

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N.J. 07114

BULLETIN 2392

March 13, 1981

TABLE OF CONTENTS

ITEM

1. COURT DECISIONS - SAUL KANE v. NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL.
2. DISCIPLINARY PROCEEDINGS (Keansburg) - SALE OF ALCOHOLIC BEVERAGES TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED 25 DAYS.
3. DISCIPLINARY PROCEEDINGS (Egg Harbor) - LICENSEE GUILTY OF FALSE AND MISLEADING ADVERTISING VIA DISPLAY SIGN INSIDE LICENSED PREMISES.

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2392

March 13, 1981

1. COURT DECISIONS - SAUL KANE v. NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3460-78

SAUL KANE,)
)
Appellant,)
)
v.)
)
NEW JERSEY DIVISION OF ALCOHOLIC)
BEVERAGE CONTROL,)
)
Respondent.)

Argued May 19, 1980 - Decided May 27, 1980.

Before Judges Botter and Morton I. Greenberg.

David S. Piltzer argued the cause for appellant
(Piltzer and Piltzer, Attorneys).

Kathryn S. Schwed, Deputy Attorney General, argued the cause
for respondent (John J. Degnan, Attorney General, attorney;
Erminie L. Conley, Assistant Attorney General, of counsel),

PER CURIAM

(Appeal affirming an unreported eligibility ruling of the
Director finding petitioner's previous criminal convictions
involved moral turpitude and rendered same not eligible for
licensure under N.J.S.A. 33:1-25.)

2. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED 25 DAYS.

In the Matter of Disciplinary Proceedings against

Stockhouse Corporation
t/a Stockhouse
60-62 Beachway
Keansburg, NJ 07734

Holder of Plenary Retail Consumption License No. 1321-33-031-001 issued by the Mayor and Council of the Borough of Keansburg.

CONCLUSIONS

AND

ORDER

S-12,435

H-7079-137

Peter B. Shaw, Esq., Attorney for Licensee.
Charles J. Mysak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

DATED: February 15, 1980 - RECEIVED: February 19, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision Below were filed on behalf of the licensee pursuant to N.J.A.C. 13:2-19.6

The licensee is charged with the sale of alcoholic beverages to a person who was "actually or apparently intoxicated". N.J.A.C. 13:2-23.1(b). Proofs are sufficient if they show that the sale, service or delivery was made to a person apparently intoxicated, without the necessity for showing that the person was actually intoxicated.

Within that context, the "...term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior." Division of Alcoholic Beverage Control v. Zane, 99 NJ Super. 196,201 (App. Div. 1968).

I have reviewed and assayed the Written Exceptions to the Initial Decision Below, filed on behalf of the licensee herein, and find that they have either been identified and correctly resolved in the Initial Decision, or are lacking in merit. Thus, having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Initial Decision, and the Written Exceptions to the Initial Decision, I concur in the factual findings of guilt by the Administrative Law Judge and adopt them as my conclusions herein.

Inasmuch as no recommendation of sanction is made by the Administrative Law Judge, upon review of the record herein, I have determined to impose a license suspension of 25 days.

Accordingly, it is, on this 31st day of March, 1980,

ORDERED that Plenary Retail Consumption License No. 1321-33-031-001 issued by the Mayor and Council of the Borough of Keansburg to Stockhouse Corporation, t/a Stockhouse, for premises 60-62 Beachway, Keansburg, be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. on Thursday, April 10, 1980 and terminating 2:00 a.m. on Monday, May 5, 1980.

JOSEPH H. LERNER
DIRECTOR

In the Matter of:)	<u>INITIAL DECISION</u>
)	
STOCKHOUSE CORPORATION)	OAL DKT. NO. ABC 5134-79
)	AGENCY DKT. NO. S 12,435
)	H 7079-137

APPEARANCES:

Charles J. Mysak, Deputy Attorney General
Peter B. Shaw, Esq., Attorney for Petitioner

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violations by Petitioner of N.J.A.C. 13:2-23.1(b) which provides that no licensee shall sell, serve, deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage directly or indirectly to any person actually or apparently intoxicated or permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises. Petitioner is the holder of plenary retail consumption license #1321-33-031-001 located in Keansburg, New Jersey.

Said violation allegedly occurred on September 15, 1979. Petitioner was served with notice of an alleged violation on October 29, 1979 and an answer and plea of not guilty was filed with the Director of the Division of Alcoholic Beverage Control on November 7, 1979. The matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was held on January 7th and January 18th and final memoranda of law were filed with the Court on January 22, 1980.

The issues of the hearing are whether or not on September 15, 1979 the Petitioner sold, served, delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and/or allowed, permitted and suffered the consumption of an alcoholic beverage by such person in or upon the licensed premises. The State presented two witnesses, J.C. and C.G., Inspectors of the Division of Alcoholic Beverage Control.

Inspector J.C. testified that he has been with the Agency approximately two years and has served with the Special Interest Unit. On September 15, 1979, he was detailed along with Inspector C.G. to investigate the Stockhouse Corporation t/a The Stockhouse with regard to an ATRA program. Both he and C.G. responded to said premises with the additional assistance of two State Troopers and two ATRA personnel. When they entered the bar, they noted approximately 100 patrons present. The premises consisted of one long oval bar and a smaller bar towards the rear. They immediately detected an apparently intoxicated individual sitting at the elongated bar on the right hand end of same and positioned themselves on the left hand end of same. He observed the patron to sway in his chair, have difficulty lifting his drink, hands fumbling, head bobbing and weaving. The investigator ordered himself a drink, which he threw out. Then he spoke with his partner and walked around the full length of the bar and stood to the right of the suspected individual, later identified as Ralph J. Dato, while his partner stood to the individual's left.

J.C. attempted to engage Mr. Dato in a conversation and detected that Mr. Dato's speech was incoherent and he was almost non-responsive to the questions posed, the patron's speech was extremely slurred and his answers were not relevant. He then made physical observations of Mr. Dato and noted that he was slovenly dressed, his belt was undone, he had stains of his drink on his shirt and he was constantly grasping for his beer.

The last call was made by the bartender, Ken Calliclio, and Mr. Dato was observed to order another beer and be served same. After the beer was served to patron, he was observed to have extreme difficulty in getting the money out of his pocket to pay for same and at that time, Inspector J.C. formed the opinion that the individual was highly intoxicated. He observed the patron to have a drink from the bottle of beer and at that time, he was advised by Inspector J.C. that he was an ABC agent and the patron was asked to step outside. The patron refused, becoming loud and abusive. Inspector J.C. stepped outside, radioed for help and re-entered the premises in the accompaniment of the two troopers and re-approached the individual.

The patron was then noted to have urinated on himself, his belt was unbuckled, his zipper was down and his shirrtail was hanging out. Once outside, the patron leaned against the outside of the premises for support.

Mr. Keelan, a principal in the corporation, came outside, approached the ATRA agents and inquired as to what was going on. He was advised by the inspectors that the patron, Mr. Dato, was being placed in protective custody, and that a report would be forwarded to the Director of the Division of Alcoholic Beverage Control, advising him of their findings. Mr. Keelan was then asked if the patron appeared to be intoxicated to him, to which he responded that the patron "probably was more stoned than intoxicated".

Under cross-examination, the Inspector admitted that this was his first occasion to perform ATRA duties. He was questioned as to what he meant by the characterization "off the wall" and whether or not a person in his opinion who was "off the wall" was necessarily drunk, to which he responded that a person who is "off the wall" has symptoms that are not altogether with regard to reality.

The inspector stated that this was his fourth or fifth stop on the evening in question with the ATRA patrol. They had made no prior arrests that evening and what attracted his attention to the individual was that he was not acting like "normal people". There was entertainment at The Stockhouse that evening, more particularly, a rock and roll band. The patron was seated alone and while the other patrons were swaying and keeping time to the music, this patron was swaying entirely off beat and could not stop himself from swaying. In addition, the patron was noted to have difficulty finding his mouth with the bottle.

He was then questioned as to what point he concluded that the patron was intoxicated and he stated that he did not conclude that the patron was intoxicated until after the patron had piqued his curiosity and he saw him being served. In addition, Petitioner was described as having a very distinguishing physical characteristic, i.e., his head was shaved. He was then asked if he recalled whether or not Mr. Keelan had requested that the patron be submitted to a breath test to which he responded he did not recall. He testified that he did not make any scientific tests to determine intoxication nor did he request any.

Inspector C.G. testified that he had been with the Division of Alcoholic Beverage Control for 14 years and on the date in question, he investigated along with Inspector J.C., The Stockhouse Corporation, t/a The Stockhouse. When he entered the bar, he observed a white male, approximately 5'8", slim, in his early 20s. His first observations were while he was seated across the bar from the individual and his next observations were when he stood up and moved next to the patron. He observed the individual to have bloodshot eyes, slurred speech, clothes disarrayed, trouble standing up and dribbling beer down the sides of his mouth when he took a sip of same. After observing the patron to be served an additional bottle of Bud, watching him sip same, he then advised the patron that he was with the ABC and requested that they step outside at which time the patron tried to dispose of his bottle of beer and had to be restrained by the Inspector.

Outside, the patron was observed to lean against the wall for support. He also testified that Mr. Keelan advised him that the patron was "probably more stoned than anything else". The Inspector concluded, however, that the patron was intoxicated.

Under cross-examination, he admitted that he arrived at his conclusion that the patron was intoxicated based on his years of experience as an inspector, his observations, and his personal experiences of observing individuals under the in-

fluence of alcoholic beverages. He was positive that he observed the patron with two beers, one when they first entered the premises, and the second which he ordered at last call. He concluded that his earlier suspicions that the individual was intoxicated were confirmed when he walked over to the patron and spoke with him, and were reaffirmed once outside when he observed that the patron had urinated on himself.

When questioned as to why he did not administer a breath test, he stated that he did not have the power to give same.

Under re-direct, he stated that Mr. Keelan did not indicate whether or not he knew the individual personally.

The State rested its case and Petitioner presented two witnesses, Alana McCabe and Thomas J. Keelan.

Miss McCabe testified that on September 15, 1979, she was working at The Stockhouse as a barmaid and had been so employed for the past year. Prior to beginning her duties that evening, she and the other barmaids and bartenders attended a meeting with Mr. Keelan wherein he informed them that they were not to serve anyone they felt was intoxicated.

On the night in question, there were two bars in operation with two bartenders working the front bar and one the rear. The crowd was very small and the establishment was trying out a new band which played hard rock. The other bartender on duty was Ken Calliclio, who was working the front bar along with her. Miss McCabe recalled that on the night in question, two of her girlfriends were present and seated next to Mr. Dato and on occasion, were observed conversing with him. Mr. Dato frequently visited the establishment and she had seen him there approximately four times prior to this occasion.

When questioned when Mr. Dato started frequenting the establishment, she stated it began sometime during the summer and that whenever he was there, he would sit by himself and talk to himself. That occasion, he had attempted to engage her in conversation but she had had such extreme difficulty in understanding him that she just ignored him.

On the night in question, Mr. Dato arrived at approximately 11:30-12:00 p.m., ordered a beer and paid for same with a \$100 bill. On all the other prior occasions, he would order a beer and pay for same with exact change.

She recalled Mr. Dato on the night in question standing and calling the name of the band at approximately 1:50 in unison with the other individuals in the bar who were doing the same. She never observed the ABC agents approach Mr. Dato nor did she observe them speaking with him. When questioned as to the physical characteristics of the individual on the night in question, she stated that he did not perform out of order, that he was not staggering or swaying and that she did not think he was under the influence of intoxicating liquor.

Under cross-examination, she admitted to serving Mr. Dato two beers and she observed Mr. Calliclio serve him two. Mr. Dato, in her opinion, appeared to be normal and fit in with the rest of the individuals that frequent the bar. She did not see when her girlfriends left nor did she observe the agents leave the bar with Mr. Dato. The most outstanding characteristics of Mr. Dato to her is his shaved head, his earring and the army jacket he is constantly wearing.

Mr. Keelan testified that he is the President of Stockhouse Corporation and on the night in question, he was located at the front door. On the date in question, he received a letter from the Division of Alcoholic Beverage Control advising him that they would be enforcing N.J.A.C. 13:2-23.1(b) and he so instructed his employees not to serve anyone who appeared to be intoxicated. His policy prior to this occasion was not to serve anyone intoxicated or apparently intoxicated but he felt he should reinforce that policy since he had received a letter that day. Accordingly, on prior occasions he has flagged individuals, escorted or driven them home, if in his opinion they had too much to drink.

He recalled seeing the two ABC agents prior to that evening when they stopped and asked if he was having a busy night to which he replied, No.

Mr. Dato, according to him, dressed sloppily, was weird looking, wore an army jacket, bald head, was poorly shaven and according to him, the characterization "far out" would be putting it mildly in describing Mr. Dato.

He recalled the two ABC agents on the night in question being somewhat older than his regular clientele and out of place. In addition, he remembered observing one of the agents with a walkie-talkie but he did not observe them with Mr. Dato prior to his being removed from the bar. The two state troopers only entered the premises, stood by the door and did not approach Mr. Dato.

He was advised by the two inspectors that they were arresting Mr. Dato for being an intoxicated person and were citing the bar for serving an intoxicated person. He stated he informed the agent that in his opinion, Mr. Dato was stoned out and he requested that he be administered a test to determine whether or not he was actually inebriated. The agents informed him that no test was needed.

Under cross-examination, he stated that Mr. Calliclio was no longer employed with him and he believed that he had gone back to Montvale to live with his parents. On the night in question, when he observed Mr. Dato with the agents, he appeared to be resisting being removed from the bar. In addition to Mr. Dato, there appeared to be two other persons that looked similar to him and acted like him. The Petitioner then rested its case.

The Petitioner, on January 22, 1980, submitted to the Court a copy of the letter he received from the Division of Alcoholic Beverage Control. Both parties then rested their case.

After having observed all the witnesses for both sides and having considered the entire record including the testimony and argument of counsel, the Court makes the following findings of facts:

1. That Stockhouse, Inc. t/a The Stockhouse, is the possessor of plenary retail consumption license number 1321-33-031-001 located at 60-62 Beach Wayn, Keansburg, New Jersey, and it was so owned on September 15, 1979.
2. That on September 15, 1979, two inspectors with the New Jersey State Police Division of Alcoholic Beverage endorcement, two state troopers and two ATRA agents were assigned to investigate The Stockhouse.
3. That two investigators entered the premises at approximately 1:30 a.m. and observed a white male seated on the right-hand rear section of the bar.
4. That the male was observed to sway in his chair, have trouble lifting his drink, hands fumbling, head bobbing, weaving, slurred speech, slovenly dressed, belt undone, stains of drink on his shirt, grasping for his beer bottle and to have urinated on himself.
5. That the patron was observed to have been served a beer at approximately 1:40 a.m. and to consume part of same.
6. That the patron was requested to leave the bar and accompany the agents outside and became belligerent.
7. That Mr. Keelan, President of the Corporation, stated that in his opinion, that the individual in question was more stoned than intoxicated.
8. That both agents, based upon their observations of the individual, concluded that the individual was severely intoxicated.

The owning of an alcoholic beverage license is a privilege and not a right and should be protected as such. It is clear that appellant did make the sale of an alcoholic beverage to an intoxicated or apparently intoxicated individual on the date in question, and that they did in addition, permit the consumption of an alcoholic beverage to an intoxicated or apparently intoxicated individual. I

reach this conclusion based upon the following. In State v. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960) it was stated that "***whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skills, and is habitually and properly inquired into by witnesses who have occasion to see him and whose means of judging correctly must be submitted to the tried of facts***".

The Court held in Hornauer v. Division of ABC, 40 N.J. Super. 504,510 (1956) that the general accepted gauge of administrative factual finality is whether the findings are supported by substantial evidence. Additionally, in Freud v. Davis, 64 N.J. Super.242,247 (App. Div. 1960) *** as our highest court said almost a century ago, it is 'the constant established practice' to permit lay opinion evidence on the question of intoxication. Kastner v. Slicker, 33 N.J.L. 507, 509-510 (E&A 1969).

The evidence presented before the Court of an individual swaying while seated, having difficulty locating beer on the bar and bringing same to his mouth, hands fumbling, head bobbing and weaving, speech slurred, answers not responsive to questions, slovenly dressed, belt undone, stains or drink on shirt, urination on front of pants are all indicate of intoxication and the court concludes that the two investigators were proper and correct in their determination that the individual observed was intoxicated. As to the argument made by Mr. Keelan that the individual was probably more stoned than intoxicated, it is the court's opinion that said argument does not exonerate the licensee from serving an individual whether he be under the influence of a narcotic or habit-forming drug vs. an alcoholic beverage. At no time should an individual suffering under either substance be permitted to be served an alcoholic beverage or consume an alcoholic beverage on a licensed premise.

Therefore, the court, based upon its conclusions, directs the Director of the Division of Alcoholic Beverage Control to impose the necessary penalty for violation of N.J.A.C. 13:2-23.1(b).

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

3. DISCIPLINARY PROCEEDINGS - LICENSEE GUILTY OF FALSE AND MISLEADING ADVERTISING VIA DISPLAY SIGN INSIDE LICENSED PREMISES.

In the Matter of Disciplinary Proceedings against :

Renault Winery, Inc. :
Bremen Avenue and :
Liebig Street :
Egg Harbor, NJ 08215 :

CONCLUSIONS

AND

ORDER

Holder of Plenary Winery License :
No. 3400-24-171-001 issued by :
the Common Council of the City :
of Egg Harbor. :

S-12,266

X-4,609-V

-----:
Piltzer and Piltzer, Esqs., by David S. Piltzer, Esq.,
Attorneys for Licensee.
Charles J. Mysak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

DATED: February 25, 1980

RECEIVED: February 28, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision Below were filed by the licensee, pursuant to N.J.A.C. 13:2-19.6. The licensee herein is charged with false and misleading advertising contrary to N.J.A.C. 13:2-24.7 (now N.J.A.C. 13:2-24.11(a) (1)) in that it misrepresented a product to be 20 years old, via a display sign inside the licensed premises. The sign was not found, nor introduced as evidence, but the licensee admitted that the representation of age of the product was made in the manner described.

The president and sole stockholder of the corporate license testified that he believed the wine to be in excess of 20 years in age, based upon storage factors and discussions with other present and former employees of the Winery. He could not substantiate the age of the product since records were no longer available. He admitted that, because he could not substantiate the age of the wine, he did not have it imprinted on the label. He admitted that, to do so would violate Federal labeling regulations.

Under those circumstances, a violation of Division regulations would also occur, inasmuch as the Division has adopted, by reference, Federal labeling requirements. N.J.A.C. 13:2-27.1. The Division did not seek to affirmatively prove, through an expert, that the product was less than 20 years old.

When a Winery makes a statement concerning the vintage or age of a product, it is not the Division which possesses the proofs of the truth or falsity of the claim, it is the licensee who has the records needed to substantiate the charges. Here, knowing it had no proof of age, and that it would violate Federal and State regulations to label the product as 20 years

old, it intentionally touted the product as being superior through age, by using a cardboard sign easily retrievable upon the arrival of Division or other authorized investigators. This is exactly the type of chicanery that the said regulation is designed to prevent.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Initial Decision, and the Written Exceptions to the Initial Decision, which I have assayed and reviewed, and find lacking in merit, I concur in the findings and recommendations of the Administrative Law Judge, and adopt them as my conclusions herein, except for the following modification:

Inasmuch as the Winery is a continuous process, I shall modify the recommended sanction of the Administrative Law Judge. Sanction shall be limited to a 15 days suspension of the licensee's retail privileges only.

Accordingly, it is, on this 8th day of April, 1980,

ORDERED that the retail privileges of the Renault Winery, Inc., be and are hereby suspended for 15 days commencing 3:00 a.m. on Wednesday, April 16, 1980 and terminating 3:00 a.m. on Thursday, May 1, 1980.

JOSEPH H. LERNER
DIRECTOR

DISCIPLINARY PROCEEDING)
AGAINST RENAULT WINERY, INC.)

INITIAL DECISION

OAL DKT.NO. ABC 4663-79

AGENCY DKT.NOS.S-12,266,X4,609-5

APPEARANCES:

Charles J. Mysak, Esq., Deputy Attorney General, for
The Director of the Division of Alcoholic Beverage
Control, Petitioner

David S. Piltzer, Esq., Piltzer and Piltzer, Esqs.,
for Renault Winery, Inc., Respondent

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On January 25, 1980 a hearing was held on the proposed suspension or revocation of the plenary winery license of respondent by virtue of the following charge that was embodied in a notice to respondent from petitioner dated June 12, 1979:

"On August 25, 1978 and on divers days prior thereto, you included in advertising material a representation that was false and misleading, viz., you advertized by means of a sign posted in your licensed premises that you had 20 year old Renault Brut Champagne for sale at \$12.50 per bottle when in fact the said champagne could not have been 20 years old; in violation of N.J.A.C. 13:2-24.7"

Respondent pleaded not guilty on August 9, 1979 and the matter was filed as a contested case on October 19, 1979.

At the outset of the hearing the following facts were stipulated:

1. The respondent is the holder of a plenary winery license.
2. Mr. Joseph Milza is the president of the respondent corporation.

At the conclusion of the Director's case the following exhibits were admitted into evidence, the final two over the objection of respondent:

1. P-1, Statement of Joseph P. Milza dated September 19, 1978 given to Senior Inspector L.F. of the State of New Jersey, Division of Alcoholic Beverage Control.
2. P-2, Copy of unsigned typewritten letter from Bernard Noble, Vice President, Renault Winery, Inc. to State of New Jersey, Division of Alcoholic Beverage Control dated September 1, 1977 indicating, among other things, the enclosure of labels for Private Label Brand of Renault Brut Champagne, Bottle Fermented, 4/5 Qt. attached to which was a copy of the label of Renault New Jersey State Champagne, Brut, Natural Fermentation in the Bottle, 4/5 Qt. and a copy of Division form P-TP-43.
3. P-3, Statement of Michael Huddy given to Senior Inspector L. F. on September 21, 1978.

L. F. testified that he is a senior inspector employed by the Alcoholic Beverage Enforcement Bureau of the New Jersey State Police. He stated that on September 19, 1978 he investigated the Renault Winery for fraud advertising. He did not observe any of the particular merchandise in question. The merchandise that was the subject of the investigation was Renault Brut Champagne, 4/5 quarts (hereinafter Renault).

The witness said he spoke to the controller and to Mr. Milza, the president of the winery. He took a signed statement from Mr. Milza and he identified it.

Mr. F. stated Mr. Milza told him he had been selling Renault 4/5 quarts at \$12.50 since September, 1977 and that 455 bottles were sold. He also told him the only advertisement was in the store itself, in Renault Winery, by a plaque, a cardboard sign about 8" x 11", with a small display of the champagne. He told him he had advertised it as being over 20 years old. The witness said Mr. Milza told him he was told by his employees that it was good old merchandise but he was not able to produce records regarding the manufacture of the champagne, stating that the records were destroyed by the former owners.

The witness testified from Mr. Milza's statement that, in response to the question, "How could this item be over 20 years old when the bottle indicated as being made in 1972 which had this product therein", Mr. Milza told him that "Sometime during the summer of 1977, it was told to me that there was upwards of 400 bottles of wood corked, bottle fermented, unlabeled champagne approximately 20 years old in our bottling plant. I was advised that the product was of such sufficient quality that we could easily sell it for \$12.50 a bottle. It was not known to me what year the glass bottle was manufactured."

The witness said he spoke to John Ordille, the wine making foreman at Renault Winery on November 16, 1978. He took his statement in the presence of Mr. Milza and Mr. Ordille indicated he had no knowledge of the 20 year old champagne, that he had no records concerning it and that he did not participate in it.

On cross-examination the witness said he saw no sign advertising the champagne.

On redirect examination he stated he did not see the sign, that it was not in the store at the time. He said he took a signed statement from a Mr. Huddy on September 21, 1978, that Mr. Huddy indicated he purchased champagne on the premises on August 25, 1978 and that it was advertised by a sign that stated the champagne was 20 years old and also there was a facsimile of an award given for the champagne. He said Mr. Huddy thought it was a fraud on the people advertising something that was not actually so.

Joseph P. Milza testified he owns the Renault Winery in Egg Harbor City. It is a corporation of which he is president, secretary and sole stockholder. He has been affiliated with Renault Wine since May, 1977 and in active charge since November, 1977.

He stated that at present the winery has 402 4/5 quarts of bottle fermented champagne and so far as his personal knowledge was concerned the winery has had the bottles for better than 20 years.

Mr. Milza stated that in the summer of 1978 the winery had bottles of Brut Champagne for sale to the public. He said the product was sitting in bottles collecting dust for obviously a long period of time. Mr. Bernard Noble, the general manager and vice president, backed by other employees, told him that this bottle fermented champagne was a rare quality. They told him that it had to be in excess of 20 years through aging of the wine, the subsequent bottling and then the subsequent rebottling.

The champagne was corked, wire hooked and laid on its side in an aging process. Subsequently a label was placed on it. The label did not indicate how old it was. It was the witness' honest belief that this champagne was over 20 years of age.

Mr. Milza stated he fired Mr. Noble in June, 1978.

On cross-examination he said he fired Mr. Noble because he did not handle himself or the employees properly and made many mistakes. He considered him inconsistent with the resume he had of him. He stated Mr. Noble handled the marketing and advertising for the champagne in question. Mr. Noble was not present for the period under discussion.

The witness said the champagne was displayed on the premises in a sales room which is open to the public. It was on top of a barrel with a little sign next to it indicating it was different from other champagne. He did not know the exact wording of the sign. He stated that this type of wine was an award winning wine in 1954. He said the sign was accurate. He never saw any documentation as to the origin of the wine.

Mr. Milza stated that the wine in question was made from grapes grown in the Renault vineyard in New Jersey. He explained that the year a grape is picked is considered the vintage year and that would be where they would determine whether it would be five, ten, twenty or thirty years old by the vintage year that the grape is picked. He did not know the year that the grapes were picked for the Renault that was sold in August and months prior. He did not know the exact year and that is why it was not on the label. Had he known he would have put it right on the label. He stated they knew it was over 20 years, it would have to be.

Mr. Milza was referred to the statement he gave Mr. F. and to that portion where he stated that sometime during the summer of 1977, it was told to him that there were upwards of 400 bottles of wood corked, bottle fermented, unlabeled champagne approximately 20 years old in our bottling plant. He admitted he indicated it was approximately 20 years old. He thought "approximately" would indicate as much over as anything else. He said he was sure he did not mean less than 20 years. He meant more than 20 years. He said maybe for the use in his statement of the word "approximately", maybe, perhaps the sign was inaccurate. It might be termed as being inaccurate but he did consider it over 20 years old. With respect to his statement, he said he did not think that it was that important "to say", to use the word "approximately" or over. He did not realize that it was such an important word. He said Federal regulations forbid him from putting the age of the wine on the bottle if he cannot fully substantiate it with records. In this case he did not have the records and he abided by the Federal law.

In the instant matter the Director of the Division of Alcoholic Beverage Control has the burden of proving the charge he has levelled against Renault Winery, Inc. by a preponderance of the believable evidence, Atkinson v. Parsekian, 37 N. J. 143, 149 (1962). N.J.A.C. 13:2-24.7, applicable to this case reads in pertinent part that:

- (a) "No manufacturer, importer, wholesaler or retailer shall include in any advertising material or other advertisement, directly or indirectly, in any manner or by any means, device or medium:

1. Any statement, illustration, design, device or representation that is false or misleading."

In my judgment, from a review of the statement and testimony of Joseph P. Milza, it is clear that the Director proved his case by a preponderance of the believable evidence. The word "false" has many meanings. It has been defined as "not true"; "assumed or designed to deceive"; "given to deceit"; "intentionally

or knowingly or negligently untrue", Black's Law Dictionary, Fifth Edition, page 540. The word "misleading", which is used in the instant matter in the disjunctive, has been defined as "delusive"; "calculated to lead astray or to lead into error", Black's Law Dictionary, Fifth Edition, page 902.

Assuming, solely for the sake of argument, that Mr. Milza honestly believed that the champagne was over 20 years of age, he is not absolved from a violation of N.J.A.C. 13:2-24.7(a)(1). The latter does not contain the word "intentionally" prior to the words false or misleading. Thus, particularly appropriate and applicable is the dissent of Judge Kolovsky in Fenwick v. Kay American Jeep, Inc., 136 N. J. Super. 114, 120-126 (App. Div. 1975) which was held to be correct in Fenwick v. Kay American Jeep, Inc., 72 N. J. 372, 376-378 (1977) where the Court stated that, "The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice. Intent is not an essential element. Since consumer protection is the ultimate goal, the standards of conduct established by the Act and implementing regulations must be met regardless of intent except when the Act specifically provides otherwise. Equally applicable is Grant Lunch Corporation v. Driscoll, 129 N. J. L. 408 (Sup. Ct. 1943), affirmed 130 N. J. L. 554 (E. & A. 1943).

Simply stated, the champagne should not have been advertised as being over 20 years old unless Renault Winery, Inc., through its agent, Joseph P. Milza, knew for a fact that it exceeded 20 years in age. Mr. Milza was unable to produce any records for L. F. regarding the manufacture of the champagne, stating that the former owners had destroyed them. Additionally, he never saw any documentation as to the origin of the wine. He did not know in what year the grapes that went into the wine in question were picked and thus he did not know how old the wine was. Had he known its age, he would have put it on the label. He admitted the cardboard sign was maybe and perhaps inaccurate by the use of the word "approximately" in his statement to L. F. "Approximately" is defined in Webster's Third New International Dictionary Unabridged (1976), page 107, as "reasonably close to", with synonyms "nearly", "almost", "about".

Mr. Milza testified he abided by Federal law and did not put the age of the wine on the label because he could not substantiate from his records that it was 20 years old. He should have adhered to the same course of conduct in the instant matter and not have advertised by means of a cardboard sign that the Renault Brut Champagne was over 20 years old. In doing so, Renault Winery, Inc., through its agent, Joseph P. Milza, violated N.J.A.C. 13:2-24.7(a)(1).

Factually, I FIND:

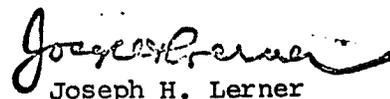
1. The facts that were stipulated at the outset of the hearing and I incorporate them here by reference without again setting them forth.
2. That Renault Winery, Inc. is the manufacturer and a retailer of Renault Brut Champagne.

3. That Joseph P. Milza is also the owner, secretary, director and sole stockholder of Renault Winery, Inc. and that since May 1, 1977 until the present time he has been affiliated with Renault Winery, Inc. and has acted as its agent within the scope of his employment with the purpose of furthering the business of Renault Winery, Inc.
4. That Renault Winery, Inc. through its agent, Joseph P. Milza, commenced selling Renault Brut Champagne, 4/5 quart, at \$12.50 each, to the public in September, 1977 and as of September 19, 1978 had sold 455 bottles.
5. That Renault Winery, Inc. through its agent, Joseph P. Milza, advertised Renault Brut Champagne for sale by means of a cardboard sign, 8" x 11" which was placed near the champagne in its store and which indicated that the Renault Brut Champagne was over 20 years old.
6. That Renault Winery, Inc. through its agent, Joseph P. Milza, advertised Renault Brut Champagne as being over 20 years old when neither the age of the wine was known nor could it be substantiated by the records of Renault Winery, Inc. that the wine was over 20 years old.

I therefore CONCLUDE that Renault Winery, Inc. violated N.J.A.C. 13:2-24.7(a)(1) and I ORDER that the plenary winery license of Renault Winery, Inc. be suspended for a period of 15 days. In arriving at this period of suspension I have balanced what I perceive, from a review of the record and the totality of the circumstances, to be conduct on the part of Renault Winery, Inc. which was not egregious with the possibility that Renault Winery, Inc. reaped a substantial profit from the sale of the 455 bottles.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.



Joseph H. Lerner
Director