected any testimony as to whether the granting of this transfer would be violative of any zoning regulation being of the opinion that this Board is not the proper forum to which such complaint should be addressed.

'NOW, THEREFORE, BE IT RESOLVED on this \_\_\_\_\_ day of December, 1961, that the application of Graulich Caterer, Inc., a corporation of New Jersey, for a transfer of plenary retail consumption license C-19 heretofore issued to Joseph Elia for premises at 157 Parrow Street to Graulich Caterer, Inc., a corporation of the State of New Jersey, for premises at 369 Park Avenue, Orange, New Jersey, be and the same is hereby approved subject, however, to the special conditions that no public bar for the sale, servicing or dispensing of alcoholic beverages is to be erected or maintained and that any sale, service or dispensing is to be limited to service bar or bars within the licensed premises.

Dated December 26, 1961.'

"Appellants' petition of appeal alleges that the action of respondent Board in granting the transfer was erroneous and should be reversed for the following reasons:

- '(a) Full and proper consideration was not given to the objections of owners and residents of the area, who strenuously objected to the granting of a transfer.
- (b) Property to where the license was transferred, is located adjacent to a building with a chapel owned by St. John's Catholic Church, and occupied by the Brothers, who are attached to the Church.
- (c) Property to where the license was transferred is occupied on Sundays for Church purposes.
- (d) The granting of the transfer of the license to the premises in question would constitute a danger to the safety of children attending St. John's School.
- (e) The transfer of a license to the premises in question will change the character of the neighborhood and affect the property value of the surrounding property.
- (f) The transfer will cause additional traffic hazards in the neighborhood.
- (g) The appellants have failed to prove the existence of adequate parking facilities.
- (h) The granting of a license will increase the use of a residential area for business use and increase noise and activity in the area.
- (i) The transfer of a license was not in the public interest.
- (j) On the evidence presented, the application should not have been granted.
- (k) The applicant has failed to show any change in conditions since the denial of a previous application for a transfer to the same premises.

- (1) Transfer of a license to premises at 369 Park Avenue, Orange, New Jersey, does not comply with the provisions of the applicable ordinance of the City of Orange.'

"On June 13, 1960, respondent denied a prior application filed by 369 Park Incorporated for transfer of a plenary retail consumption license held by Peter and Margaret Rinaldi, to premises 369 Park Avenue and from premises 107 South Day Street. Two of the three members of the respondent Board (Raymond L. Cunneen and Harry D. Meyers) voted against the transfer, whereas the third member (Charles P. Saporit6) was absent from the meeting. On appeal from the denial of the said transfer, the Director affirmed the action of the respondent Board as a reasonable exercise of its discretionary powers. In commenting on the provisions in the zoning ordinance, the Director was of the opinion that 'the appropriate forum to litigate such technical issue is not this agency', and cited Lublimer v. Board of Alcoholic Beverage Control for the City of Paterson (59 N.J.S. 419, aff'd 33 N.J., page 428). The Director further remarked, 'Especially is this so where the zoning issue involves the construction of several variances and intricate amendatory ordinances'. 369 Park Incorporated v. Orange, Bulletin 1399, Item 1.

"In the instant appeal, the appellants urged as one of the grounds for reversal that the ordinance in existence barred the respondent Board from approving the transfer in question. In the Conclusion & Resolution of the respondent Board (hereinbefore referred to), among other things, it was stated, 'The Board specifically rejected any testimony as to whether the granting of this transfer would be violative of any zoning regulation being of the opinion that this Board is not the proper forum to which such complaint should be addressed'.

"The matter of an apparent violation of a zoning ordinance was considered in Lublimer et al. v. Board of Alcoholic Beverage Control for the City of Paterson et als. (59 N.J.S. 419), wherein the Court stated that although a liquor license must comply with all applicable statutes and ordinances, it is not necessary, where a variance of a zoning ordinance may be required, that it be obtained previous to a grant of a transfer of a liquor license to a proposed site. Thus, it is unnecessary to consider the ground alleged by appellants that respondent Board failed to comply with a municipal zoning ordinance.

"The testimony of three witnesses who live in the area where the licensed premises in question are located entered objections to the transfer of the license because it was their opinion that the parking facilities were inadequate and that it would be unsafe for children who attend a parochial school and pupils who attend a public school, as they would have occasion to pass the driveways on Park Avenue and Cleveland Street, respectively, used by motor vehicles when entering and leaving the licensed premises. One of the witnesses complained of being annoyed by noise from automobiles, rattling of garbage cans and persons engaged in conversation in the parking area. However, the witness testified that because of his vocation, he is away from home six months in the year and the noise which resulted from the rattling of garbage cans 'early in the morning' has ceased.

"By stipulation of the attorneys for the respective parties, it was agreed that if four other persons in attendance at the hearing and who live in the neighborhood where the licensed premises are located were called to testify, their objections would be similar to those expressed by the other objectors who testified.

"It might be pointed out that the two members of the respondent Board who voted to grant the transfer herein were not members of the said Board on June 13, 1960 when the prior application for transfer of a liquor license to the premises in question was denied.

"In commenting with reference to a situation analogous to that now under consideration, Justice Jacobs stated in Lubliner et al. v. Board of Alcoholic Beverage Control for the City of Paterson, 33 N.J.S. 428:

'While properly looking with disfavor on the filing of vexatious repetitious applications which present no altered circumstances or policies, the Division has always recognized the right of municipal issuing authorities to alter, in the reasonable exercise of their discretion, their earlier policies particularly where there have been membership changes. See Whalan v. Township Committee of the Township of Mt. Olive, Bulletin 1103, Item 2 (1956); Tolen v. Mayor & Council of the Town of Kearny, Bulletin 880, Item 1 (1950); Hearty v. Township Committee of the Township of Liberty, Bulletin 671, Item 5 (1945); Northend Tavern, Inc. v. Mayor & Council of the Borough of Northvale, Bulletin 493, Item 5 (1942).'

"In said case the Court also set forth the language used by the Director in the Whalan case, supra, that:

'The decision in the former appeal, Thompson v. Mount Olive Township, supra (Bulletin 986, Item 1), is not binding upon respondent Committee as presently constituted. The general rule of law is that no governing body may tie the hands of its successors in matters involving the exercise of discretion. Northend Tavern, Inc. v. Northvale, Bulletin 493, Item 5. Each application is a separate one and must be decided in the sound discretion of the local issuing authority as constituted at the time the application is considered. Tolen v. Kearny et al., Bulletin 880, Item 1.'

"I have carefully considered the additional grounds mentioned in the petition of appeal and the evidence presented with reference thereto, but find said objections to be general in nature and founded on mere conjecture, so as to be unacceptable and of insufficient substance for serious consideration.

"The burden of proof to establish that the action of the respondent Board was erroneous rests with appellants. Rule 6 of State Regulation No. 15. The evidence presented does not indicate any improper motivation on the part of the members of respondent Board and their approval of the transfer appears to be a reasonable exercise of their discretion. Where there is room for latitude of opinion in cases of this kind, that is, reason for a reasonable difference of opinion concerning the desirability of transfer of license, the successor Board

is free to exercise its own discretion. In my opinion, appellants have failed to sustain the burden of proof resting upon them. I therefore recommend that an order be entered affirming the action of respondent Board and dismissing the appeal."

Pursuant to the provisions of Rule 14 of State Regulation No. 15, written exceptions to the Hearer's Report and written argument with respect thereto were filed with me by the attorney for appellants.

Having carefully considered the entire record, including the evidence, exhibits, Hearer's Report, exceptions and arguments thereto made by the attorney in behalf of appellants, I concur in the conclusions of the Hearer and adopt them as my conclusions herein. I shall enter an order in accordance with the recommendation.

Accordingly, it is, on this 9th day of May, 1962,

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

WILLIAM HOWE DAVIS  
Director.

3. APPELLATE DECISIONS - MONMOUTH COUNTY RETAIL LIQUOR STORES ASSOCIATION v. MIDDLETOWN TOWNSHIP and CIRCUS LIQUORS, INC.

MONMOUTH COUNTY RETAIL LIQUOR STORES ASSOCIATION, )

Appellant, )

-vs- )

ON APPEAL  
CONCLUSIONS AND ORDER

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, and CIRCUS LIQUORS, INC., )

Respondents. )

-----  
Samuel Moskowitz, Esq. and Samuel J. Davidson, Esq.,  
Attorneys for Appellant.

Roberts, Pillsbury & Carton, Esqs., by Michael J. Barnacle, Esq., Attorneys for Respondent Township Committee.

Abramoff & Apy, Esqs., by Milton M. Abramoff, Esq., Attorneys for Respondent Circus Liquors, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Township Committee in approving an application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License C-16 (with broad package privilege) from Willard O. Sanders and Marion F. Sanders to respondent Circus Liquors, Inc., and from premises at Seabrook and Wilson Avenues to premises to be constructed at 835 Highway 35, Township of Middletown.

"At the hearing before respondent Committee, four of the five members thereof (Compton, Field, Kavalek and Pandolfi) voted to approve the transfer in question, whereas the fifth member (Lawley) voted to deny the transfer.

"Respondent Committee adopted the following resolution:

'WHEREAS, application has been made for transfer of plenary retail consumption license, heretofore issued to Willard O. Sanders and Marion F. Sanders, for the license year beginning July 1, 1961 and ending June 30, 1962, said license having a broad package privilege, to be transferred to Circus Liquors, Inc., at premises known as #835 Route 35, Middletown, in a new building to be constructed at the present food store known as the "Food Circus"; and

'WHEREAS, plans have been filed for the new store designated as "New Store Attached to Existing Food Circus Building, Highway 35, Middletown, N. J., F. A. Amodio, A.I.A., 60 Broad Street, Red Bank, N. J.", signed by F. A. Amodio, C-2887; and

'WHEREAS, certification has been received from the Beverage Tax Bureau of the Department of the Treasury, certifying a release providing a Beverage Tax Report for November 1st, to the date of the transfer, be submitted by the licensee to the issuing authority; and

'WHEREAS, consent has been filed, consenting to the transfer of said license, signed by Willard O. Sanders and Marion F. Sanders the licensees; and

'WHEREAS, a fee of \$55.00 has been duly paid for transfer from person to person and from place to place; and

'WHEREAS, public hearing has been held, giving all persons objecting to the issuance of said transfer an opportunity to be heard; Now, Therefore,

'BE IT RESOLVED that the Township Committee of the Township of Middletown authorizes the transfer of the plenary retail consumption license, with broad package privilege, from Willard O. Sanders and Marion F. Sanders, the holders of the same, to Circus Liquors, Inc., a corporation, to the same to be transferred to 835 Route 35, Middletown, N. J., in an addition to the present food store building known as "Food Circus"; being a separate building, as shown on the plans filed with the application, with the condition that the transfer of the license be not endorsed upon the same unless and until the separate building where the license is to be located, which is to be attached to the present Food Circus building, according to said plans; be completed and inspected by the proper Township officials and report made to the Township Clerk.'

"The petition of appeal alleges that the action of respondent Committee in approving the application for transfer should be reversed on the following grounds:

'A. Public need, necessity or convenience does not warrant the transfer of said license to the premises in question.

'B. No deficiency or lack in present facilities was shown for the area to which said license was transferred.

'C. The transfer aggravates a present concentration of licenses now amply serving said area.

'D. The Township Committee of the Township of Middletown at its meeting held in August 1957 on an application to transfer a license to the same area determined that the applicant failed to show public necessity and need for the license in the locality and denied the application. There was no showing before the Committee on December 29, 1961 that this condition has changed warranting a reversal of its previous action.

'E. The granting of the transfer offends the public interest and is a violation of public policy declared by the New Jersey Alcoholic Beverage Control Laws of the State of New Jersey.

'F. The Township Committee of the Township of Middletown, New Jersey, was guilty of an abuse of discretion and a mistake of law and fact in granting the transfer of said license.

'G. The granting of said transfer of license to the Respondent, Circus Liquors, Inc. was arbitrary, capricious and unreasonable nor based on an applicable law, fact or public policy.'

"The answer filed by respondent Township Committee contends that the best interests and needs of the community will be served by the transfer herein.

"On August 14, 1957, respondent Committee denied a prior application filed by John Azzolina & Sons, a corporation of the State of New Jersey, for transfer of a plenary retail consumption license (with broad package privilege) held by Leroy Doran and Mildred Doran from the same premises located at Seabrook and Wilson Avenues to premises to be erected at State Highway 35 and Mt. Hill Road, Township of Middletown.

"The five members of the respondent Township Committee (Bills, Compton, Edwards, Lawley and Blaisdell) voted to deny the transfer for which application had been made. On appeal from said denial of the transfer, the Director affirmed the action of the respondent Committee as a reasonable exercise of its discretionary power. Azzolina & Sons v. Middletown et als., Bulletin 1208, Item 1.

"In the instant appeal, appellants produced J. Arthur Fell, Executive Secretary of the appellant corporation, who testified in opposition to the transfer, as he was of the opinion that there would be no plenary retail consumption license in the area from which the license was transferred, especially to meet the needs and convenience of summer visitors. Furthermore, Mr. Fell testified that there hasn't been any too great an influx of population or any building of

any kind of homes in the area of the proposed location.

"Henry F. Gehlhaus, owner of the building used as a licensed premises by the transferor, testified that a tavern had continuously occupied the premises since the repeal of prohibition. Furthermore, Mr. Gehlhaus testified that a large percentage employed at a nearby 'fish factory' frequented the former premises. When asked whether or not he ever purchased alcoholic beverages at the former licensed premises, Mr. Gehlhaus answered, 'I have three licenses of my own, so it wouldn't be necessary'.

"Two liquor licensees (Peter Andros and Arthur Soden) testified that they objected to the transfer because they are of the opinion that there are too many liquor outlets on Route 35 at the present time. Mr. Soden further testified that his liquor establishment is approximately a mile and a half from the proposed site, but he was concerned with the danger that might arise by reason of cars entering the highway from the parking area surrounding the respondent-licensee's proposed establishment.

"Three other witnesses, two of whom lived in the area of transferor's licensed premises and one who lived some distance away, objected to the transfer in question for the reason that it would constitute an inconvenience to the permanent residents and also to the summer vacationers. One of the witnesses also testified that the employees of the 'fish factory' would be inconvenienced if the transfer of the license in question was upheld.

"It might be well to mention that, of the five members of the Township Committee who had voted on the prior application, only two of them remained on the Committee when the instant application was heard. Mayor Lawley was a member of the respondent Township Committee when the prior application for transfer was heard and also at the time when the present application was considered. On both occasions, he voted to deny the transfer.

"Committeeman Compton voted to deny the application submitted for the prior transfer, but voted to approve the transfer now under consideration. He gave as his reason for the change in his vote that since the former application was denied, the population in the area surrounding the proposed site had greatly increased, whereas the area where the license had formerly existed 'has had a meager growth'. He further stated that, in his opinion, there is a definite need for a liquor outlet at the proposed location at the present time.

"Committeeman Kavalek testified that when the former application was heard, he was not a member of the Committee. However, he stated that he was in favor of the transfer; that he is of the opinion that there is a need for the liquor license at the proposed site.

"Ceil Jampole testified that she resides about a half mile from the proposed premises and that she favors the transfer to the site in question because it would be a convenience to her to buy liquor when she does her shopping at the Circus food center.

"By stipulation of the attorneys for the respective parties, it was agreed that if nine other persons in attendance

at the hearing, and who live in the neighborhood where the licensed premises is to be located, were called to testify, their testimony would be similar to that sentiment expressed by Ceil Jampole.

"In a situation somewhat similar to that now under consideration, Justice Jacobs stated in Lubliner et al. v. Board of Alcoholic Beverage Control for the City of Paterson, 33 N. J. S. 428:

'.....While properly looking with disfavor on the filing of vexatious repetitious applications which present no altered circumstances or policies, the Division has always recognized the right of municipal issuing authorities to alter, in the reasonable exercise of their discretion, their earlier policies particularly where there have been membership changes. See Whalan v. Township Committee of the Township of Mt. Olive, Bulletin 1103, Item 2 (1956); Tolen v. Mayor & Council of the Town of Kearny, Bulletin 880, Item 1 (1950); Hearty v. Township Committee of the Township of Liberty, Bulletin 671, Item 5 (1945); Northend Tavern, Inc. v. Mayor & Council of the Borough of Northvale, Bulletin 493, Item 5 (1942).'

"In said case the Court also set forth the language used by the Director in the Whalan case, supra, that:

'The decision in the former appeal, Thompson v. Mount Olive Township, supra (Bulletin 986, Item 1), is not binding upon respondent Committee as presently constituted. The general rule of law is that no governing body may tie the hands of its successors in matters involving the exercise of discretion. Northend Tavern, Inc. v. Northvale, Bulletin 493, Item 5. Each application is a separate one and must be decided in the sound discretion of the local issuing authority as constituted at the time the application is considered. Tolen v. Kearny et al., Bulletin 880, Item 1.'

"I have carefully considered all of the objections set forth in the petition of appeal and the evidence presented with reference thereto, but find that they lack sufficient merit to warrant reversal of the action taken by the respondent Committee in approving the application for transfer.

"The burden of proof to establish that the action of the respondent Committee was erroneous rests with appellant. Rule 6 of State Regulation No. 15. No evidence was adduced showing improper motivation on the part of the members of respondent Committee, and neither was their action arbitrary, capricious or unreasonable. I am satisfied that the action taken in approving the transfer was a reasonable exercise of discretion on the part of the members of the respondent Committee.

"Being thus satisfied that the appellant has failed to sustain the burden of proof resting upon it, it is recommended that an order be entered affirming the action of the respondent Committee and dismissing the within appeal."

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 14 of State Regulation No. 15. Having carefully considered the entire record herein, including the transcript of testimony, the exhibits and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 10th day of May, 1962,

ORDERED that the action of respondent Township Committee of the Township of Middletown be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

WILLIAM HOWE DAVIS  
Director.

4. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - FALSE STATEMENT IN LICENSE APPLICATION - ALLEGED MITIGATION - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 35 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against  
EISENHOWER'S MUSICAL BAR, INC.  
t/a EISENHOWER'S CIRCLE INN  
Second Traffic Circle, Route 70  
Laurel & Union Streets  
Lakehurst, N. J.,  
Holder of Plenary Retail Consumption License C-4, issued by the Borough Council of the Borough of Lakehurst.

CONCLUSIONS  
AND ORDER

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Licensee, by Donat D'Onofrio, President, Pro se.  
Edward F. Ambrose, Esq., appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that (1) on April 18-19, 1962, it sold drinks of alcoholic beverages to a minor, age 19, in violation of Rule 1 of State Regulation No. 20, and (2) in its application for current license falsely denied any record of prior license suspension, in violation of R. S. 33:1-25.

In attempted mitigation, licensee claims that the sales were made in reliance on false identification produced by the minor. As to this, it is pointed out that reliance on false identification, in the absence of obtaining requisite written representation of age as contemplated by R.S. 33:1-77, constitutes no defense and very little mitigation, especially where, as here, the licensee has suffered a recent previous suspension of license for similar violation.

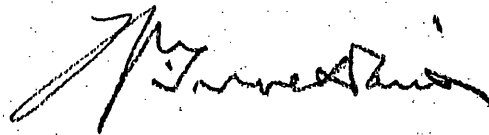
The licensee's previous record above mentioned consists of a suspension of license by the Director for ten days, effective September 6, 1960, for sale to a minor. Re Eisenhower's Musical Bar, Inc., Bulletin 1357, Item 8.

The prior record considered, the license will be suspended on the first charge for twenty-five days (Re Cappy's

Hideaway, Inc., Bulletin 1446, Item 11) and on the second charge for ten days (Re Costanzo, Bulletin 1393, Item 1), or a total suspension of thirty-five days, with remission of five days for the plea entered, leaving a net suspension of thirty days.

Accordingly, it is, on this 22nd day of May, 1962,

ORDERED that Plenary Retail Consumption License C-4, issued by the Borough Council of the Borough of Lakehurst to Eisenhower's Musical Bar, Inc., t/a Eisenhower's Circle Inn, for premises Second Traffic Circle, Route 70, Laurel and Union Streets, Lakehurst, be and the same is hereby suspended for thirty (30) days, commencing at 2:00 a.m. Tuesday, May 29, 1962, and terminating at 2:00 a.m. Thursday, June 28, 1962.



William Howe Davis  
Director