26 Rose Avenue,
Madison,
Morris County, New Jersey.

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 1039 NOVEMBER 30, 1954.

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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 1039 NOVEMBER 30, 1954.

1. APPELLATE DECISIONS - PAPP v. TRENTON.

MICHAEL PAPP and ELIZABETH PAPP, Partners, trading as PARADISE, ROBERT PALMER and SAMUEL STROMAN,

Appellants,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF TRENTON,

Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Albert H. Rees, Jr., Esq. and Leonard J. Williams, Esq., Attorneys for Appellants.
Louis Josephson, Esq., by John A. Brieger, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The issue raised by this appeal relates to the validity of two special conditions imposed by the respondent against the current plenary retail consumption license held by the appellants, Michael and Elizabeth Papp, for premises at 301 Union Street, Trenton. These conditions were contained in a resolution, dated June 30, 1954, granting a renewal of the license, and are as follows:

1. That no music of any nature or kind be played upon or in said licensed premises, excepting music furnished by radio, television, or juke box.

2. That the closing hour for the conduct and operation of the business upon said licensed premises shall be not later than 12 o'clock midnight for each and every day of the term of the license.

Application for stay of the conditions pending this appeal was denied with respect to the first condition and granted as to the second condition.

The tavern in question is located in an area which is predominantly residential, although several neighborhood stores are situated there. In June 1953, the licensees installed a colored orchestra, consisting of drums, piano and trumpet

Several persons residing in the vicinity testified that the noises emanating from the tavern, as a result of the extremely loud music and the accompanying singing and clapping of hands by the members of the orchestra and the patrons, caused them extreme discomfort and many sleepless nights, especially on week ends. On the other hand, several other nearby residents testified that the noise did not bother them. As is usual in this type of case, the reaction of these witnesses, who reside within hearing range of the noise, varies in direct proportion to their sensibilities to the type of music, singing and kindred noises emanating from the tavern. A complaint of excessive noise lends itself, at best, only to subjective proof, and what is pleasing and moderate to one may be extremely distressing and raucous to another.

However, one of the respondent's investigators testified that the orchestra could be heard for a distance of a block away and that,

on several occasions, he found it necessary to caution the licensees about the excessively loud playing of the orchestra. He also stated that the tavern was not equipped with air-conditioning. As a result, the doors and windows of the tavern are kept open for a substantial part of the year

A special officer, employed by the licensees to maintain order on the licensed premises, testified that both he and Mr. Papp had occasion to direct the orchestra "to play a little more quietly". The licensees' bartender described the music played as "jazz", and that, at midnight, he "would tell the band to cut down and not play so loud".

Upon a careful consideration of all the evidence relating to the special condition concerning the elimination of live music, I cannot conclude that its imposition lacks sufficient justification and it is, therefore, affirmed.

With respect to the second condition, it has already been held that a municipal issuing authority has no power to impose a discriminatory closing hour in individual cases. In Cesar v. Trenton, Bulletin 951, Item 2, former Director Cavicchia held, when considering a similar condition imposed by this respondent, as follows:

> "Our State Alcoholic Beverage Law (in R.S. 33:1-40) empowers the governing body of each municipality to limit, by ordinance, the hours between which the sale of alcoholic beverages at retail may be made. It would seem clear that the intendment of the statutory authorization in this regard in R. S. 33:1-40 (taken together with R.S. 33:1-94) is that a given municipality's hours for the sale of alcoholic beverages may be fixed by ordinance only and not by a special condition under R. S. 33:1-32. It has long been held that municipal hours of sale and closing must be uniform with respect to all licensees of the same class. (See Re Grillo, Bulletin 253, Item 4; Re Harrington, Bulletin 118, Item 13; Re Lamson, Bulletin 118, Item 6; Re Wenzel, Bulletin 19, Item 7.)
>
> "Pursuant to Trenton's alcoholic beverage ordinance tavern owners are permitted to remain open for business until 2:00 a.m. week round. I find that respondent had no jurisdiction to impose the 'midnight closing' special condition herein on appeal. That special condition is disapproved and held to be of no binding force or effect.
>
> "In Betsy Ross, Inc. v. Union Township, Bulletin 435, Item 12, an 11:00 p.m. curfew was imposed upon a single licensee in the face of an ordinance fixing the municipal closing hour at 3:00 a.m. The special condition in that case may have been an expedient and happy solution but there is serious doubt, even under the peculiar circumstances there present, as to its legal soundness. In any event the situation was entirely different from that in the appeal before me. And quite apart from the legal question involved, it is to be remarked that in the cited case the then Acting Commissioner was aware of the very real danger courted when he stated (Bulletin 435, Item 12, page 13):
>
> > "'It should be pointed out that the imposition of this type of condition in a license is, however, to be sparingly and most cautiously exercised. Otherwise, the resultant confusion of diversified conditions will render nugatory practical enforcement of local regulations.'"

I might add that the Betsy Ross Case, decided in December 1940, did not involve an appeal from the imposition of a special condition by a local issuing authority but was one in which the license was conditioned directly by the then Acting Commissioner after the appeal had been taken to this agency.

In view of the foregoing, it is immaterial whether the licensees did, or did not, voluntarily agree to the condition relating to the earlier closing hour of their tavern.

One further point. The respondent objects to the inclusion, in addition to the licensees, of the other two individual appellants as parties to this appeal. One of them is the licensees' bartender, who alleges that his employment at the tavern has been jeopardized, and the other is a patron of the tavern, who claims to be inconvenienced by the conditions. I agree with the respondent that their interests are entirely too remote and not such as to give them any status to appeal the imposition of the special conditions herein within the contemplation of the Alcoholic Beverage Law. See R. S. 33:1-22, 31 and 41. Even were it otherwise, their interests, being purely private and personal, must yield to the paramount interest of the public in the proper regulation and control of licensed establishments.

Accordingly, it is, on this 9th day of November, 1954,

ORDERED that the action of the respondent whereby it imposed the special condition relating to the elimination of live music be and the same is hereby affirmed, and its action whereby it imposed the special condition relating to the earlier closing hour be and the same is hereby reversed.

WILLIAM HOWE DAVIS
Director.

2. APPELLATE DECISIONS - BACON v. WEST PATERSON.

THOMAS BACON and MARIE BACON, trading as BACON'S CAFE,
Appellants,
-vs-
BOROUGH COUNCIL OF THE BOROUGH OF WEST PATERSON,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Donato & Donato, Esqs., by Joseph D. Donato, Esq., Attorneys for Appellants.
Joseph M. Harrison, Esq., Attorney for Respondent.

BY THE DIRECTOR:

This is an appeal from respondent's denial of appellants' application to renew their plenary retail consumption license for the licensing year 1954-55 for premises 499 McBride Avenue, West Paterson. The action of respondent was unanimous to deny said renewal.

Respondent alleges in support of its action that appellants had no right to possession of said premises at the time the application for renewal of the license was filed.

The essential facts are not in dispute. The evidence presented herein discloses that on or about November 1, 1953, appellants vacated

the premises for which the renewal of the license was sought. The fixtures and equipment contained in the premises were either moved or disposed of by the appellants. Thereafter the premises were rented to various other tenants, the last of whom had a right of possession thereto up to and including July 9, 1954. Appellants' application for renewal of their license for the premises in question was filed with respondent on June 28, 1954. On June 30, 1954, appellants entered into an agreement to lease their former premises (499 McBride Avenue) for a term of two months to commence on July 10, 1954. On July 14, 1954, the application for renewal of appellants' license for the premises aforementioned was denied.

It is well established that an applicant for a liquor license or for a renewal thereof must have possession of, or right to possession of, or interest in, the premises sought to be licensed. If the applicant does not have possession of, or right to possession of, or any interest in, the premises, no license may be lawfully issued. Re Haneman, Bulletin 449, Item 4; Procoli v. Trenton, Bulletin 28, Item 6; Caplan v. Trenton, Bulletin 29, Item 11; Re Pennsauken, Bulletin 48, Item 8; Re Sakin, Bulletin 67, Item 13; White Castle, Inc. v. Clifton, Bulletin 97, Item 13; D'Annibale v. Fredon, Bulletin 139, Item 7; Agzigian v. Pequannock, Bulletin 216, Item 1; Eavenson v. South Orange, Bulletin 283, Item 8; Vasapoli v. Plainfield, Bulletin 301, Item 7; Licata v Camden, Bulletin 342, Item 1; Hindin v. Egg Harbor, Bulletin 399, Item 1; Gimber v. Galloway, Bulletin 427, Item 9; Bodrato v. Northvale, Bulletin 433, Item 1; Berry v. Newark, Bulletin 433, Item 8; Alberts v. Roselle, Bulletin 444, Item 1; Montclair Athletic Club v. Montclair, Bulletin 859, Item 1; Terlizzi v. Union City et als., Bulletin 860, Item 2; Ways & Witteborn, Bulletin 951, Item 3.

It is apparent that appellants did not have possession or right to possession of, or interest in, the premises sought to be licensed at the time they applied for renewal of the license. The respondent had no jurisdiction to grant a renewal of the license for the present licensing period for premises 499 McBride Avenue.

Under the circumstances, respondent's action in refusing to grant the renewal of appellants' license for premises 499 McBride Avenue is affirmed.

Accordingly, it is, on this 12th day of November, 1954,

ORDERED that the action of respondent 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 - HYMAN v. HOWELL TOWNSHIP.

AARON HYMAN, trading as HYMAN'S GENERAL STORE,
Appellant,
-vs-
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOWELL,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Harry Sagotsky, Esq., Attorney for Appellant.
Barkalow, McGowan & Krusen, Esqs., by M. Raymond McGowan, Esq., Attorneys for Respondent.
Sidney Simandl, Esq., Attorney for Objectors.

BY THE DIRECTOR:

This is an appeal from the action of respondent whereby it denied an application to transfer appellant's plenary retail distribution license from Hulse's Corner Road and Fort Plains Road to the west side of Highway 9, 250 feet North of Hulse's Corner Road, Township of Howell.

Respondent denied the application on the ground that "there are sufficient number of places whereby people can be accommodated in purchasing package goods in the vicinity in which this transfer is requested."

Appellant alleges that the action of respondent was erroneous for various reasons which may be summarized as follows:

(a) There are no plenary retail distribution licenses on Highway 9. The objections were made by holders of plenary retail consumption licenses and these objections are untenable since persons (especially women) who purchase alcoholic beverages in package stores will not make alcoholic purchases in taverns;

(b) No objections were offered to show that appellant is unfit or that the proposed premises are unsuitable;

(c) Appellant will suffer undue hardship from the denial of the transfer;

(d) Appellant was not granted a fair hearing before the Township Committee

As to (a): In addition to appellant's license, respondent has issued two other plenary retail distribution licenses for premises in other sections of the Township. Appellant seeks to transfer his license a distance of one and one-half miles from premises on a side road to premises on Highway 9. At the present time there are no plenary retail distribution licenses on Highway 9. However, it appears from the testimony that said highway runs for a distance of eight miles through the Township of Howell and that, on said section of the highway, there are now five plenary retail consumption licenses and one limited distribution license. One of the premises for which a plenary retail consumption license has been issued is located three-tenths of a mile from appellant's proposed premises, and the premises for which the limited distribution license has been issued are located about one-half mile from appellant's proposed premises. Appellant testified herein that about two hundred homes were erected in

1950 on the highway in a development known as "Land of Pines." However, it appears that appellant's proposed premises would be seven-tenths of a mile from "Land of Pines" and that the nearest existing place licensed for consumption is about a mile from said development.

It is well established that, in determining whether a plenary retail distribution license should be issued or transferred, a local issuing authority may properly take into consideration the number of retail consumption licenses existing in the vicinity. Colonna v. Montclair, Bulletin 39, Item 8; Boody v. Gloucester, Bulletin 300, Item 11; Thompson v. Mount Olive, Bulletin 986, Item 1. Referring to the contention that women will not purchase alcoholic beverages in taverns, in Franklin Stores Co. v. Belleville, Bulletin 102, Item 2, Commissioner Burnett said:

> "Appellant claims, however, that consumption places do not cater to the package trade and that women desiring to make such purchases would prefer to enter stores dealing only with package goods. Quite true. But they already have in the municipality three such stores. With present-day telephone and transportation facilities such stores can properly service large areas."

See also Russ v. Logan, Bulletin 733, Item 10.

As to (b): No question has been raised herein as to the fitness of appellant or the suitability of his proposed premises. However, it does not follow that appellant is entitled to a transfer of his license. The transfer to other premises is a privilege not inherent in appellant's license. The issuing authority may grant or deny the transfer in the exercise of a reasonable discretion. If denied on reasonable grounds, such action will be affirmed. VanSchoick v. Howell, Bulletin 120, Item 6.

As to (c): Appellant now operates a grocery and liquor store at his present licensed premises. He testified that he has recently purchased the property on Highway 9 and plans to operate eventually a general store at that location. The mere fact that denial of the application may result in personal hardship to appellant is not sufficient to overcome the primary consideration of the general welfare of the community. Moran v. West Orange, Bulletin 143, Item 8; Hutchins v. Paterson, Bulletin 764, Item 9.

As to (d): There was introduced into evidence herein a transcript of the proceedings below. It appears therefrom that some competitors spoke against the transfer of the license and that the attorney for appellant questioned these persons. Apparently appellant produced no testimony below, but there is nothing in the record to show that appellant was prevented from producing testimony and, in any event, he has been afforded full opportunity to be heard at the hearing of this appeal. Cf. Marsteller v. Somers Point et al., Bulletin 244, Item 7. There is nothing in the case which would lead me to conclude that any member of the Township Committee was improperly motivated.

After considering all the evidence herein I conclude that appellant has failed to sustain the burden of establishing that the action of respondent was erroneous. Respondent's action will be affirmed.

Accordingly, it is, on this 12th day of November, 1954,

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

WILLIAM HOWE DAVIS
Director.

4. APPELLATE DECISIONS - O'BERTZ v. PERTH AMBOY.

VICTORIA O'BERTZ, trading as OBERTZ TAVERN,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE CITY OF PERTH AMBOY,

Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Walter Waverczak, Esq., by Elias A. Kanter, Esq., Attorney for Appellant.
Francis M. Seaman, Esq., Attorney for Respondent.

BY THE DIRECTOR:

This is an appeal from the action of respondent on July 7, 1954, whereby it denied appellant's application for renewal of her plenary retail consumption license for the 1954-55 licensing period for premises 33-35 Smith Street, Perth Amboy. Respondent's resolution which was approved unanimously by the five members of the respondent Board set forth the following reasons for such denial:

"WHEREAS, a public hearing was held on this 7th day of July, 1954, on objections to the application of Victoria O'Bertz for the renewal of a Plenary Retail Consumption License for premises located at 33-35 Smith St., Perth Amboy, N. J.; and

"WHEREAS, it was established that the Licensee, on her applications for renewal of her Plenary Retail Consumption License in the years 1945 through 1953 inclusive, did, in violation of R. S. 33:1-25, make false and misleading statements in response to questions numbers 34, 35, 36 and 37 contained in said applications.

"IT IS, THEREFORE, on this 7th day of July, 1954, resolved that the application of Victoria O'Bertz for the renewal of her Plenary Retail Consumption License aforesaid be and is hereby denied."

Appellant contends in her petition of appeal that the action of respondent was arbitrary, capricious and unreasonable.

This appeal was heard de novo pursuant to Rule 6 of State Regulations No. 15.

The undisputed facts in the instant case disclose that continuously since 1940 appellant has held a plenary retail consumption license and, including the 1953-54 licensing period, has renewed said license for premises 22 Smith Street. On October 19, 1953, appellant filed an application for a transfer of her license to 33-35 Smith Street. On November 18, 1953, respondent denied said transfer. An appeal was filed from said denial and, after a hearing in the matter, an order dated April 6, 1954, was entered reversing the action of respondent and directing it to issue to appellant the place-to-place transfer of the license as applied for. O'Bertz v. Perth Amboy, Bulletin 1011, Item 1. On June 8, 1954, appellant applied for renewal of her license for premises 33-35 Smith Street, which application was denied by respondent on July 7, 1954. Thereafter appellant appealed from said denial, and her 1953-54 license was extended pursuant to R.S. 33:1-22.

Appellant admits that years ago on divers occasions she had run afoul of the law. Appellant's convictions in a local recorder's court are as follows:

"February 11, 1927 -- convicted of selling liquor to three boys, 15, 17 and 18 years, respectively -- paroled.

"March 7, 1932 -- convicted on a charge of disorderly conduct liquor violation and fined $50.

"May 7, 1933 -- convicted as a disorderly person on a charge of possession of liquor at 8 Smith Street and fined $50.

"May 13, 1935 -- convicted of violation of City liquor ordinance, selling liquor to a girl under 17 years, and fined $50.

"May 13, 1935 -- convicted of violation of City liquor ordinance, selling liquor to a girl under 17 years (different girl) -- sentence suspended."

Mayor James J. Flynn, Jr., who voted against the renewal of appellant's license, testified at the hearing herein as follows:

"Q. In your opinion, Mr. Mayor, is the applicant a fit person to whom, in your opinion, a plenary retail consumption license should be issued? A. No.

"Q. And what is the basis for that conclusion, your conclusion, Mr. Mayor? A. The basis of the application not being answered properly.

"Q. Primarily what was it? A. Primarily the reputation of the establishment that was conducted previously.

"Q. With respect to her applications? A. That's right.

"Q. You came to the conclusion that the applicant is not a fit person by reason of mis-statements over all these years and in her application for renewal? A. That's right.

"Q. Mr. Mayor, prior to the applicant's application for a transfer in November, 1953, did you have any personal knowledge of the prior record of the applicant before the time of that application. A. No, sir."

Commissioners Tarloski, Mihalko and Muska testified that they also voted to deny the appellant's application for renewal because of the misstatements made by her in prior renewal applications. Commissioner Tarloski testified that he knew appellant "thirty years or better" when she operated a candy store. He further testified that "Her reputation personally I always found her to be good. I used to deal with her. She used to deal with my drug store." Commissioners Tarloski and Mihalko testified that they had no knowledge that appellant had a police record until the time she applied for transfer of her license in 1953.

R. S. 33:1-24 provides:

"It shall be the duty of each other issuing authority to receive applications for such licenses as such other issuing authority is authorized to issue; to investigate applicants ***."

The record of appellant's convictions (all of which occurred in Perth Amboy) was available to respondent and could have been readily inspected.

I shall now examine the record of convictions of appellant. Appellant was convicted twice of disorderly conduct, and twice for violation of a local ordinance. The remaining conviction on February 11, 1927 (for sale of alcoholic beverages to minors) resulted in appellant being placed on parole. The record relating to said conviction fails to disclose what provision of the law was violated. The attorney for respondent advised me that a search of the records of the municipal court discloses that the original complaint, from which the desired data could be obtained, is no longer available. Appellant's convictions for disorderly conduct are not convictions of a crime within the meaning of R. S. 33:1-25 (Re Case No. 65, Bulletin 193, Item 11; Re Case No. 221, Bulletin 246, Item 7). Sudol v. Wallington, Bulletin 276, Item 7. Furthermore, the convictions of violations of a local ordinance are not convictions of a crime within the meaning of the aforementioned statute (Re Case No. 249, Bulletin 303, Item 8). In fairness to appellant, because of the absence of information with reference to the conviction on February 11, 1927, I cannot assume that the said conviction constitutes a conviction of a crime within the meaning of the Alcoholic Beverage Law. Since appellant's convictions were not convictions of crime, the omission to set them forth was not improper. There is nothing in the record to indicate that appellant violated any Federal or State law relating to alcoholic beverages.

Proper liquor control dictates that an issuing authority should be free, within the confines of a sound discretion, to determine whether or not a person is fit to hold a license. However, the determination of unfitness must in every case be founded upon valid and substantial grounds. Vuono v. Belleville, Bulletin 163, Item 12; Jones v. Absecon, Bulletin 218, Item 1; Zicherman v. Newark, Bulletin 227, Item 7; Sudol v. Wallington, supra, Robert et al. v. Hoboken, Bulletin 642, Item 10.

Under the circumstances existing in this case, respondent, for the reasons stated, was not justified in refusing to renew the license. I shall reverse the action of the respondent Board.

Accordingly, it is, on this 16th day of November, 1954,

ORDERED that the action of the respondent Board be and the same is hereby reversed, and respondent is directed and ordered to issue to appellant a renewal of her license for the current licensing year pursuant to the conclusions herein.

WILLIAM HOWE DAVIS
Director.

5. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITIES (PERMITTING MAKING ARRANGEMENTS ON LICENSED PREMISES FOR ILLICIT SEXUAL INTERCOURSE) - SALE DURING PROHIBITED HOURS IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 38 - SALE TO MINOR - CHARGE ALLEGING THAT PROSTITUTES WERE PERMITTED ON LICENSED PREMISES DISMISSED - LICENSE SUSPENDED FOR 210 DAYS.

In the Matter of Disciplinary Proceedings against)

JOSEPH ORANGES and MORRIS N. HINKES)
168-170 South Orange Avenue)
Newark, N. J.,)

Holders of Plenary Retail Consumption License C-145 for the 1952-53, 1953-54 and 1954-55 licensing years, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.)

CONCLUSIONS AND ORDER

William Osterweil, Esq., Attorney for Defendant-licensees.
Edward F. Ambrose, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The defendants were served with charges alleging that on May 5 and 6, 1953, they allowed, permitted and suffered (1) prostitutes on their licensed premises, in violation of Rule 4 of State Regulations No. 20, (2) lewdness and immoral activity on their licensed premises, viz., solicitation for prostitution and the making of arrangements for illicit sexual intercourse, in violation of Rule 5 of State Regulations No 20, (3) the sale, service and delivery of alcoholic beverages to a minor, in violation of Rule 1 of State Regulations No 20, and that (4) on May 5, 1953, at about 10:45 p.m., they allowed, permitted and suffered the sale of a bottle of whiskey in its original container for consumption off the licensed premises, in violation of Rule 1 of State Regulations No. 38, which prohibits such activity before 9:00 a m. or after 10:00 p.m. on week days.

Pleas of not guilty were entered to charges (1), (2) and (4), and a plea of non vult to charge (3).

Hearing of this case consumed ten days, extending over a period of approximately six months. The stenographic transcript reached the unprecedented total of 1567 pages, or at least three times the length of any prior case heard in the Division's twenty-year history, and more than ten times the average of contested hearings before this Division.

To attempt a detailed analysis of the testimony of all of the witnesses would, in view of the decision I have reached in this case, unnecessarily burden this opinion with much that is immaterial and irrelevant. Suffice it to say that a substantial portion of the record relates to the activities of one Smith, employed by the defendants as a porter, who introduced agents of this Division to a girl named Audrey on the occasion of their first visit to the licensed premises on May 5, 1953, and to two girls named Josephine and Dolores on their second and final visit on May 6, 1953. Arrangements for sexual intercourse were made by one of the agents with Audrey but, when the agent informed her that he was "broke", they made a date to meet again at the tavern the next day, to wit, May 6, 1953. Although Audrey kept the date, she told the agent that she would have to postpone their appointment for several days. Arrangements for the purpose of illicit sexual intercourse were then made by the two agents with the aforementioned Josephine and Dolores.

Although employed as a porter, all of Smith's activities on the occasions in question took place while off-duty and while his capacity on the licensed premises differed in no respect from that of any other patron. Whatever may be the rule of liability regarding the off-duty activities of a manager or a person employed in some similar capacity, it is clear that one employed in such a menial capacity, as was Smith, may not fairly bind the licensees to liability for his wholly off-duty activities while a patron on the premises, within the principle embodied in Rule 31 of State Regulations No. 20, which imposes responsibility on a licensee for the acts of an employee, servant or agent, irrespective of the licensee's participation therein, or that the acts were committed contrary to his instructions or that they did not occur in his presence.

This is not to say that, under no circumstances, may a licensee be responsible for such activities. Even where the violation results from the acts of a patron, otherwise disassociated with any connection with the licensed premises, the licensee must accept responsibility therefor where knowledge, expressed or implied, of the acts constituting the violation, may be imputed to the licensee. The proofs in this case, however, do not satisfy me that the defendants had actual knowledge of the off-duty activities of Smith or that they were so extensive or notorious that they should have been known by the defendants.

However, the case does not end here. After the agents had completed their arrangements for illicit sexual intercourse with Josephine and Dolores, one of the agents approached Arthur Wylie, then acting as bartender, and said to him, "Tony, Josephine is taking me upstairs for a lay. Is it safe? You know I'm married, I don't want to get in no trouble", to which the bartender replied, "I don't want to know nothing, whatever deal you make with her that's between you and her. I don't want to know nothing. All I'm here for is sell whiskey, nothing else. I pay no mind to anything you say". In full view of the bartender, one of the agents then handed some money to Josephine and the other agent handed some money to Dolores. One of the agents then asked the bartender to hold his wallet for him, offering the reason that he did not want to get "rolled" when he went upstairs to engage in sexual intercourse. Although reluctant to take the wallet, and first saying, "Don't get me mixed up in it. I don't want to know what deals you made", the bartender, after Smith had interceded in the agent's behalf, accepted the wallet and placed it on the back bar for safekeeping. The agents and the girls then proceeded to rooms over the tavern, where they were subsequently found by other enforcement officers and the money, the serial numbers of which had been previously noted, was discovered in the possession of the girls.

The bartender testified that he is hard of hearing and paid no attention to the agents' references to their arrangements with the girls for engaging in sexual intercourse. He admits, however, that he stated to one of the agents that "I don't want to know what you and the girls are going to do". I am satisfied that the bartender was aware that the agents had made the arrangements for illicit sexual intercourse with Josephine and Dolores and that, in accepting the wallet for safekeeping, affirmatively aided in the consummation of those arrangements. I find the defendants guilty, therefore, of so much of charge (2) as relates to the activities of the bartender on May 6, 1953.

There is no probative proof in the record to substantiate the allegations of charge (1), and that charge is, accordingly, dismissed.

The non vult plea to charge (3) admits the service of alcoholic beverages to Audrey, hereinbefore mentioned, a minor aged eighteen years.

With respect to charge (4), it appears that, shortly after 10:30 p.m. on May 5, 1953, one of the agents gave some money to Smith and asked him to purchase a bottle of whiskey for him. Smith approached the defendant, Oranges, who obtained a bottle of whiskey, received payment from Smith, and the latter then handed the bottle to the agent, who subsequently took the unopened bottle with him when leaving the premises. Oranges admits the sale of the bottle to the agent but claims that he cautioned Smith that the contents of the bottle would have to be consumed on the licensed premises. Assuming that such cautionary statement was made, it constitutes no defense to the violation. Obviously, a mere statement to that effect amounts to no more than giving lip service to compliance with the regulation prohibiting the sale of packaged liquor for consumption off the licensed premises after 10:00 p.m. on week days. I am convinced that the defendants failed to exercise that degree of diligence which would have prevented the occurrence of the violation and I, therefore, find them guilty of charge (4).

After the conclusion of the hearings, the defendants' attorney expressly waived oral argument before the Director. He did, however, submit a lengthy memorandum devoted largely to the contention that the defendants were not accorded a fair trial before the Hearer. It suffices to say that a careful reading of the voluminous transcript convinces me that, not only is the contention specious, but that the Hearer permitted the attorney considerably more latitude in his examination of witnesses, presentation of evidence and argument thereon, than is normally required under any concept of justice and fair play, whether applied to administrative or strictly judicial proceedings. Other contentions made in the memorandum are either answered herein or are so lacking in merit as to require no answer.

The defendants have no prior record. While the finding of guilt under charge (2) requires a heavy-fisted penalty, I seriously doubt whether, under all of the attendant circumstances, an outright revocation of the license herein is warranted. The bartender neither procured the girls for the agents nor was he instrumental in effecting their acquaintance. He had no contact with the violation until after the illicit arrangements had been made. Whether the addition of any of those features would have resulted in an outright revocation in this case need not now be resolved. All that I here hold is that in the absence of all of those features, a lesser penalty than a total deprivation of the license privileges is indicated. It would seem unnecessary to add that, obviously, where the proofs disclose a practice of providing girls for immoral purposes, or that the activities of such females are actually known by the licensees, or that such activities are sufficiently extensive that they should have been known by the licensees, the only proper penalty is revocation. Cf. Re Sevak, Bulletin 1012, Item 2; Re Shaw, Bulletin 1028, Item 1.

In fairness and justice to the licensees, I have determined, as already indicated, that an outright revocation of their license would be unnecessarily severe. However, the unholy union of vice and liquor on licensed premises cannot, and will not, be tolerated. Stern penalties will go a long way toward ensuring their complete divorce. A careful consideration of the circumstances involved in the instant violations impels the imposition of a suspension for a period of 210 days. Such will be the order.

Accordingly, it is, on this 16th day of November, 1954,

ORDERED that Plenary Retail Consumption License C-145, issued for the 1954-55 licensing year by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Joseph Oranges and Morris N. Hinkes, for premises 168-170 South Orange Avenue, Newark, be and the same is hereby suspended for a period of two hundred ten (210) days, commencing at 2:00 a.m. November 23, 1954, and terminating at 2:00 a.m. June 21, 1955.

WILLIAM HOWE DAVIS
Director.

6. DISCIPLINARY PROCEEDINGS - SALE FOR OFF-PREMISES CONSUMPTION IN OTHER THAN ORIGINAL CONTAINER - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against HODES CORPORATION 168-1/2 Belmont Avenue Newark 3, N. J., Holder of Plenary Retail Consumption License C-291 for the 1953-54 and 1954-55 licensing years, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS AND ORDER

Saul C. Schutzman, Esq., Attorney for Defendant-licensee.
David S. Piltzer, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded not guilty to the following charge:

"On Sunday, May 30, 1954, at about 12:10 P.M., you sold an alcoholic beverage not pursuant to and within the terms of your license as defined by R. S. 33:1-12(1) in that you sold a pint bottle of Hunter Blended whiskey in other than the original container for consumption off your licensed premises, in that you opened such container and thereby destroyed its original character before making delivery thereof to the purchaser; in violation of R. S. 33:1-2."

An ABC agent testified that prior to noon on Sunday, May 30, 1954, he and another agent arrived in the vicinity of defendant's licensed premises. The further testimony of this agent may be summarized as follows: The licensed premises opened promptly at 12:00 o'clock, at which time a number of men entered. The agent entered the premises at approximately 12:05 p.m. and observed three men behind the bar who were subsequently identified as Paul Hodes and Sam Hodes, officers of defendant corporate-licensee, and Charles Horton, an employee. The agent walked to the far end of the barroom and joined a line of three or four men who were purchasing bottles of liquor at the end of the bar. The agent waited his turn and then ordered a pint of Hunter's whiskey from Paul Hodes. Hodes obtained a bottle of the brand requested and handed it to Charles Horton, saying "Cut that seal." Charles Horton "scored" the seal with a penknife as the agent paid Paul Hodes for the whiskey. The agent then asked Paul Hodes for a paper bag and, when he failed to respond to the agent's request, Charles Horton, who stood directly in front of the agent, remarked "stick it in your pocket." The agent complied with the suggestion and left the premises by way of the front door. He rejoined his fellow agent and then both entered the premises and made known their identity.

The agent who remained outside testified that at 12:05 p.m. his fellow agent entered defendant's licensed premises through the front door. A short time thereafter his fellow agent emerged from the same door and showed him a bottle of whiskey with the seal partly broken. The two agents entered the premises and identified themselves. The witness testified he went into the back room but did not see anyone consuming any whiskey and did not see any whiskey glasses or bottles therein.

The testimony of Paul Hodes discloses that shortly after noon on Sunday, May 30, the agent came to the end of the bar and asked him for a pint of "Hunter's" whiskey. He said he told the agent "For drinking on the premises only" and then obtained the item and cut the seal. His testimony further discloses that Charles Horton "was in behind the bar at the end of the bar" at the time. Paul Hodes testified that he then said to the agent, "How many glasses? What kind of chaser do you want?" but, before he could give the agent the glasses and chaser, the agent ran out of the place. He testified, in response to a question, that he had cut the seal of "about one or two" bottles prior to the time the agent made his purchase, but later denied that he made sales of bottled goods immediately after 12:00 noon upon which he cut the seals. His testimony discloses that he did not know whether his brother, Sam Hodes, had made sales of bottles of whiskey with cut seals as he was busy "on the other side of the bar." However, in subsequent testimony he said he saw his brother make sales of two bottles and cut the seals thereon. When asked whether he actually observed him cut the seals, Paul Hodes answered "That is our practice."

Defendant produced three witnesses who testified they were in defendant's licensed premises on the afternoon in question. The first witness (Henderson Stanback) testified that he saw the ABC agent at the bar and heard him ask for a pint of Hunter's whiskey. Paul Hodes cut the seal of a pint of whiskey and gave it to the agent, saying "In the back. How many glasses? What kind of chaser do you want?" Henderson Stanback did not know where Paul Hodes obtained the bottle of whiskey nor did he remember where Sam Hodes was standing behind the bar. He testified he did not see Charles Horton, but believed he was standing by the beer cases at the end of the bar. Henderson Stanback further testified he heard Paul Hodes say "Where he go?", start toward the back, then come back. The second witness (Cary Davis) testified that he was standing at the bar drinking a glass of beer when he saw Paul Hodes make the sale, and heard him ask the agent "How many glasses and what kind of chaser he want." Davis said he then went in the back with "my own and sat at a table" when he saw another "fellow" come in and say "ABC men." Davis said he was "middleway of the bar" and, when asked when he first saw the agent, he testified "First saw him -- I saw him buying the whiskey. He went out." When asked thereafter if he saw the agent buy the whiskey, Davis said, "I saw him making the sale. I didn't recognize him. He bought the whiskey." Davis further testified, in answer as to where the agent was when he bought the whiskey, "I know he wasn't on the end." Subsequent testimony of Davis disclosed that he did not know where the middle of the bar was; that he bought a bottle of Lord Calvert whiskey, sat at a table in the back with the whiskey, and "a glass of ginger ale chaser", when a man came in and said "Revenue man." The third witness (John Fowler) testified he saw the agent buy a bottle of whiskey and leave the premises by the back door.

I am satisfied, after careful review of all the testimony adduced herein, that the agent purchased a pint bottle of Hunter's whiskey for off-premises consumption during prohibited hours. The testimony of the agents was positive in character, whereas that of Paul Hodes and the three defendant's witnesses was uncertain and contradictory. The breaking of the seal, thereby converting it into an open container, was an apparent attempt to circumvent Rule 1 of State Regulations No. 38 which prohibits sale of alcoholic beverages in original containers for off-premises consumption on Sunday. Such subterfuge on the part of a licensee will not be tolerated and will avail him nothing.

I find defendant guilty as charged.

Defendant has no prior adjudicated record. I shall suspend its license for fifteen days. Re Langer and Bershaw, Bulletin 907, Item 5.

Accordingly, it is, on this 1st day of November, 1954,

ORDERED that Plenary Retail Consumption License C-291, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Hodes Corporation, for premises 168-1/2 Belmont Avenue, Newark, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. November 8, 1954, and terminating at 2:00 a.m. November 23, 1954.

WILLIAM HOWE DAVIS
Director.

7. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

RENATO R. CARABELLI
T/a CARABELLI'S BAR
E/S Fort Dix Road
Pemberton Township
P. O. Pemberton, N.J.,

Holder of Plenary Retail Consumption License C-5, issued by the Township Committee of the Township of Pemberton.

CONCLUSIONS AND ORDER

Renato R. Carabelli, Defendant-licensee, Pro Se.
Edward F. Ambrose, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded non vult to a charge alleging that he sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, at his licensed premises to a minor and allowed, permitted and suffered consumption of said alcoholic beverages by said minor in and upon his licensed premises, in violation of Rule 1 of State Regulations No. 20.

The file herein discloses that on Sunday night, October 3, 1954, Pvt. David ---, a member of the United States Army, aged 18, visited defendant's licensed premises and during the time spent in said premises was served with five glasses of beer by an employee of defendant.

Defendant has no prior adjudicated record. I shall suspend defendant's license for a period of ten days. Five days will be remitted for the plea entered herein, leaving a net suspension of five days. Re Watters, Bulletin 954, Item 9.

Accordingly, it is, on this 1st day of November, 1954,

ORDERED, that Plenary Retail Consumption License C-5, issued by the Township Committee of the Township of Pemberton to Renato R. Carabelli, t/a Carabelli's Bar, E/S Fort Dix Road, Pemberton Township, be and the same is hereby suspended for a period of five (5) days, commencing at 2:00 a.m. November 8, 1954, and terminating at 2:00 a.m. November 13, 1954.

WILLIAM HOWE DAVIS
Director.

8. DISCIPLINARY PROCEEDINGS - SALE DURING PROHIBITED HOURS IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 38 - PRIOR RECORD - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against JOHN E. McCANN T/a SUMMIT TAVERN 377 Summit Avenue Jersey City 6, N. J., Holder of Plenary Retail Consumption License C-80, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	CONCLUSIONS AND ORDER

John E. McCann, Pro Se.
Edward F. Ambrose, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant has pleaded non vult to the following charge:

"On Saturday, October 30, 1954, at about 12:50 A.M., you sold and delivered and allowed, permitted and suffered the sale and delivery of alcoholic beverages at retail in their original containers for consumption off the licensed premises; in violation of Rule 1 of State Regulations No. 38."

The file herein discloses that on Saturday, October 30, 1954, at about 12:50 a.m., one of two ABC agents who were present in defendant's licensed premises purchased from the licensee six cans of Schmidt's beer to take out. The agents left the premises with the merchandise and returned later to identify themselves to John McCann, who admitted the sale.

Effective November 5, 1951, the license for the above premises (then in the name of the defendant herein and a partner) was suspended for ten days by the local issuing authority for selling to intoxicated persons and for a brawl. In view of the prior dissimilar record, I shall suspend defendant's license for a period of twenty days. Five days will be remitted for the plea entered herein, leaving a net suspension of fifteen days. Re Cohen, Bulletin 968, Item 2.

Accordingly, it is, on this 8th day of November, 1954,

ORDERED that Plenary Retail Consumption License C-80, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to John E. McCann, t/a Summit Tavern, for premises 377 Summit Avenue, Jersey City, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. November 15, 1954, and terminating at 2:00 a.m. November 30, 1954.

William Howe Davis
Director.