

V

MR. ZEMEL

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

BULLETIN 1591

December 10, 1964

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - MATTEO v. GLOUCESTER TOWNSHIP.
2. APPELLATE DECISIONS - EIGHTY-NINE CLINTON, INC. v. ATLANTIC HIGHLANDS.
3. STATE LICENSES - NEW APPLICATIONS FILED.

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1. APPELLATE DECISIONS - MATTEO v. GLOUCESTER TOWNSHIP.

#3029-
George W. Matteo, Sr.,)
Appellant,)
v.)
Township Committee of the)
Township of Gloucester,)
Respondent.) On Appeal
-----) CONCLUSIONS and ORDER

#3051-
George W. Matteo, Sr.,)
Appellant,)
v.)
Township Committee of the)
Township of Gloucester,)
Respondent.)

Simon, Jaffe & Denstman, Esqs., by Sidney S. Jaffe, Esq.,
Attorneys for Appellant
Meyer L. Sakin, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Two separate appeals were instituted by the appellant against the respondent Township Committee of the Township of Gloucester (hereinafter Committee). Since the issues involved herein are interrelated and necessarily integrated, they have, by stipulation of counsel, been consolidated for hearing and will be the subject of a single report.

The first appeal was taken pursuant to R.S. 33:1-41 and challenges inter alia the applicability of a limitation ordinance adopted by Committee to appellant's pre-existing plenary retail distribution license for premises on Evesham Road, Glendora, Gloucester Township. The second appeal is from the denial by Committee of appellant's application for renewal of the said license which expired on June 30, 1964. The basis for the denial was premised upon the adoption of the aforesaid ordinance which limited the number of distribution licenses to a number less than then outstanding at the time of the application for renewal.

The first appeal is directed toward the action of the respondent in adopting an ordinance on March 17, 1964, whereby it amended a prior ordinance authorizing the issuance of a total of not more than three plenary retail distribution licenses in the

said Township. The subject ordinance reduced the authorized number of such licenses to two. There was no saving clause with reference to any pre-existing licenses of this type and character theretofore issued by the Committee. In his petition challenging the applicability of the said ordinance the appellant asserts that said ordinance has a retroactive effect upon all plenary retail distribution licenses authorized and theretofore issued and is, therefore, "arbitrary, unreasonable and confiscatory." He thus seeks by this action to "set aside, vacate or repeal the limitation" therein or, in the alternative, "change, alter, amend or otherwise modify the same to the end that it shall have no retroactive effect."

In the petition of appeal in the second action, whereby the Committee refused to renew appellant's license on June 2, 1964, the appellant challenges such action as being erroneous for the following reasons:

- (1) The application is for a renewal, and not for a new license;
- (2) That the appellant is fully qualified to hold such license since he has not violated any provisions of the Alcoholic Beverage Law or any municipal ordinance nor have there been any charges preferred against him;
- (3) The appellant has been discriminatorily singled out and his license not renewed "ostensibly on the basis of the adoption" by Committee of the amended ordinance of March 17, 1964, reducing the number of authorized plenary retail distribution licenses from three to two;
- (4) That such action by the Committee is "unreasonable, arbitrary, capricious, confiscatory and has the effect of revoking appellant's license in a manner contrary to the provisions of the New Jersey Alcoholic Beverage Law."

In its answer to the petition of appeal in the first action, Committee admits the provisions of the said ordinance as alleged in the petition of appeal, and its "application to the facts extant, as to its legal effect and applicability." However, it asserts that the ordinance is valid, effective and enforceable as to appellant; that appellant has no vested right to said license and has "failed to demonstrate any behavior or conduct in substantial reliance upon his asserted right under said license." It further sets up in separate defenses the following:

- (a) The appellant is not entitled to the relief prayed;
- (b) The ordinance is a valid exercise of its authority and is enforceable against appellant;
- (c) The appellant does not possess any vested right to said license;
- (d) Appellant is guilty of laches;
- (e) Appellant is guilty of estoppel.

The sixth separate defense, challenging the jurisdiction of the Director to hear this appeal, was abandoned at this appeal hearing. This apparently also invalidates the defense of estoppel set forth as (e) herein.

In its answer to the second action, which challenges Committee's refusal to renew appellant's license, it asserts the following separate defenses:

- (a) It acted properly upon a valid ordinance, and said ordinance is not "arbitrary, unreasonable or confiscatory" but "valid and enforceable as to appellant;"
- (b) The appellant does not possess any vested right to said license;
- (c) The action was in conformity with law;
- (d) The appellant had a determination in the New Jersey Superior Court and the matter is res adjudicata;
- (e) The appellant is guilty of estoppel.

The sixth defense, which questions the jurisdiction of the Director, was similarly abandoned.

These were appeals de novo, with full opportunity for counsel to be heard, to present evidence under oath and cross examine witnesses pursuant to Rule 6 of State Regulation No. 15. Shapiro v. Long Branch, Bulletin 901, Item 2.

The record developed at this hearing reflects the following established facts: Under an ordinance in existence since 1940, the Township of Gloucester was authorized to, and did, issue two plenary retail distribution licenses. No new licenses were issued for this type since the original two were issued. During this period of time, according to the 1960 Federal census, the Township's population had increased from 6,198 in 1940 to 7,952 in 1950 and to 17,591 in 1960. It is estimated that there are approximately 22,000 persons resident therein at the present time.

On November 29, 1963 the municipality, cognizant of this population explosion, adopted an ordinance increasing from two to three the number of authorized plenary retail distribution licenses in the Township. The appellant was one of several applicants who filed an application for this additional license and, on December 9, 1963, pursuant to a resolution of the Committee, his application was approved on December 20, 1963. The license certificate was actually delivered to him on December 23, 1963. The Committee took into consideration several factors in addition to the population increase which motivated and prompted its favorable action of his application. As the then Mayor expressed it:

"The applications for the plenary retail distribution license have been examined and considered. There is no objection or fault to find with any application. Two of the applicants are already holders of beverage license in the township. In consideration of the matter it was resolved to the question of location first and then of the applicants. The matter of population and area to be served is a matter of public need and public convenience and was considered and the public welfare. This resolved the location for the license and the place of business in favor of the Glendora area. The concentration of population in the area, the adjacent municipality of Runnemede which has eight thousand or nine thousand population with but one package store, it's proximity to a section of Magnolia were factors considered because of the area to be served and the need and the convenience to that area. With the

area determined to be Glendora consideration was then given to the application and it was resolved that the applicant be granted the license, George Matteo, Sr. [appellant herein]."

Thus, out of six applicants for the license, the Committee as then constituted determined that the appellant was the most desirable, and acted accordingly.

The action of the Committee in adopting this escalator ordinance on November 27, 1963 apparently met with objection from some quarters because, shortly after its adoption, the Gloucester Township License Beverage Association took two steps with respect thereto. First they filed an action in the nature of a prerogative writ in the Superior Court of New Jersey wherein they challenged the legality of the said ordinance, alleging that the authorized number exceeded the quota permitted by the State limitation statute. Secondly, it filed an appeal with this Division alleging the illegality of the said ordinance for the reasons aforesaid, and also challenging the propriety of the issuance to the appellant of the said license.

The record further discloses that, although the appellant was not named as a party defendant in the Superior Court action, he intervened in that action. However, he was specifically joined as a party respondent to the appeal to this Division, and an answer was filed by him therein.

With respect to the Superior Court action, the Association plaintiff based its argument challenging the validity of the ordinance upon the assertion that, in counting the number of outstanding distribution licenses for the purpose of the State limitation statute, there had to be included those plenary retail consumption licenses having broad package privileges. However, after hearing argument thereon, the Superior Court Judge decided in favor of the appellant herein, and on April 4, 1964, an order was entered upholding the validity of the ordinance and granting Matteo summary judgment.

Subsequently the Gloucester Township License Beverage Association withdrew its appeal to this Division, so that the propriety of the issuance of the license to appellant remains unchallenged.

Several other matters of singular relevance to this issue occurred. At the time the November 1963 ordinance was passed, the Committee was controlled by a majority of Democratic members. However, after the election in November the Republicans gained control, and in January 1964 the majority of the newly constituted committee was Republican. Significantly, therefore, when the motion for summary judgment in Superior Court was argued, the new counsel appointed by the newly constituted Committee did not join in the argument of said motion.

In the meantime, according to the testimony, the appellant had purchased the proposed site for the sum of \$10,000, paid a \$1,000 deposit and made plans in furtherance of his intention to build a building in accordance with plans and specifications submitted to the Committee. He retained an architect and paid fees for the preparation of the said plan and, while acting circumspectly because of the pending litigation, nevertheless spent sums of money in furtherance of the said license.

On March 3, 1964, Committee introduced an amended ordinance, heretofore alluded to, which sought to reduce the number of plenary retail distribution licenses to two, and specifically

repealed the November 29, 1963 ordinance. Unlike the prior ordinance and the usual ordinances adopted in accordance with suggested procedure of this Division as it relates to limitation (cf. Re Sahl, Bulletin 198, Item 11), it did not contain any provision exempting from its operation pre-existing licenses. At the March 3, 1964 meeting, counsel for the appellant objected, by letter, to the Committee on the ground that, while the said Committee had the authority to pass a limitation ordinance, its provisions cannot be invoked retroactively to affect his license and to prevent renewal thereof. Therefore, he asserted, the absence of such limitation and the clear intent to invoke its provisions against the renewal of the appellant's license was arbitrary, discriminatory and an infringement of appellant's constitutional rights.

After the ordinance was adopted, the appellant obtained leave to file a cross claim in the Superior Court in the action hereinabove referred to against the Committee to test, inter alia, the effect of the limitation ordinance as it relates to his license. Concurrently an appeal was taken to this Division (the first appeal discussed herein) pursuant to R.S. 33:1-41, to determine its validity as it may affect appellant's license.

The cross claim came on for hearing on May 29, 1964 in the Superior Court and, on motion made by the municipal attorney, the cross claim was dismissed because the Court held that the appellant had to exhaust his administrative remedies before resorting to judicial action. The Court further held that R.S. 33:1-41 gave this Division full authority to review and construe limitation ordinances; that, if appellant was aggrieved by the Director's determination with respect thereto, he may then appeal to the Appellate Division of the Superior Court pursuant to R.S. 33:1-22.

In the meantime, and before the final order of the Superior Court was entered on June 5, 1964, the appellant filed his application for renewal of the said license on May 14, 1964, for the period expiring June 30, 1965. Similar renewal applications were filed by the two other holders of distribution licenses. On June 2, 1964, the Committee renewed the other two licenses but denied the application of the appellant for renewal of his license. Such denial was based exclusively upon their allegation that they had no authority to grant three licenses under the March 17, 1964 ordinance. As stated before, this apparently was the sole basis for such denial.

I

There are certain applicable principles of law which should be set forth in order to provide a proper perspective for the determination of these matters. It is fundamental that a municipality has a right to enact an amendment to an ordinance as was done in the instant matter. It is also unarguable that a challenge to the validity of an ordinance is not within the judicial orbit of this Division. Judge Schalick, in his opinion in the Superior Court, noted that the question of the validity of an ordinance can only be determined in a court of law and not in an administrative agency.

However, the challenge is not to the validity of the ordinance but to its alleged infringements upon the rights of the appellant who is the holder of a liquor license by virtue of the prior ordinance. The subject ordinance does not contain the usual clause relating to licenses then in existence, as has been suggested by this Division on a number of occasions. Kirschhoff v. Millville et al., Bulletin 254, Item 8. The usual provision

states "Provided, however, that existing licenses may be renewed as long as the holders qualify."

Counsel for the appellant convincingly argues that the obvious intent of this ordinance is to cancel out or revoke the appellant's license and, if that is its intent, it is discriminatory. He points out that, even if it was not adopted for that purpose but used merely for the stated purpose of reducing the number of licenses from three to two, the ordinance also suffers from the same infirmity. At the time of its adoption there were three licenses of like kind in force in this municipality. He asserts that the appellant's license should not be treated differently from the two existing licenses since it stands in no different position than those licenses. The equal protection clauses of the State Constitution, Article I, Paragraph 5, and the 14th Amendment of the United States Constitution require that governmental action should affect all persons in like circumstances in the same manner. See Washington Nat. Ins. Co. v. Board of Review, N.J. Unemployment Comp. Commission, 1 N.J. 545 (1949); Reid Development Corp. v. Parsippany-Troy Hills Tp., 110 N.J. 229 (1952). The majority and prevailing rule appears to be that the number of licenses which may be granted in a given locality or territory may be limited by statute. However, a statute limiting the number of licenses has been held to apply to all licenses not yet issued at the effective date of the statute. Therefore, such limitations do not apply to the licenses then in existence. See 30 Am. Jur. 613, Intoxicating Liquors, § 135, see also 48 C.J.S. 173, Intoxicating Liquors, § 38. This Division has consistently adhered to this view from the earliest days. See Re Sahl, supra.

Thus, when the then Commissioner Burnett anticipated that some municipalities might desire to fix a quota in an amount less than the existing licenses, he proposed a form of ordinance to accomplish that end. In that ordinance he suggested the following saving clause:

"Provided, however, that this limitation shall not prevent the issuance of renewals of _____ licenses to persons holding such licenses at the time this regulation was adopted, and further provided that this limitation shall not prevent the transfer of licenses, or the renewal thereof, according to law...."

In Kirschhoff, supra, the Board asked the following question: "If existing licenses may be freely sold and transferred, how will the number ever be reduced?" to which the Commissioner answered as follows:

"Here is one answer which I have repeatedly urged upon municipalities, viz.: Reduction of outstanding licenses may be effected with fairness by eliminating, through revocation or through refusal to renew, those whose owners have misconducted themselves....",

citing numerous cases where renewals have been denied and upheld on appeal because of previous misconduct. He adds the following:

"Or, if public interest demands such drastic and difficult action, municipalities may adopt a numerical quota which will require, at renewal time, the selection of only the most desirable of renewal applicants." See Re Hinchcliffe, Bulletin 171, Item 7.

My examination of decisions throughout the entire administration of alcoholic beverage control has failed to disclose one single case where a municipality has been able to set up a valid standard for adopting a numerical quota such as suggested in Hinchcliffe. Obviously in the instant matter no such valid standard was adopted nor even suggested. I am satisfied that the failure to include the saving clause in the March 17, 1964 ordinance was an affirmative act on the part of the municipality in order to cancel out or revoke the appellant's license. In this connection I further find that R.S. 33:1-40, which confers the power upon municipalities "by ordinance" to "limit the number of licenses to sell alcoholic beverages at retail..." does not contain any indication of a legitimate intent to restrict the number of licenses on a retroactive basis. Therefore it must be read prospectively and be construed in that manner. Schmidt v. Carlstadt, 132 N.J.L. 18 (Sup.Ct. 1944); Neel v. Ball, 6 N.J. 546 (1951).

Added force to this position is the consistent attitude of this Division during the entire period of its administration of the alcoholic beverage law. Thus, in Beam v. Caldwell, Bulletin 380, Item 3 (1940), the Town of Caldwell denied renewal of an existing license on the ground that an ordinance enacted following the issuance of the subject license had limited the number of these licenses below the number of such licenses already in effect in said municipality. The then Commissioner noted that, in his opinion, adoption of the ordinance had been motivated by the obvious design to eliminate the license in question. In holding that the subsequently adopted quota ordinance (which, like the subject ordinance herein did not expressly exempt from its operation pre-existing licenses), to the extent that it sought to affect a license in existence prior to its adoption, was unreasonable, Commissioner Burnett said:

"It may fairly be inferred that the adoption of the ordinance was motivated by respondent's persistence in its design to eliminate Beam as a licensee. If that be so, the ordinance, in its failure to exempt renewals from its provisions, may be treated as unreasonable as to appellant, and hence no obstacle to renewal of his license. I should not hesitate to do so if it were not for the fact that I found Beam guilty of a violation." See Beam v. Caldwell, Bulletin 309, Item 7.

Of course, no such impediment exists in the case sub judice.

There is one other consideration which is particularly worthy of comment. I am persuaded from the proofs in this case that the action taken by the Committee on March 17, 1964 was politically motivated and directed solely against the appellant's license. This conclusion is fortified by the fact that a strong argument was made for the need and necessity for such license only several months prior to this amended ordinance by the Mayor of this municipality. He showed that the Glendora section had no plenary retail distribution license and that it was in need of same, and that the welfare of the inhabitants of that area would best be served by the introduction of such license.

In addition, there was the testimony of the building inspector who stated that some fifty-six building permits for new construction had been issued by his department during a short period of time. Additionally, the tremendous increase in popula-

tion from 6,000 in 1940 to 22,000 at the present time underlines the force and validity of the reasoning behind the adoption of the ordinance of November 1963 and the issuance of this license. There is the presumption that the conditions which justified the three retail distribution licenses on November 29, 1963 continued to exist on June 2, 1964. Orcutt v. Hoyt, 6 N.J. 46, 55 (1950); State v. United States Steel Corp., 19 N.J. Super. 274, 301 (Ch. Div. 1952); aff'd 12 N.J. 318 (1953); Rodgers v. Reid Oldsmobile, Inc., 58 N.J. Super. 375, 383 (App. Div. 1959).

As was stated hereinabove, this area does not have a license of this type, and the nearest licensed distribution outlet is approximately three miles from the present location.

Finally it should be observed that the appellant is a lifelong resident of the municipality, a builder by profession, and a person who has a clear and unblemished record without any violations of any kind. I therefore recommend that the limitation imposed by the said ordinance, insofar as it affects appellant's license or his right to renewal thereof, be declared arbitrary, unreasonable and invalid. Cf. Blanck v. Magnolia, 73 N.J. Super. 306; reprinted in Bulletin 1443, Item 1. (Reversed on other grounds, 38 N.J. 484; reprinted in Bulletin 1486, Item 1.) I am persuaded that this ordinance was adopted for the sole purpose of eliminating his license and for no valid reason.

II

The appellant advocates that there is no legal basis for denial of the renewal of the license and that, therefore, the license should have been renewed; that such failure to renew was arbitrary, capricious, discriminatory and an abuse of its discretion. The attorney for the Committee argues that the appellant does not possess a vested right to a liquor license; that a license to sell intoxicating liquors constitutes a mere permission or permit, and that the Committee acted under the valid ordinance in denying such permit.

He further argues that the appellant, a real estate operator, has not acted deliberately in pursuing his claim under the license because he waited for several months before obtaining a permit to build. "His own explanation of these delays further confirms his failure to act with promptitude and diligence." The latter argument was considered hereinabove, and found unmeritorious.

Renewal of a license, just as the issuance of a new license, will depend upon the sound reasons advanced by applicant to justify such action. It is well settled that there is no inherent right to the renewal of a license. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946). However, it is equally well established that an application for a renewal of a license may not be denied capriciously or merely to reduce the number of licenses. Such denial must be based on reasonable grounds or it will be reversed. Kleinberg v. Harrison, Bulletin 984, Item 2; Costa v. Red Bank, Bulletin 133, Item 5; McGuire v. Paulsboro, Bulletin 392, Item 10. Cf. Great Atlantic & Pacific Tea Co. v. Clifton, Bulletin 1319, Item 1; B & L Tavern, Inc. v. Bayonne, Bulletin 1459, Item 1. Cf. Township Committee of the Township of Lakewood v. Brandt et als., 38 N.J. Super. 462, 466.

Since the only substantial reason given by respondent for denying renewal herein was its invalid application of the

limitation imposed by the subject ordinance, and since I have recommended that such ordinance, seeking to impose a retroactive rather than a prospective application upon such license, be declared discriminatory, I therefore find as a fact that the Committee's refusal to renew the appellant's license herein is unreasonable, arbitrary and discriminatory.

After considering the evidence, exhibits and briefs filed herein, I recommend that an order be entered on this second appeal reversing the action of the respondent and directing respondent to grant to appellant the renewal of the license at the premises being erected, subject to the express condition that the premises as described in the plans and specifications prepared and submitted by the appellant, and found acceptable by the issuing authority, shall first be completed.

Conclusions and Order

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

Having carefully considered the entire record herein, I concur in the findings and conclusions of the Hearer with respect to the unreasonableness of the numerical limitation ordinance as applied to appellant, and with respect to denial of the application for renewal. I find specifically that the ordinance in question is discriminatory and unreasonable in its purported application to appellant, and that the denial of appellant's application for renewal was likewise unreasonable.

Accordingly, it is, on this 15th day of October 1964,

ORDERED that respondent's action denying appellant's application for 1964-65 license renewal be and the same is hereby reversed; and it is further

ORDERED and directed that respondent grant appellant's application for 1964-65 renewal, subject to the special condition that the license shall not be issued unless and until the proposed premises are first duly completed in keeping with the plans and specifications filed.

JOSEPH P. LORDI
DIRECTOR

2. APPELLATE DECISIONS - EIGHTY-NINE CLINTON, INC. v. ATLANTIC HIGHLANDS.

Eighty-Nine Clinton, Inc.,)	
t/a The Copper Basket,)	
Appellant,)	
v.)	On Appeal
Mayor and Borough Council of)	CONCLUSIONS
the Borough of Atlantic)	AND ORDER
Highlands,)	
Respondent.)	

Sorenson & Moore, Esqs., by Francis X. Moore, Esq., Attorneys for Appellant
Pillsbury, Carton, Barnacle and Saling, Esqs., by Henry J. Saling, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Appellant Eighty-Nine Clinton, Inc., the holder of Plenary Retail Distribution License D-2 for premises at 110-112 First Avenue, Atlantic Highlands, was found guilty by respondent of violation of Rule 1 of State Regulation No. 20 in that it sold and delivered alcoholic beverages at its licensed premises to a minor, and its license was suspended for a period of seven days, effective May 16, 1964.

It filed this appeal challenging such conviction and an order was entered on May 22, 1964, staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

In its petition of appeal, appellant alleged that respondent's action was erroneous for reasons which may be summarized as follows:

- (a) Conviction was contrary to the weight of the evidence;
- (b) Punishment meted out was "unjust and too severe under the circumstances";
- (c) Notice to the licensee of the charges was improperly prepared and transmitted;
- (d) The conduct of the respondent and its Borough Attorney was "improper";
- (e) Appellant was unjustly restricted in the presentation of its defense to the said action.

In its answer, respondent entered a general denial, and did not set forth the basis for its action.

This matter was heard de novo, pursuant to Rule 6 of State Regulation No. 15, with full opportunity to counsel to

present testimony under oath and cross examine witnesses.

The testimony adduced at this hearing reflects the following: Borough Police Officer Samuel A. Guzzi testified that from the police headquarters building, he noted a motor vehicle pull into a parking lot adjacent to appellant's premises, and observed the minor (George ---) get out of the said car and walk to the side entrance of the said premises. This parking lot separates police headquarters from appellant's licensed premises.

Suspecting that this individual was under the statutory age, he accosted him after George left the premises with six bottles of Horlacher beer and questioned him. At police headquarters, an inspection of a selective service card and driver's license satisfied him that this minor was twenty years of age. These were the only identification documents in the possession of the minor. He was thereupon arrested and photographed, and held for arraignment in the municipal court.

About a half-hour after he apprehended the minor, Officer Guzzi accompanied him to appellant's premises and spoke to a Mr. Caplan. He informed him that Caplan's wife had been accused of selling alcoholic beverages to this minor, and was told that Mrs. Caplan was not on the premises, having left shortly before then for home.

It was also developed that, while the alleged offense took place in February, the hearing before respondent was held on May 11, 1964. Finally, in his opinion, the minor appeared to be about twenty years of age.

George --- testified that on February 22, 1964, he was twenty years of age, his date of birth being October 30, 1943. He entered appellant's premises and purchased a six-pack of beer. He was not asked by Mrs. Caplan (the manager of the premises who sold him the beer) how old he was nor was he required to produce any identification regarding his age or sign any statement of representation with respect thereto.

When he left the premises he was apprehended by the officer, interrogated about his age, and thereupon produced the driver's license and selective service card, as aforesaid. He had no other documents on his person which would have verified his actual age. On cross examination, he readily admitted that he knew he had violated the law by purchasing alcoholic beverages. He admitted that he had purchased beverages earlier that day at this store, and was waited upon by Mrs. Caplan, but denied that he had ever been questioned with respect to his age.

Mrs. Rose F. Caplan testified that she is the "owner" of the corporate licensee, and admitted selling alcoholic beverages to the minor under the following circumstances: The minor came into the store about four o'clock in the afternoon of the date alleged (Washington's Birthday) and sought to purchase six quarts of beer. Upon her request, he produced identification in the form of a registration card which showed "that his birthday was in 1942. And this is all I checked because--because it was 1942 I immediately found out he was over the age of 21." She added that "he had a beard on him, and an unruly beard" and looked over twenty-one; thus, "I felt a little ridiculous after I had asked him because he was also wearing a wedding band. Of course, these days it doesn't mean much." Therefore, she did not feel it necessary to ask him to sign any representation.

He returned later that evening at about 7:30 p.m. and was sold an additional six-pack without being required to produce

any further identification. On cross examination, she reiterated that he looked at least twenty-five years of age to her and that, therefore, she did not feel it necessary to make him sign any written representation thereof.

Anita G. Bellen corroborated Mrs. Caplan's testimony with respect to the earlier incident on February 22. She too felt that the minor appeared to be over twenty-one and felt that it was ridiculous to request any identification. She stated that the beard appeared to be about one inch ("maybe a little less") in length. She also admitted that she was not present later in the evening when the sale upon which this charge is based was made.

Mildred S. Piano similarly corroborated the testimony of Mrs. Caplan with respect to the minor's appearance. She was then asked:

"Q Did he appear to you to be over 21, Mrs. Piano?"

A To be over 21 I couldn't answer you truthfully, but the man produced evidence to the fact, I mean, and if I was in business I would accept it."

She added that she could not truthfully say approximately how old he was because she did not take a good look at him. Therefore, she could not offer any opinion as to how old he actually was or appeared to be.

The crucial issue in this case has been clearly delineated, namely, whether this minor, whose statutory ineligibility to purchase alcoholic beverages has been clearly established, was sold alcoholic beverages without being required to make a written representation of age, as enjoined by the rules and regulations of this Division.

My evaluation of the testimony inclines to the conviction that the version of the minor stands in a better posture than that of appellant's witnesses. He insists that he was not requested to produce identification or proof of age. Mrs. Caplan's feeling that it would seem "ridiculous" to pursue this inquiry because of his appearance, satisfies me that, in fact, she did not take the required steps with reference thereto.

This Division is, as was, indeed, the respondent, bound by the imperative legislative provisions and must conclude that there was herein an unmistakable statutory violation.

Appellant could have protected itself against these circumstances if it had complied strictly with the imperatives of the statute, especially since Mrs. Caplan admits that, at first, she was suspicious of the minor's age. She insists that she required the minor to produce identification, although she asserts that the identification produced was perhaps spurious and indicated that he was over twenty-one years of age.

In R.S. 33:1-77 the statute contains the following proviso:

"...that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the minor falsely represented in writing that he or she was twenty-one (21) years of age or over, and (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be twenty-one (21) years of age or over, and (c) that the sale was made in

good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually twenty-one (21) years of age or over." (Emphasis ours)

Such alleged fraud, although denied by the minor in this case, was specifically anticipated by this Division in a special note (page 77 of the Rules and Regulations) which, in explanation of Rule 1, states in part:

"...(c) that the sale was made in reliance upon such written representation and appearance and in the reasonable belief that the minor was of age. Hence it is not a defense that mere verbal inquiry may have been made as to the age of the minor or that the minor had verbally misrepresented his age or that the minor had displayed some document (such as a driver's license, birth certificate, military identification card, selective service registration certificate, or any other similar document) which represented his age as over 21. The representation in writing required by the Alcoholic Beverage Law is a writing made by the minor at or prior to the time of sale or service. Such a writing must be signed by the minor in the presence of the licensee or his employee and one in which the minor gives his name, address, age, date of birth and, by signing the writing, makes a statement that he is making the representation as to his age to induce the licensee to make the sale. After the writing has been signed, the licensee should require that the person signing the representation adequately identify himself as that person and thus affirmatively avoid the acceptance of these representations from persons using fictitious names, addresses and ages..." (Emphasis added)

In Re Wedemeyer, Bulletin 1050, Item 8, the Director said:

"Experience in cases similar to this indicates that for some reason licensees or their agents are reluctant to 'embarrass' a minor by requiring him to reduce to writing his name, age and address. If licensees are willing to use their own methods of determining the age of a minor, rather than follow the statute, they do so at their peril and must accept the consequences of their own neglect."

Even if I accepted Mrs. Caplan's version of what occurred (which I do not), it is indisputable that since George was under twenty-one years of age and no written representation was demanded of him by the agent of appellant, his alleged mature appearance, by itself, does not satisfy the regulatory requirements. The prevention of sales of intoxicating liquor to minors not only justifies but necessitates the most rigid control. Hudson-Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); Mazza v. Cavicchia, 15 N.J. 498 (1954); Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Guill v. Mayor and Council of the City of Hoboken, 21 N.J. 574 (1956).

In a memorandum submitted by appellant's attorney, he advances a theory of entrapment as a defense to this action upon the following situation: The minor, who has no record of conviction of crime, was, however, arrested on several occasions for drunkenness and once for allegedly having purchased beer without producing adequate identification. He theorizes that the police

officer stood by while the minor entered appellant's premises and "watched when he could have stopped it, but he waited for this to happen and then apprehended the boy." Thus, says appellant, there was entrapment and "the subsequent hearings [constituted] double jeopardy."

This an amazing rationalization. It would, of course, have been unthinkable for the police officer to have prevented the minor from entering the said premises upon suspicion that he might want to make an illegal purchase. In any event, this situation is not contemplated under the doctrine of entrapment, as defined in our case law. In State v. Rosenberg, 37 N.J. Super. 197, the court, adopting the definition of entrapment in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, said:

"Generally, it may be said that where a police officer 'envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration' for the purpose of providing a victim for prosecution, the defense is available."

See also Vogellus v. Division of Alcoholic Beverage Control (App. Div. 1963) not officially reported, reprinted in Bulletin 1537, Item 1; State v. Dolce, 41 N.J. 422. I have found no evidence in this case to support the applicability of a defense of entrapment and, therefore, the same is rejected.

Counsel further argues that the penalty imposed by respondent was unduly excessive. It has been generally held by this Division that a suspension imposed in a local disciplinary proceeding rests, in the first instance, within the sound discretion of the municipal issuing authority; and the power of the Director to reduce or modify it will be sparingly exercised, and only with the greatest caution. Melstan Corporation v. Randolph, Bulletin 1496, Item 1; Harrison Wine and Liquor Co., Inc. v. Harrison, Bulletin 1296, Item 2. I am not persuaded that the penalty of seven days imposed herein was so severe as to form a basis for reversal or even modification on this appeal. In fact, it is long established Division policy to impose a minimum ten-day suspension for sale to a twenty-year-old minor. See, for example, Re Paini, Bulletin 1538, Item 7.

There has been no evidence produced at this plenary de novo hearing with respect to grounds of appeal (c) (notice to the licensee of the charges was improperly prepared and transmitted), (d) (alleged improper conduct of respondent and its counsel at the hearing below), or (e) (appellant was unduly restricted in the presentation of its defense). Nor has any reference been made thereto in the written memorandum of appellant. Accordingly, these allegations must be considered as abandoned on this appeal.

My evaluation of the entire record herein and the written memoranda in summation submitted by counsel for appellant and respondent, satisfies me that appellant has not met the burden of establishing that the action of respondent herein was erroneous. I, therefore, recommend that an order be entered affirming respondent's action and dismissing the appeal, fixing the effective dates for the suspension imposed by respondent, and stayed pending the entry of the order herein.

Conclusions and Order

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

Having carefully considered the transcript of the testimony, the exhibits, the memoranda of counsel for appellant and for respondent, and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

In the memorandum submitted in summation on behalf of appellant, counsel asserts, for the first time, a defense of double jeopardy. In support thereof, he sets forth that Mrs. Caplan was found "not guilty" of charges preferred against her in the municipal court; that "the differentiation between the matter in the Municipal Court and the Borough Hall as to criminal and civil is merely a question of *cermantus* (sic), and that the decision of the local magistrate of not guilty bars and prevents any further hearing on this matter."

The question of semantics has nothing to do with the issue herein. Disciplinary proceedings are civil in nature and not criminal and the measure of proof is by a preponderance of the believable evidence and not guilt beyond a reasonable doubt. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948).

This matter concerned the corporate license and its license, whereas the criminal charge in the municipal court was against the individual. As the court pointed out in In re Schneider, 12 N.J. Super. 449, 457:

"In the determination of the present appeal we are not concerned with whether the appellant's activity constituted an indictable common law or statutory crime. Cf. State v. Baldino, 11 N.J. Super. 158 (App. Div. 1951); State v. Damorjian, 204 N.W. 498 (Sup. Ct. Wis. 1925). We are dealing here with a purely disciplinary measure and its alleged infraction."

Therefore, no double jeopardy was involved in these proceedings. Cf. Domapp, Inc. v. Newark, Bulletin 1543, Item 1.

Counsel also advocates in his memorandum that the proceedings before respondent were irregularly conducted. I agree with the Hearer that there is nothing in the record before me to support such allegations. In any event, appellant was given full opportunity to be heard and to present witnesses in its behalf at this plenary de novo hearing on appeal.

Accordingly, it is, on this 19th day of October, 1964,

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

ORDERED that the seven-day suspension imposed by respondent, which was stayed during the pendency of these proceedings, be and the same is hereby reimposed and reinstated, and, hence, it is further

ORDERED that Plenary Retail Distribution License D-2, issued by the Mayor and Borough Council of the Borough of Atlantic Highlands to Eighty-Nine Clinton, Inc., t/a The Copper Basket, for premises 110-112 First Avenue, Atlantic Highlands, be and the same is hereby suspended for seven (7) days, commencing at 9:00 a.m. Monday, October 26, 1964, and terminating at 9:00 a.m. Monday, November 2, 1964.

JOSEPH P. LORDI
DIRECTOR

3. STATE LICENSES - NEW APPLICATIONS FILED.

Popper Morson Corp.

38-53 Essex Street & 41-47 Morris Street
Jersey City, New Jersey

Application filed December 2, 1964 for
place-to-place transfer of Plenary
Wholesale License W-40 to include
additional space and to include a
warehouse at the above address.

The F. & M. Schaefer Brewing Co.

56 Park Place
Newark, New Jersey

Application filed December 4, 1964 for
place-to-place transfer of Additional
Warehouse License AW-10 to include
additional space at 5525 South Crescent
Boulevard, Pennsauken, New Jersey,
operated under Limited Wholesale License WL-6.

Dodd Importers & Distributors, Inc.

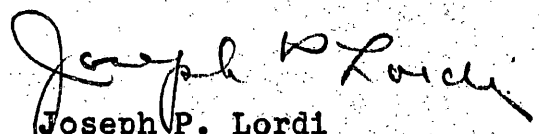
254A Park Avenue
Newark, New Jersey

Application filed December 4, 1964 for
place-to-place transfer of warehouse on
Wine Wholesale License WW-15 from 319
Jacet Road, Kearny, New Jersey, to
497 Raymond Boulevard, Newark, New Jersey

Dealers' Liquor Company

271 Atlantic Avenue
Camden, New Jersey

Application filed December 8, 1964 for
place-to-place transfer of Additional
Warehouse License AW-54, operated under
Plenary Wholesale License W-67, from
200-202 North Texas Avenue, Atlantic City,
New Jersey, to Decatur Avenue off New Road,
Pleasantville, New Jersey.


Joseph P. Lordi
Director