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

BULLETIN 296 FEBRUARY 6, 1939.

1. DISCIPLINARY PROCEEDINGS -- PASSAIC -- HEREIN OF A VICIOUS ATTACK REFUTED.

January 27, 1939.

Arthur D. Bolton,
City Clerk
Passaic, N. J.

My dear Mr. Bolton:

I have before me staff report and your letter of January 25th re disciplinary proceedings against William J. Veech, 39 Garden Street, charged with keeping his licensed premises open for business during prohibited hours in violation of local regulation and note that his license was suspended for five days.

I can, of course, express no opinion on the merits because perchance the case may come before me on appeal. I wish, nevertheless, to extend to the Board my appreciation not only for the conduct of the proceedings and the penalty imposed, but the militant attitude which, to a man, they displayed when this Department and its investigators were attacked by the licensee's attorney.

According to the staff report, in his summation for the tavern keeper, William C. Egan, Esq., who happens also to be counsel for the New Jersey Licensed Beverage Association, asserted that the investigators of this Department would stoop to anything to get evidence and they've got to bring home the bacon because they are not protected by Civil Service and hence would be fired if they did not produce cases whether they existed or not.

Truly an amazing statement from one who knows better! It is common knowledge that the investigators of this Department are under no compulsion whatever to make cases to keep their jobs. It is equally common knowledge that no investigator was ever discharged from this Department for the reason that he failed to make cases where none existed. It was therefore heartening to have the Board of Commissioners unanimously expunge from the record the vicious and unwarranted accusations of the defense attorney.

I am this morning in receipt of letter from Neil F. Deignan, President of the New Jersey Licensed Beverage Association repudiating and condemning the tirade as a foul below the belt and publicly apologizing for the Egan remarks. I am satisfied that what Egan said did not represent the attitude of the Association or its responsible officers for they have given me hearty, continuous and wholesome cooperation in strict enforcement of the liquor law.

With appreciation, I am,

Very truly yours,

D. FREDERICK BURNETT
Commissioner

2. RETAIL LICENSEES - REBATES - PAYMENT BY LICENSEE OF CUSTOMERS' PARKING METER FEE PROHIBITED.

January 28, 1939

Library Delicatessen & Food Shop,
Hackensack, N. J.

Gentlemen:

As I understand it, you wish to know whether it will be permissible for you, a plenary retail distribution licensee, to advertise that you will pay the five cent parking meter fee of all customers who make purchases in your store.

State Regulations No. 20, Rule 20, provides:

> "No retail licensee shall, directly or indirectly, offer or furnish any gifts, prizes, coupons, premiums, rebates, discounts or similar inducements with the sale of any alcoholic beverage for consumption off the licensed premises; provided, however, that nothing herein contained shall prohibit retail licensees from furnishing advertising novelties of nominal value."

The nickel payment, like the refund for telephone orders disapproved in Re International Liquor Co., Bulletin 260, Item 11, is a rebate, and therefore prohibited.

Don't do it.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

3. DISCIPLINARY PROCEEDINGS - PARTNERSHIP LICENSE SUSPENDED FOR BALANCE OF ITS TERM SUBJECT TO LIFTING UPON APPLICATION OF INNOCENT PARTNER.

February 1, 1939

Walter Beisch, Secretary,
North Bergen Municipal Board of
Alcoholic Beverage Control,
North Bergen, N. J.

My dear Mr. Beisch:

I have before me your letters of January 13th and 23rd re disciplinary proceedings conducted by the Municipal Board against William Kotze and Joseph Coupland, 1091 Bergenline Avenue, the holders of plenary retail consumption license #C-56.

I note that besides the sale of alcoholic beverages to a boy of seventeen, for which a ten day suspension was imposed, the licensee Coupland was charged with an indecent attack upon the boy, for which the license was suspended for the balance of its term, subject to be lifted upon the application of William Kotze, the innocent partner, upon proof that he had become the sole owner of the business. The disposition made was well advised and eminently fair.

Please convey to the members of the Municipal Board my appreciation for their initiative in instituting these proceedings and the penalties imposed. Swift and vigorous enforcement of the law commands respect.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. ENFORCEMENT DIVISION ACTIVITY REPORT FOR JANUARY, 1939.

To: D. Frederick Burnett, Commissioner

ARRESTS: Total number of persons - - - - - - - - - - - - 70
Licensees - 4 Non-licensees - 66

SEIZURES: Stills - total number seized- - - - - - - - - - 19
Capacity 1 to 50 gallons - - - - - - - 9
Capacity 50 gallons and over - - - - 10

Motor Vehicles - - total number seized - - 2
Trucks - 0 Passenger Cars - - 2

Alcohol
Beverage Alcohol - - - - - - - - - - - - - 416 Gal.

Mash - Total number of gallons - - - - -47,410

Alcoholic Beverages
Beer, Ale, etc. - - - - - - - - - - - - - - - 12 gallons
Wine- - - - - - - - - - - - - - - - - - - - - -764 "
Whiskies and other hard liquor- - - - - -196 "

RETAIL INSPECTIONS:
Licensed premises inspected - - - - - - - - - 1,535
Illicit (bootleg) liquor - - - - - - - 11
Gambling violations - - - - - - - - - - 24
Sign violations - - - - - - - - - - - - 30
Unqualified employees - - - - - - - - - 49
Other mercantile business - - - - - - - 65
Disposal permits necessary- - - - - - - 3
"Front" violations - - - - - - - - - - - 1
Improper beer markers - - - - - - - - - 4
Other violations found- - - - - - - - - 16

Total violations found- - - - - - - - -203
Total number of bottles gauged- - - - - - - 11,195

STATE LICENSEES:
Plant Control Inspections completed - - - 270
License applications investigated - - - - 24

COMPLAINTS:
Investigated and closed - - - - - - - - - - 374
Investigated, pending completion- - - - - 184

LABORATORY:
Analyses made - - - - - - - - - - - - - - - 165
Alcohol and water and artificial coloring cases - - - - - - - - - - - - - - - - - - - 27
Poison and denaturant cases - - - - - - - - 1

Respectfully submitted,

E. W. Garrett,
Deputy Commissioner.

5.MONTE CARLO PARTIES - THE DECISIONS REVIEWED AND THE RULES RESTATED HEREIN OF THE DIFFERENCE BETWEEN GAMES AND GAMING.

Dear Commissioner:

The Rock Spring Riders Club is planning a subscription supper dance to be given at the Rock Spring Golf Club, West Orange, on Saturday, February 4, 1939, the object of which is to raise funds for the purposes of the Club.

We are going to try to create, as much as possible, an atmosphere of the Old West, and it has been suggested that a "gambling room" might help accomplish this end. The number of games would necessarily be limited because of lack of space, since their operation would be but a minor attraction, and would probably consist of a wheel of chance, roulette, and horse racing. Imitation money would be used and at the end of the evening the player having the most money would be given a prize. It would not be liquor.

We are anxious to have your ruling as to whether the entertainment as outlined above would in any way jeopardize the license of the Rock Spring Golf Club. If not, we would also like to know whether we would have to give each person attending the dance an equal amount of the imitation money upon payment of the entrance fee or whether it would be possible to sell the stage money for a nominal charge to those desiring to play.

Very truly yours,
Harry V. Osborne, Jr.

February 1, 1939

Harry V. Osborne, Jr., Esq.,
Newark, New Jersey.

My dear Mr. Osborne:

If you will conduct the "Old West gambling room" within the bounds of the rulings heretofore made in Re Laird, Bulletin 119, Item 6, Re Bates, Bulletin 122, Item 8, and Re Phillips, Bulletin 159, Item 10, limiting the stage money each guest may use to a specified and equal amount per person, to be included in the general admission charge, there will be no objection and the license of the Golf Club will not be jeopardized.

You may also award a prize to the person having the most stage money at the end of the evening, or sell or auction prizes to be paid for in stage money if you wish. See Re Bates and Re Phillips supra.

One more thought: This permission is granted reluctantly, not because I fear that somebody in Rock Spring is going to HELL by playing with imitation ducats, but rather because of what these requests lead to and which you, with your wide public experience and demonstrated civic consciousness, will readily appreciate.

Thus, the earliest decision in Re Laird dealt with the Junior Service League of Short Hills where the objective was charity. Next came Re Bates, which concerned another chapter of the

Junior League, and the proceeds were to be distributed among the Morristown charities. Then followed Re Phillips, where the party was to be given by the Plainfield Junior League, but to be patronized also by members of the Plainfield Country Club and invited guests. Nothing was said about charity. I noted the transition at the time, but in view of the precedents, I saw no great harm in such innocent flutter and therefore granted permission. But then came Re Hollander, Bulletin 271, Item 1, where a liquor licensee sought to open a casino with a daily menu of baccarat, trente-et-quarante, and roulette, all to be played with stage money and never a notion of gambling or side bets — perish the thought! The prospectus set forth that, despite hundreds of systems used at Monte Carlo, the bank had been broken but twice in 60 years, and therefore urged that the proposed casino, operating with stage money only, would have an educational value in teaching that gambling was a losing game. I drew the line, nevertheless. It was a commercial proposition. The stage money was an obvious device to veil thinly the true objective. I was not in favor of making a tavern a prep school for Monte Carlo. Neither do I purpose that Golf Clubs, or any other clubs having liquor licenses, shall make a regular practice of conducting these so-called Monte Carlo parties on licensed premises. Practices tabooed in taverns are likewise forbidden in clubs.

These homeopathic doses of pseudo-gambling are permissible only in those cases where it is clear that it is only for the sake of the social pastime — a mere entertainment — a sheer divertissement as distinguished from a gamble against the House. The form is permitted because the substance is absent. Children play "cops and robbers" and go through the motions without our raising an eyebrow so long as we can distinguish between felony and fun. So the line is drawn on the Monte Carlo party when it ceases to be a game and becomes gaming.

Therefore, you may not sell to guests additional stage money, however nominal the price. Nor is there to be any buying and selling between the guests. As soon as a player loses his original allotment, he's out of the play for the rest of the evening and must stay out. Otherwise, the permission is automatically void ab initio. Re Phillips, supra.

The permission above granted is conferred only for the specific and isolated occasion described in your letter. No blanket permission was given or intended to be conferred by any of the previous rulings made.

Hereafter, the matter will be kept under control by requiring a special permit issuable only in cases where the entire proceeds are devoted to a recognized charity and subject to the foregoing conditions as well as such others as experience, from time to time, shall indicate.

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

6. APPELLATE DECISIONS - ATLANTIC CITY LICENSED BEVERAGE ASSOCIATION v. ATLANTIC CITY.

ATLANTIC CITY LICENSED BEVERAGE ASSOCIATION LOCAL NO. 6 OF NEW JERSEY LICENSED BEVERAGE ASSOCIATION, a corporation of the State of New Jersey,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC CITY and JACOB ADELMAN,

Respondents.

WILLIAM CAMPBELL, MARIE TOWHEY and ELVA KING,

Appellants,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC CITY and JACOB ADELMAN,

Respondents.

ON APPEAL

CONCLUSIONS

Cole and Cole, Esqs., by Maurice Y. Cole, Esq., Attorneys for Appellant, Atlantic City Licensed Beverage Association, Local No. 6 of New Jersey Licensed Beverage Association.
Elwood F. Kirkman, Esq., Attorney for Appellants, William Campbell, Marie Towhey and Elva King.
Samuel Backer, Esq., by Daniel J. Dowling, Esq., Attorney for Respondent, Board of Commissioners of the City of Atlantic City.
Emory J. Kiess, Esq., Attorney for Respondent, Jacob Adelman.

BY THE COMMISSIONER:

These are appeals, consolidated for hearing and determination, from the transfer to 121 South Kentucky Avenue, Atlantic City, of plenary retail consumption license No. C-35, issued to Jacob Adelman originally for premises located at 139 South Kentucky Avenue, Atlantic City.

The respondent licensee has conducted a licensed place of business at 139 South Kentucky Avenue, Atlantic City, since Repeal. He is a tenant under a lease expiring March 1st, 1939 and was requested by his landlord to seek other premises. Accordingly, he leased a store at 121 South Kentucky Avenue, applied for transfer of his license thereto, and this application was granted by the respondent, Board of Commissioners. Thereupon, the appellants filed their appeals on the ground that the transfer was in violation of Section 7 of Ordinance No. 42 of the City of Atlantic City, which provides as follows:

> "No plenary retail consumption or plenary retail distribution license, excepting renewals of licenses presently outstanding, shall be issued for or transferred to any premises within three hundred feet of premises for which a similar type of license is outstanding."

One hundred and twenty-one South Kentucky Avenue is a store in the building occupied by the Wellsboro Hotel, located at the corner of South Kentucky and Westminister Avenues. There is a building on the opposite side of South Kentucky Avenue, which is occupied by the Rittenhouse Hotel and contains a barroom operated by the Kentucky Cafe. The evidence establishes that the entrance to 121 South Kentucky Avenue is well within three hundred feet of the entrance to the Kentucky Cafe. Measured in accordance with the ruling in Re Guenther, Bulletin 206, Item 15, the distance is one hundred twenty-three and three-tenths feet. See also Re Deull, Bulletin 234, Item 7, and Hudson Bergen County Retail Liquor Stores Association v. Loris and West New York, Bulletin 254, Item 10.

In view of the foregoing facts, it is evident that the transfer of the license was in direct violation of the express terms of the ordinance. Counsel for respondents contend, however, that (1) the ordinance should be construed to be inapplicable to situations where, as here, the transfer is to new premises located within three hundred feet of the licensee's old premises; and (2) if such construction is not adopted, the ordinance is unreasonable as applied to the respondent licensee.

The language used in the ordinance is unambiguous and affords no basis for the construction suggested by the respondents. If the Board of Commissioners had desired to exempt transfers by licensees to new premises located within three hundred feet of their old premises, they could have so provided; they did not and it is not my function to rewrite their ordinance.

That the ordinance, in seeking to keep consumption places at a reasonable distance from each other, is valid on its face is beyond question. See Gruber v. Atlantic City, Bulletin 289, Item 5; Re Lee, Bulletin 232, Item 8. And nothing has been presented which establishes that it is unreasonable in its application to the respondent licensee. It is true that it works a hardship upon him. Restrictive liquor regulations may, and oftentimes do, result in individual hardships. However, where larger social interests justify a general restrictive policy, private individual interests must give way. If satisfactory liquor control is ever to be achieved, there must be consistent and full-hearted observance of wholesome municipal policies such as that embodied in the Atlantic City ordinance.

One further point requires mention. The respondents have questioned the standing of the individual appellants to maintain their appeal on the ground that none of them objected at the hearing before the respondent Board of Commissioners or prior thereto. All of the individual appellants are residents of Atlantic City and operate hotels on South Kentucky Avenue, Atlantic City, in the vicinity of 121 South Kentucky Avenue. These circumstances afford to them adequate standing to maintain their appeal pursuant to R. S. Sec. 33:1-26, notwithstanding their failure to object before the Board of Commissioners of Atlantic City. Cf. Haines v. Burlington, Bulletin 223, Item 6, citing Ferry v. Williams, 41 N. J. L. 332 (Sup. Ct. 1879), and White v. Atlantic City, 62 N. J. L. 644 (Sup. Ct. 1899).

The action of respondent, Board of Commissioners of the City of Atlantic City, in granting the application for transfer to 121 South Kentucky Avenue of Plenary Retail Consumption License No. C-35, issued to respondent, Jacob Adelman, for premises located at 139 South Kentucky Avenue, Atlantic City, is hereby reversed.

D. FREDERICK BURNETT,
Commissioner.

Dated: February 1, 1939.

7. APPELLATE DECISIONS - VanKESTEREN and BONINI v. CAMP.

HERMAN VanKESTEREN and D. WILLIAM BONINI,

Appellants,

-vs-

HONORABLE PERCY CAMP, Judge of the Court of Common Pleas in and for the County of Ocean and Issuing Authority, and BENJAMIN PAUL,

Respondents.

CONCLUSIONS AND ORDER

Joseph A. Citta, Esq. and William C. Egan, Esq.,
Attorneys for Appellants.
No Appearance on behalf of Respondent, Honorable Percy Camp.
W. Durward McCloskey, Esq., Attorney for Respondent, Benjamin Paul.

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license by respondent, Honorable Percy Camp, to respondent Benjamin Paul, for premises located on the south side of Bay Avenue, Stafford Township, Ocean County.

In June 1938 the respondent issuing authority denied an application for plenary retail consumption license by James Mascolo, who had leased the brick building located on the south side of Bay Avenue, Stafford Township, Ocean County, from its owner, Benjamin Paul. Thereafter, an appeal from the denial of the application was duly taken to the Commissioner. In the answer to the appellant's petition of appeal the issuing authority asserted that there were only eight or ten families living in the immediate vicinity of the premises sought to be licensed; that there were already three taverns operating in the general vicinity; and that public necessity did not require the issuance of the additional license sought. The evidence introduced, on appeal, substantially established the foregoing and, on August 24, 1938, I affirmed the issuing authority's action and rendered formal Conclusions which embodied my reasons. See Mascolo v. Camp, Bulletin 268, Item 2.

After the decision in the Mascolo case was rendered, the present appeal was filed from the respondent issuing authority's action in granting, on August 18, 1938, a plenary retail consumption license to Benjamin Paul for the same premises originally sought to be licensed by Mascolo. When the Mascolo application was considered by the issuing authority, the appellants, VanKesteren and Bonini, successfully objected on the ground that there was no need for an additional licensed place of business. While the Mascolo appeal was still pending, the same objection was urged by them to the Paul application, but this time it was rejected without a stated reason.

The evidence establishes that no change occurred between the dates of the applications by Mascolo and Paul respectively, in so far as population, number of licenses and physical surroundings are concerned. Apparently, the sole difference between the applications was that the first was by the tenant, a qualified person, and the second by the landlord, an equally but no more qualified person.

This distinction was in no wise material to the issue of whether public convenience and necessity dictated the licensing of an additional place of business. If, as the issuing authority found, there was no need for the license sought by Mascolo, then presumably there was an equal absence of need for the license sought by Paul. Nothing whatsoever has been presented to explain or justify the issuing authority's departure from the findings and policies evidenced by his action in the Mascolo case. At the hearing on the present appeal, the respondent issuing authority was not represented and the respondent licensee did not suggest any rational basis for the departure.

In the light of the foregoing and the present state of the record, the conclusion must be reached that the issuance of the license to the respondent, Benjamin Paul, was improper. This does not mean that he may never obtain a license for his premises. It may well be that, in connection with some future application, the evidence introduced will show a sufficient change of circumstances or affirmative basis for a change in the issuing authority's original findings which resulted in the denial of the license sought by Mascolo.

The action of the respondent issuing authority, in granting a plenary retail consumption license to the respondent, Benjamin Paul, for premises located on the south side of Bay Avenue, Stafford Township, Ocean County, is reversed, and said license is hereby set aside and declared void. The respondent, Benjamin Paul, is directed to cease doing business under the aforementioned license on February 8, 1939 at 7:00 A.M. and to surrender the license certificate to the issuing authority.

D. FREDERICK BURNETT,
Commissioner.

Dated: February 1, 1939.

8. DISCIPLINARY PROCEEDINGS - GAMBLING - FIVE DAYS' SUSPENSION.

| | |
|---|---|
| In the Matter of Disciplinary Proceedings against<br><br>NICHOLAS CAPELLI,<br>743 Hudson Avenue,<br>West New York, New Jersey,<br><br>Holder of Plenary Retail Consumption License No. C-19, issued by the Board of Commissioners of the Town of West New York. | CONCLUSIONS AND ORDER |

Nicholas Capelli, Pro Se.
Stanton J. MacIntosh, Esq., Attorney for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Licensee pleads guilty to a charge of permitting gambling on his licensed premises on January 6, 1939, in violation of Rule 7 of State Regulations No. 20.

The evidence shows that, on January 6, 1939, two investigators of this Department and two members of the West New York Police

Department found five men playing poker in a rear room of the licensed premises, at which time $27.95 was found on the table at which the game was being played and $3.30 in a glass jar. In a statement given at the time of his arrest, licensee swore that the money in the glass jar was intended to be used by the card players in purchasing eats and drinks, and that the only benefit he received arose from the fact that the eats and drinks were purchased in his place of business.

This is the licensee's first offense, and I shall suspend his license for five days.

Accordingly, it is on this 2nd day of February, 1939,

ORDERED that Plenary Retail Consumption License No. C-19, heretofore issued to Nicholas Capelli by the Board of Commissioners of the Town of West New York, be and the same hereby is suspended for a period of five (5) days, commencing on February 6, 1939 at 3:00 A.M.

D. FREDERICK BURNETT,
Commissioner.

9. APPELLATE DECISIONS - HILL v. RUNNEMEDE.

ARTHUR E. HILL,
Appellant,
-vs-
BOROUGH COUNCIL OF THE BOROUGH OF RUNNEMEDE,
Respondent

ON APPEAL
CONCLUSIONS

Frank M. Lario, Esq., Attorney for Appellant.
S. Lewis Davis, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from a fifteen-day suspension of appellant's plenary retail consumption license. The suspension was imposed by respondent after appellant had pleaded non vult to a charge of remaining open and selling alcoholic beverages between 2:00 A.M. and 7:00 A.M. on August 20, 1938, in violation of a resolution adopted by the Mayor and Council of the Borough of Runnemede dated January 6, 1937.

At the hearing on appeal, appellant admitted that his licensed premises had remained open and that he had conducted his business therein between 2:00 A.M. and 4:30 A.M. on August 20, 1938. He contends, however, that he had received permission to remain open and that, even if it be found that he did not have such permission, the penalty imposed herein is excessive.

Appellant testified that he had requested George Smith, who is his bartender and also a member of the Borough Council, to obtain permission from the Borough Council to keep his licensed premises open during the prohibited hours on the morning of August 20, 1938; that he was assured by the members of the Borough Council,

after a regular meeting held on August 3, 1938, that "it was all right"; that, thereafter, he had cards printed advertising "Gala Birthday Parties" of four persons, including himself, which parties were to be held at his premises and to be "continuous from Friday to Saturday nites, Aug. 19-20, 1938"; that one of these cards was sent to the Mayor and each of the Councilmen except one; that a newspaper, published on August 18th, contained an announcement of the birthday parties to be held at appellant's premises.

Councilman-Bartender Smith testified that he had discussed Mr. Hill's request with the other members of Borough Council at a caucus held on August 1st and that he had been advised to take it up at the next regular meeting; that, at the regular meeting held on August 3rd, every member of Council consented to permit Mr. Hill to remain open, as requested - "said everything would be O.K."

There is no evidence at all, however, that the Borough Council to k any action, by resolution or motion or otherwise, on appellant's request. Aside from the flimsy oral permit, the Borough Council had no power to grant a special dispensation to a single licensee. In Re Wenzel, Bulletin 19, Item 7, I ruled that a regulation prohibiting certain retailers from doing business on Sunday while authorizing other retailers of the same license class to do so, was invalid. In Re Sierszputowski, Bulletin 52, Item 4, approval was given to a contemplated ordinance permitting sales on Sunday on condition that it apply to all. In Re Holz, Bulletin 117, Item 8, I held that regulations extending the closing hour must confer the privilege generally upon all licensees and not upon some in particular. In Re Harrington, Bulletin 118, Item 15, I ruled that discrimination as to closing hours against some and in favor of others was not permissible.

It thus appears that in fact no official permission was given to appellant to keep his premises open during prohibited hours and that, even if such permission had been given, the action of the Borough Council, in granting such permission to a single licensee, would have been void.

As to the penalty, it appears that, in February 1938, appellant herein was found guilty by the Borough Council on a charge of violating the closing hour, at which time he was reprimanded and advised that in the future the resolution was to be enforced. Since this is a second offense, a penalty of fifteen days is not excessive.

At the hearing on appeal, Councilman-Bartender Smith stated that he "sat in" but "took no action" at the disciplinary proceedings before the Borough Council. The point, naturally, is not raised by the licensee against his own bartender, but I deem it advisable to call attention to the point that an employee of a licensee, if a member of the issuing authority, is barred, while so employed, from participation in any matter concerning any phase of alcoholic beverage control or the administration or enforcement of the liquor laws. Re Loog, Bulletin 39, Item 3, Re Brundage, Bulletin 80, Item 7; Re Ford, Bulletin 225, Item 8. He was disqualified from participating in the disciplinary proceedings even if he did not actually vote. Petrusha v. Mine Hill, Bulletin 146, Item 8. I refer to this matter solely for the guidance of the Borough Council and other issuing authorities in future proceedings.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: February 2, 1939.

10. APPELLATE DECISIONS - SIDNEY'S, INC. ET AL. v. NEWARK.

SIDNEY'S, INC., a corporation of New Jersey, ABE KARTZMAN, NEW ROYAL DELICATESSEN, INC., a corporation of New Jersey, SAMUEL LIPSHITZ, AARON LEVITT, and HARRY LUSTIG,

Appellants,

-vs-

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

Respondent

ON APPEAL
CONCLUSIONS

Charles Handler, Esq., Attorney for Appellants, Sidney's, Inc., Abe Kartzman, New Royal Delicatessen, Inc., Samuel Lipshitz, Aaron Levitt.
Nathan A. Reuben, Esq., Attorney for Appellant, Harry Lustig.
No Appearance on behalf of Respondent.

BY THE COMMISSIONER:

These appeals, which were instituted and heard separately are here joined for convenience in rendering Conclusions since they involve a common issue. They are taken from respondent's refusal to renew the plenary retail consumption licenses of the respective appellants on the ground that their premises (located in Newark) do not conform with R. S. 33:1-12(1), which provides that no plenary retail consumption license shall be issued to permit the sale of alcoholic beverages on premises "in which a grocery, delicatessen, drug store or other mercantile business (except the keeping of a hotel or restaurant, or the sale of cigars and cigarettes at retail as an accommodation to patrons, or the retail sale of nonalcoholic beverages as accessory beverages to alcoholic beverages) is carried on."

The appellants, although operating bona fide restaurants at their respective premises, nevertheless admittedly there also conduct a delicatessen or similar mercantile business. They contend, however, that this business is merely incidental to their restaurants and therefore does not bar them from a plenary retail consumption license since R. S. 33:1-12(1), as above quoted, permits the issuance of such a license for restaurants and since R. S. 33:1-1(t) defines a restaurant as an establishment equipped and used for providing regular meals to the public "and in which no other business, except such as is incidental to such establishment, is conducted."

The premises of Sidney's, Inc. (located at 62 Prince Street) contain tables in the rear half capable of seating 212 or 215 persons. In the front of the premises, on one side of the entrance, there is a bar; on the other side, there is a long display counter containing a variety of delicatessen meats, salads, pickles, relishes, etc. The President of Sidney's, Inc. testifies that its total gross monthly income is between $8000.00 and $10,000.00; that 10% to 15% of this sum represents sales of merchandise taken out of the premises; that these sales include sales of liquor of which, however, he states that Sidney's, Inc. "hardly sell anything"; that half the sales of outgoing merchandise are to persons who have first eaten there.

Kartzman's premises (located at 491 Clinton Avenue) contain nine tables that are capable of seating 48 persons and are arranged in the rear and along one side of the premises. On the opposite side, there is a long display counter containing a stock of the delicatessen delicacies aforesaid. Kartzman testifies that the total gross monthly income of the business is between $3500.00 and $4000.00; that 6% of this sum represents sales of food for off-premises consumption, of which about half are to persons who have first eaten there.

The premises of the New Royal Delicatessen, Inc. (located at 418 Hawthorne Avenue) contain four tables that are capable of seating 16 persons and are arranged along one side of the premises. On the opposite side, there is a long display counter containing a variety of the delicatessen delicacies aforesaid. Another counter, also containing meats and salads, is located in the rear. The general manager testifies that the total gross monthly income of the business is $2500.00; that 18% to 20% of this sum represents sales of merchandise (including bottled liquor) for off-premises consumption; that only 2% represents sales of food to be taken out.

Lipshitz' premises (located at 181 Spruce Street) contain four tables and two booths capable of seating 34 persons. A display counter running along one side of the premises contains a variety of the delicatessen delicacies aforesaid. Lipshitz testifies that the total gross monthly income of the business is $3500.00 or $3800.00; that about 5% of this sum represents sales of food to be taken out; that most of these sales are made to persons who have first eaten there, customers who enter solely to purchase food to take out numbering about 20 per day.

Levitt's premises (located at 372 Chancellor Avenue) contain six tables that are capable of seating 48 persons and are arranged along one side of the premises. Running along the opposite side is a display counter containing a stock of delicatessen as aforesaid. Levitt testifies that the total average monthly income of the business is $3500.00; that 10% or 15% of this sum represents sales of food to be taken out; that most of the sales are made to persons who have first eaten there.

Lustig's premises (located at 449 Clinton Avenue) contain eight tables capable of seating 32 persons. A display counter runs along one side of the premises containing a variety of tempting delicatessen as aforesaid. No one appeared at the hearing on appeal to give figures concerning the proportion of Levitt's business which represents sales of food to be taken out.

The Hearer, by consent of counsel, personally viewed the premises of all appellants. He reports that, in addition to being restaurants, they are all obviously devoted in a substantial degree to the sale of delicatessen foods for off-premises consumption; that, in fact, they are the familiar type of combination restaurant-and-delicatessen; that the above figures given by various of the appellants as to the proportion of their business represented by sales of food to go out are apparently much minimized; that the premises of each appellant contain, not only a predominating display counter which contains a full stock of the usual foods sold by delicatessens for off-premises consumption, but also mercantile equipment such as scales, rolls of paper, bags and containers that are explainable only by a substantial devotion to sales of delicatessen food to be taken out; that he viewed the various premises between 3:00 P.M. and 5:00 P.M., at which time the tables were

practically empty and the only business engaged in being the sale of such foods; that the tables in all the places are of the oblong, glassy-surfaced type customarily found in a combination restaurant-and-delicatessen; that all the appellants advertise themselves on their street display signs or windows as a delicatessen.

The casual sale of outgoing delicatessen foods by a bona fide restaurant licensed to sell liquor, or its sale of sandwiches or other similar foods prepared and intended for immediate off-premises consumption, do not, when incident to the general restaurant business, establish the restaurant as engaging in an independent mercantile business forbidden by R. S. 33:1-12(1). If, however, such sales are more than merely incidental, a contrary result must be reached. Re "Other Mercantile Business", Bulletin 38, Item 6; Retail Liquor Distributors Association v. Atlantic City and Polonsky, Bulletin 88, Item 10; Retail Liquor Distributors Association v. Atlantic City and Kornblau, Bulletin 88, Item 11; Re Stotter, Bulletin 292, Item 12.

In the instant cases, where the appellants' establishments are physically arranged obviously to cater to a delicatessen trade, and contain a regular stock of delicatessens and also mercantile paraphernalia for sales of food to be taken out, and actually do a regular and appreciable business in such sales, their delicatessen business is clearly substantial and independent and not merely incidental to the restaurant end. The contention of some of the appellants that they are not as fully stocked with articles as a shop exclusively devoted to the delicatessen business is without merit. Their outgoing sales of food, even if not constituting a full-fledged delicatessen business, nevertheless plainly fall within the phrase of "other mercantile business" in R. S. 33:1-12(1).

The fact that appellants obtained plenary retail consumption licenses for their premises in prior years is no warrant for the issuance of such a license for the current term. Liquor licenses are granted on a yearly basis. Those which were issued to appellants in past years were contrary to law and created no immunity in them to obtain a license for the current year in continued disregard of the statute. The mandatory provisions of the law are not to be nullified by neglect or non-user. Cf. Memorial Presbyterian Church v. Newark and Vicari and Scavone, Bulletin 191, Item 8, and Haines v. Burlington and Zekis, Bulletin 225, Item 3, where issuance of a retail liquor license in prior years for premises within 200 feet of a church, in violation of R. S. 33:1-76, was held no warrant for the issuance of a similar license for a new term.

The contention that R. S. 33:1-12(1) is unconstitutional is answered by reflecting that there is no inherent right in anyone to sell intoxicating liquors at retail in this State. Meehan v. Excise Commissioners, 73 N. J. L. 382 (Sup. Ct. 1906), aff'd 75 N. J. L. 557 (E. & A. 1908); Bumball v. Burnett, 115 N.J. L. 254 (Sup. Ct. 1935), Crowley v. Christensen (1890), 137 U. S. 86. In the Meehan case, the New Jersey Supreme Court stated:

> "The right to regulate the sale of intoxicating liquors by the legislature, or by municipal or other authority under legislative power given, is within the police power of the state, and is practically limitless."

Also see Franklin Stores Co. v. Burnett, 120 N. J. L. 596 (Sup. Ct. 1938).

Some of the appellants point out that they were denied a license for the current term without a hearing. In this, respondent committed no error. A local issuing authority is not required to conduct a hearing as a requisite to denial of a municipal license. Gomulka v. Linden, Bulletin 294, Item 8.

Normally, I would unconditionally affirm respondent's action in refusing to issue a plenary retail consumption license for premises which, as here, do not conform to R. S. 33:1-12(1). However, in the instant cases the appellants have held during past years, and continuously to the current term, such a license for their respective premises. There is no indication that they practiced fraud or were in bad faith in obtaining those licenses. It would be unfair now to compel them to lose their liquor business without a fair opportunity to remedy their premises so as to conform to R. S. 33:1-12(1).

Accordingly, the action of respondent in the instance of each appellant in these cases is reversed, but only on condition that said appellant shall, on or before March 1, 1939, cease his or its delicatessen business and furnish adequate proof of such to the State Commissioner, or, in the alternative, shall, on or before March 1, 1939, satisfactorily separate his or its delicatessen from the liquor premises and furnish adequate proof of such to the State Commissioner. If either condition is fulfilled, respondent will be directed to issue a license to said appellant, but only for the separated liquor premises in case of performance of the latter condition. In the event that an appellant performs neither of these conditions, the action of respondent in refusing to renew the license of that appellant is affirmed, in which case the order of extension (pending determination of appeal) of that appellant's license of the last licensing year, will be cancelled forthwith on March 1, 1939.

D. FREDERICK BURNETT,
Commissioner.

Dated: February 1, 1939.

11. DISCIPLINARY PROCEEDINGS - LIMITED DISTRIBUTION LICENSEE - THIRTY DAYS' PENALTY.

In the Matter of Disciplinary Proceedings against

NICHOLAS COLONNA,
421 - 17th Street,
West New York, N.J.,

Holder of Limited Retail Distribution License DL-11, issued by the Board of Commissioners of the Town of West New York.

CONCLUSIONS AND ORDER

Charles Basile, Esq., Attorney for the State Department of Alcoholic Beverage Control.

Defendant-Licensee, Pro Se.

BY THE COMMISSIONER:

The defendant, a limited retail distribution licensee, pleads guilty to the charge of possessing chilled malt liquor on his licensed premises in violation of Rule 21 of State Regulations 20, and of permitting a gambling device there in violation of Rule 7 of State Regulations 20.

The facts, briefly, are as follows:

On November 23, 1938, Investigators Hendrickson and Hull of this Department visited the licensed premises (a grocery and delicatessen store) and found sixteen 12-ounce cans and four 12-ounce bottles of chilled beer in an electric icebox under a meat counter. They warned the defendant that he, being a limited retail distribution licensee, was forbidden to have any chilled malt liquor on his licensed premises. Despite this warning, they discovered twenty 12-ounce cans of chilled beer in the refrigerator on December 21, 1938. On that same visit, they also found a punch board in the store, calling for five cents a punch and yielding prizes of cake to the person buying the last punch and to the persons punching the lucky numbers.

As regards the chilled beer, there is no evidence that the defendant sold any, although it appears that on three occasions prior to adoption of Rule 21 of State Regulations 20 (Bulletin 265, Item 13) he was warned about chilled beer found in his store. The defendant, as to the present instances of keeping chilled beer there, states that he lives with his family in premises behind the store; that the only refrigerator for the household is the electric icebox located in the store; that the beer found there was solely for personal consumption. As regards the punch board, he states that his wife took that to help out a cake salesman and that he (the defendant), being unaware that it was forbidden, permitted it to remain in the store.

The defendant's explanation for keeping the chilled beer in his store, even if true, does not excuse his palpable violations of Rule 21 of State Regulations 20, which forbids a limited retail distribution licensee from possessing chilled malt liquor on his licensed premises. Neither does his ignorance of Rule 7 of State Regulations 20, which forbids a retail licensee from permitting gambling devices on his licensed premises, excuse his permitting a punch board in his store in violation of that rule. A liquor licensee must learn and obey the liquor regulations at his peril.

In April 1936, the defendant's then outstanding limited retail distribution license was suspended for two days by the West New York Board of Commissioners for illegally possessing a quantity of hard liquor, such as whiskey, etc., in the premises behind his store.

In view of this record, the defendant's present license will be suspended for ten (10) days for possessing chilled beer in his store on November 23, 1938; for an additional twenty (20) days for possessing chilled beer there on December 21, 1938; and for an additional five (5) days for permitting a gambling device there on the latter date; or a total of thirty-five (35) days, less five (5) days for the plea, or a net of thirty (30) days.

Accordingly, it is on this 3rd day of February, 1939,

ORDERED that Limited Retail Distribution License DL-11, heretofore issued to Nicholas Colonna by the Board of Commissioners of the Town of West New York, be and the same is hereby suspended for a period of thirty (30) days, commencing on February 7, 1939 at 3:00 A.M.

D Frederick Burnett

Commissioner.