THE NEW JERSEY STATE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

The present New Jersey State Department of Alcoholic Beverage Control was created as a result of the Twenty-first Amendment to the federal Constitution, but the history of the regulation and control of dispensing intoxicating liquors goes back to the very inception of government in New Jersey.[1] By the laws of 1738-39 tavern keepers were obliged to apply to the justices of the peace annually in open court for a license;[2] the prices at which liquor could be sold were fixed by the same justices of the peace;[3] and after the Revolution, gambling of any sort was prohibited on licensed premises.[4] For many years the Court of Common Pleas continued to grant licenses and fix prices,[5] and thereafter and until "prohibition" the trade was regulated by a system of licenses granted by municipal authorities, vested with wide discretionary powers over such grants, the amounts to be paid therefor, and over the sale of liquor in general.[6]

Prior to the effective date of the "repeal" amendment,[7] the Legislature by joint resolution[8] appointed a committee, known as the Alcoholic Beverage Commission, "to investigate, inquire into and report concerning proposed legislation for the regulation and taxation of traffic in alcoholic beverages." The Commission named consisted of outstanding citizens of the state.[9]

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1. The history of regulation was recently surveyed by the Supreme Court in Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct. 1939).
2. Allison's Laws, p. 103.
3. *Ibidem*, p. 105.
4. Patterson's Laws, pp. 237-238.
5. See Rev. St. 1847, sec. 21, p. 581.
6. See Gaine v. Burnett, *supra*, note 1.
7. December 5, 1933.
8. Dated October 9, 1933.
9. The Commission was composed of the following: Thomas N. McCarter,

This public spirited group held numerous closed meetings, eight public hearings and one all day hearing in the Public Service Auditorium in Newark,[10] and after intensified study reported to the legislature the result of their efforts. Attached to this report was a draft of recommended legislation, the substance of which provided for a strict licensing system under the control of a state department headed by a single commissioner. With but few changes, the proposed draft became the original control act.

The primary problem which faced the commission involved the method of administration: whether the department should be operated by a commission or by a single commissioner. It is felt that the choice of a "single executive" was a wise one. The object of liquor legislation is rigid, uncompromising control. The main duties of the department are police in nature, and such duties are performed with greater e;ciency and promptness through a single individual than through a plural board. The "single executive" can make up his mind quickly and act at once; in case of a board, it is necessary to bring a number of minds to focus, with the possible result of delay and postponement, leading often to compromise not easily made the basis for effective action.

The Constitutionality of the Act

The general constitutionality of the organic act has never been seriously questioned. A long line of decisions dealing with previous attempts to effectuate control clearly recognize that the regulation of the liquor industry, no matter how stringent,

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Chairman; Andrew F. McBride, Vice-Chairman; Harvey N. Davis, Secretary; Dr. Robert C. Clothier, William C. Heppenheimer, Kate Prentice (Mrs. Reeve) Schley, and H. Norman Schwarzkopr. The late D. Frederick Burnett acted as counsel.

10. The Commission's report deplores the relatively small number of interested citizens who attended and participated in the public hearings.

constitutes a valid exercise of the state's "police power." The traffic "has been subject to license and regulation at all times."[11]

A. Delegation of Power

Legislative power is vested in the Senate and General Assembly and has been held non-delegable;[12] but the practical necessity of delegating "regulation making" powers has been recognized by our courts.[13] In the language of the Court of Errors and Appeals:

> "It is only necessary that the statute establish a sufficient basic standard—a definite and certain policy and rule of action for the guidance of the agency created to administer the law."[14]

The legislature has provided the basic standard in the instant statute; it is that the control act shall be "administered in such manner as to promote temperance and eliminate the racketeer and bootlegger."[15]

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11. Meehan v. Excise Commissioners, 73 N.J.L. 382 (Sup. Ct. 1906). Also, Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888): "The delegation of the liquor traffic, to be controlled and regulated . . . has all the sanction of venerable usage."

12. See Attorney-General v. McGuiness, 78 N.J.L. 346 (E. & A. 1910).

13. Jacobs and Davis, "A Report on the State Administrative Agency in New Jersey" (1938), Eighth Report of the Judicial Council to the Governor (pp. 6-31).

14. State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 522 (E. & A. 1935). *Cf.* Hoboken v. Martin, 123 N.J.L. 442 (E. & A. 1939).

15. Rev. St. 33:1-3. This declaration of policy is similar to that contained in other state liquor control acts which afford judicially recognized powers to administrative officials. See brief filed on behalf of the Commissioner in Gaine v. Burnett, at pp. 13-14. See also Silberghed v. Mulrooney, 150 N.Y. Misc. 251, 270 N.Y.S. 290 (Sup. Ct. 1934) and Wilson v. Quinn, 1 N.Y.S. (2d) 766 (Sup. Ct. 1937), approving the following standard in the New York Alcoholic Beverage

The delegation to the Commissioner of the legislative power to promulgate rules and regulations and the exercise of that power in a broad and comprehensive manner has received judicial sanction.[16]

When the statute was first enacted, doubt was expressed as to the Constitutionality of certain of the delegations of permissive authority to municipalities.[17] No action has been instituted to determine the validity of the act in this respect, but it is submitted that there is no constitutional repugnancy.

No section of the act purports to do more than grant to a municipality the power to exercise governmental functions at option. The grant of such power is clearly the power of the legislature. The first commissioner discussed the problem in an extremely able manner:

> "The confusion has arisen from a failure to distinguish delegation of permissive powers to a municipality from one where the Legislature delegates to the municipality the right to determine for itself whether or not the municipality should have the power at all. In the latter case the doctrine that the Legislature, while it may impose its own will may not interpolate an alien will, admittedly obtains. What it means is that in such a case the governing body of a municipality which happens to be in office at the time cannot elect whether the municipality should or should not have the power; that only the 'electorate' can make such decision. But that is clearly not the present case. No such inhibited delegations of power are contained in the bill.[18]

Law: " . . . fostering and promoting temperance in their consumption and respect for and obedience to law."

16. Franklin Stores Co. v. Burnett, 120 N.J.L. 596 (Sup. Ct. 1938).
17. See Annual Report, 1934, p. 1.
18. *Ibidem.*

merce cases in its "Third Annual Report" to Congress, indicated that its intervention had been sanctioned where a "substantial proportion" of the employer's finished product was shipped in interstate commerce. In other words, since the court had not yet given its imprimatur to the *de minimis* principle, the Board was not ready to assert in its report that it had received judicial recognition as the measure of jurisdiction.[11]

After the Santa Cruz decision came the *Consolidated Edison* case.[12] There, federal control of the industrial relations of utility companies which operate wholly intrastate, but which furnish power to interstate agencies, was sustained. The proof showed that the company served railroads, steamships, telegraphs, telephones, the Port of New York authority, piers of transatlantic steamships, a transatlantic radio service, etc., which were engaged in interstate and foreign trade. In sustaining the assumption of jurisdiction, the court said that:

> "The criterion of the federal constitutional power to suppress unfair labor practices . . . is the injurious effect upon interstate and foreign commerce *rather than the source of the injury.*
>
> "Whether or not particular action in the conduct of intrastate enterprises affects interstate or foreign commerce in such a close and intimate fashion as to be subject to federal control, depends on the particular case.
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> "There is no doubt that the federal power may intervene to protect interstate and foreign commerce even though the effect is produced by one who operates intrastate.
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> "It cannot be doubted that these activities, while conducted within the state, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a *small part* of the entire

11. Third Annual Report of N.L.R.B., p. 219.
12. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938).

> service rendered by utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power."

The Chief Justice might have used "trivial" instead of "small" in describing the part the power sold to the interstate and foreign agencies of commerce represented of the total output of the employer. However, it would have seemed incongruous had he done so, not because the percentage of the total business was trivial, but because of the relative importance of the agencies which received the power and the obvious effect upon their operations if it ceased to be transmitted because of industrial strife. In any event, "small" is different from "substantial" and undoubtedly would justify the assertion that somewhat further extension of the Board's power had been sanctioned.

However, it was in the *Somerville Manufacturing Co.* case[13] that the *de minimis* contention of the Board was finally given full recognition. There, the employers were engaged in the business of processing materials into various types of women's sport garments. They opperated what is known as a "contract shop". Materials were supplied and owned by a New York company. Cloth was cut by this company in New York and shipped by truck to the employer in New Jersey. Sometimes raw materials were shipped at the order of the New York company directly from the manufacturing mills to the employer. Many of the mills are outside of New Jersey. All work done by the employer in New Jersey was under contract. Finished garments were delivered to a representative of the New York company who shipped them directly to the New York office and directly to customers throughout the country. Throughout the year there was normally a continuous day by day flow of shipments of raw materials to factory from points without the state and of

13. N.L.R.B. v. Somerville Mfg. Co.

finished garments from the plant to New York City and to other points outside New Jersey. In brief, the situation appeared to be that the employer took delivery of its raw materials which were shipped in commerce or ordered shipped in commerce by someone else and delivered the finished products to the representative of the shipper within the state, who in turn dispatched them in commerce.

Justice Stone, speaking for the majority of the court, said:

> "It is settled that an employer may be subject to the Act although not himself engaged in commerce. Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondent and in the transportation of the finished products to points outside the state for distribution to purchasers and ultimate consumers. Whether shipments were made directly to respondent as the Board found, or to a representative of the New York sportswear company at the factory is immaterial. *It was not* any less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported.
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> "Nor do we think it important that the volume of the commerce—though substantial for it—was small as compared with that in other cases arising under the act. The power of Congress to regulate interstate commerce is *plenary and extends to all such commerce,* be it great or small.
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> "The language of the Act seems to make it plain the Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.
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> "Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small.

"Examining the Act in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim of *de minimis.*

"There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce. Some, like the clothing industry, are extensively unionized and have had a long and tragic history of industrial strife . . .

"In this, as in every other case, the test of jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such that unfair labor practices have led or tend to lead to a labor dispute burdening or obstructing commerce."

This view establishes that the Board may take jurisdiction over any employer whose interstate operations are greater than "trivial," providing the cessation of those operations because of labor troubles would affect interstate commerce to the necessary degree. It was again indicated that one of the factors to be considered in determining whether the labor relations of a particular employer have a close and intimate relation to interstate commerce is the character of the industry in which he is engaged. Is he one unit—even though an independent one—of an industry which in the aggregate contributes a large volume of interstate commerce? If so, and if the industry is extensively unionized and has a history of industrial strife, it is probable that he is subject to the act even though his interstate business is just above the inconsequential.

The reference of Justice Stone to the history of industrial strife in a particular industry, to the fact of extensive unioniza-

tion thereof and to the fact that the industry in the "aggregate" may supply a large volume of commerce, poses a question which, if answered affirmatively, may further extend the Board's influence. Supposing an employer is a unit—independent and unrelated except in nature of work—of such an industry, and suppose his operations are purely intrastate. Will the size of the industry as a whole from a national standpoint, plus the fact of extensive unionization and a history of industrial strife, be sufficient to charge the individual employer with obedience to the Act? Having the present temper of the court in mind, it is not too much to expect that the federal authority to act would be sustained.

This is not the first time that mention has been made of the significance of the history of labor relations in a particular industry. In the Jones case it was said that commerce is a practical conception, that labor disputes were not to be considered in the abstract, but rather in the light of practical experience, and that the government had "aptly" referred to the 1919-1920 steel strike. Likewise, in *Friedman-Marks v. N. L. R. B.* the court's discussion, after referring to the fact that the company was a comparatively inconsequential figure in the industry, centered largely on the nature of the industry as a whole, its place in the national industrial scheme, the size and character of the union involved, the fact that it had over 125,000 men and women employed in the industry, the effect of industrial strife in the past, and the peace which collective bargaining had brought to the portion of the industry which had recognized the desirability of bargaining.

This willingness of the court to consider the labor history of an industry is of tremendous significance in connection with jurisdictional problems and the full impact of this willingness obviously has not yet been felt.

Many persons believed that the *Carter Coal* case,[14] which

14. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

outlawed the Bituminous Coal Conservation Act of 1935, would preclude the application of the Wagner Act to mine operators. It was felt that the opinion dealt with employer-employee relations before commerce began, and stood for the proposition that such relations do not have the necessary proximity to commerce to justify regulation by Congress. However, in the Jones case this contention was summarily rejected with the statement that the issue in the Carter case was primarily one of due process and improper delegation of legislative power.

On the way to the Supreme Court at the present time is a controversy which will put at rest any further speculation about the value of the Carter case as a precedent in commerce problems. In July, 1939, the Circuit Court for the Eighth Circuit sustained the intervention of the Board in labor troubles in a coal mine.[15] The mine was a small one and the operator a Lilliputian in the industry. Two hundred and seventy thousand tons of coal were produced annually. Twenty-five per cent was sold to interstate railways, twelve per cent to jobbers, which was loaded in cars at the time and billed at their direction to other states. About ten per cent was purchased by a local power company which transmitted a small percentage of power to other states. Here not only was the suggested Carter rule thrust aside, but Justice McReynold's idea[16] that it is not the relation of the employer's interstate purchases and sales to his total purchases and sales which should control the application of the Act, but rather the relation of his interstate business to the total business done in the industry—that is, if the particular employer's business is inconsequential considered in the light of the whole interstate trade in the field, then cessation of his flow through labor strife would not have a direct effect upon commerce—was also rejected again.

Then the Fourth Circuit recently followed literally the Su-

15. N.L.R.B. v. Crowe Coal Co. (July 1939).
16. Dissent, Jones case, p. 94-6 (p. 933 L. Ed.).

The opinion of the court in *Paul v. Gloucester County*[19] appears very definite on the point that a delegation of local self government to a political subdivision of the state is not an unconstitutional delegation of the legislative power. The true basis of the legislative right to so delegate is stated to reside in the fact "that it has always been recognized as a legitimate part of the legislative function, as well as a duty in harmony with the spirit of our institutions, to enable the people, in whom all power ultimately resides, to control the police power in communities for themselves";[20] and the extent to which the delegation may be made "lies wholly within legislative discretion."[21]

B. Seperation of Powers

Though the Commissioner, as will be pointed out later, is vested with a combination of powers, executive, legislative and judicial in nature, the combination has never been attacked in the courts as in violation of Article III of the New Jersey Constitution, which provides that "the powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others . . . "[22] The reason for the absence of attack may be found

19. 50 N.J.L. 585, 603 (E. & A. 1888).

20. *Ibidem.*

21. *Ibidem*, at p. 605.

22. Compare Articles I, II and III of the Federal Constitution. Article III of the New Jersey Constitution is in recognition of the famous doctrine of separation first expounded by MONTESQUIEU in his "L'Esprit des Lois." *Cf.* LARNAUDE (1904), quoted at length in FRANKFURTER and DAVISON, "Cases on Administrative Law," Introduction: "The seperation of powers is merely a formula, and formulas are not working principles of government. Montesquien chiefly aimed to indicate by his formula the aspirations of his times and country. He could not and did not wish to propose a definite and permanent solution of all

in the fact that "our courts have expressly recognized that the vesting of powers . . . in administrative agencies is not in violation of the constitutional doctrine of seperation of powers."[23]

By implication, the combination of powers in the instant department has been held valid. Legislatively, the Commissioner is empowered to promulgate rules and regulations. His right to do so has been sustained.[24] In an executive capacity, he is charged with instituting prosecutions for violations of the regulations and the act. The right of the Commissioner to prosecute for the sale of liquor in violation of a regulation was upheld.[25] In the manner of the judiciary, he is authorized to make adjudications respecting licenses and violator. The Supreme Court has sustained such an adjudication.[26]

D. Due Process of Law

The statute contains no requirements for a formal hearing in advance of the promulgation of rules. Considerations of due process do not require such a hearing. In *State Board of Milk*

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the questions brought up by a government of men and their long-felt longings for fairness and justice." See also Frankfurter and Landis, *Power of Congress Over Criminal Contempts in Federal Courts* (1924), 37 HARVARL L. REV. at 1012: " . . . the true meaning which lies behind the 'seperation of powers' is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became te great Chief Justice." See the excellent discussion of the principle behind the doctrine in CHAFFE, "State House Versus Pent House (1927), pp. 47-53.

23. JACOBS and DAVIS, *supra*, note 13, at pp. 8-9, citing authorities.

24. Franklin Stores Co. v. Burnett, 120 N.J.L. 596 (Sup. Ct. 1938); Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct. 1939).

25. *Semble*, Gaine v. Burnett, *supra*, note 24.

26. Conover v. Burnett, 118 N.J.L. 483 (Sup. Ct. 1937); Silver Rod Stor , Inc. v. Burnett, 121 N.J.L. 417 (Sup. Ct. 1938).

Control v. Newark Milk Co.,[27] the Court of Errors and Appeals stated:

> "In the absence of a specific constitutional, or statutory requirement thereof, notice of proceedings before the subordinate body exercising, as here, the administrative function is not requisite to valid action by that body. Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement; and, for obvious reasons, the like clauses of the State Constitution bear the same construction."

The procedure of promulgating rules without hearing was attacked in *Franklin Stores Co. v. Burnett*,[28] but the court failed to consider the question.

Further, the liquor business is said to involve a "privilege" rather than a "right," and has been held that when a privilege is involved, due process does not require a hearing or notice.[29]

The Department

The organic act creates a state department of Alcoholic Beverage Control,[30] headed by a state commissioner appointed by a joint session of the legislature for a term of seven years at an annual salary of $16,500.[31] Broadly speaking, the act recites

27. 118 N.J.Eq. 504, 522 (E. & A. 1935).
28. 120 N.J.L. 596 (Sup. Ct. 1938).
29. Garford Trucking, Inc v. Hoffman, 114 N.J.L 522, 531 (Sup. Ct. 1935).
30. Rev. St. 33:1-3.
31. Rev. St. 33:1-2. It sould be noted that the legislature did not follow the recommendation of the State Alcoholic Beverage Commission that the state commissioner be appointed by the Governor and confirmed by the Senate. It did, however, follow the novel precedent established by the legislature in 1926, when, in creating the Department of Motor Vehicles, the first commissioner was named in the act. The late D. Frederick Burnett was named as the first state commissioner of alcoholic beverage control.

that it is the duty of the commissioner "to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner as to promote temperance and eliminate the racketeer and bootlegger."[32]

Section 4 of the act as originally written created divisions in the department respectively labelled administration, licensing and investigation. The inadvisability of a fixed departmental set-up was pointed out by the commissioner in his first annual report[33] and the act was amended in 1934[34] to give the commissioner complete power "to organize said department, creating such divisions and altering them in such manner and at such times as he considers advisable."

The commissioner is empowered to appoint three deputy commissioners at a rate of compensation not exceeding $6,000 per annum. Each deputy is removable by the commissioner "at will," and each is charged with the administration of a division assigned to him by the commissioner.[35]

Inspectors and investigators are appointed by the commissioner, who is empowered "to fix their duties, terms of service and compensation." Inspectors and investigators presently are not subject to civil service[36] and are "removable by the commissioner at will." Their rate of compensation cannot exceed $3,500

32. Rev. St. 33:1-12.

33. Ann. Rep. 1934, p. 22: "Actual experience has demonstrated that there is no clear line of cleavage between administration and licensing or between investigation and compliance. What the divisions should be and what duties should be imposed is still in a state of flux. It would be more conducive to efficiency to direct the commissioner to organize the department and create such divisions and alter them as he shall from time to time deem advisable."

34. P. L. 1934, ch. 85, sec. 4, p. 224.

35. Rev. St. 33:1-4.

36. There is current agitation to bring the entire department under the operation of the Civil Service Title. The legal division of the department has submitted an extensive report advocating civil service status to all employees. See *Newark Evening News*, Thursday, April 25, 1940, p. 11; also *Newark Star-Ledger*, April 29, 1940, p. 1, which speaks of a "revived agitation for bestowing Civil Service protection on the score of ABC." On April 29, 1940, a bill extend-

per annum.[37] The commissioner's power of appointment extends also to "clerical force and employees," subject to the Civil Service title, and to "counsel and other legal assistants," not subject to the Civil Service title.[38]

No officer or employee of the department may directly or indirectly "have any interest whatsoever in the manufacture, sale or distribution of alcoholic beverages, or in any enterprise or industry dealing or connected with the alcoholic beverages or kindred or cognate thereto."[39]

Pursuant to the statutory sanction, the commissioner divided the department into three divisions, namely, legal, licensing and enforcement.

A. The Legal Division

The legal division is headed by a deputy commissioner, who is also chief counsel, and includes the department's attorneys, stenographers, and a "court" reporter.

The following duties and functions contemplated by the act devolve upon the legal division:

1. *Legal Interpretations*: Municipal officials, local enforcement officers, members of the liquor industry and the general

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ing civil service to the department was introduced in the Assembly by Assemblyman Volpe of Essex County. To date, no action has been taken on the bill.

37. Rev. St. 33:1-4. The highest actual salary paid an investigator is $2240. A higher scale has been recommended. See Ann. Rep. 1938, p. 6: "Furthermore, there should be a general adjustment upwards of investigators' salaries. The department's investigators, many of whom have been in its employ since 1933, receive salaries from $1800 to $2240 per annum. Considering the nature and responsibility of their work, such compensation is clearly inadequate. The lowest salary paid to any Federal investigator doing comparable work is $2600 for the first year of service. It is my recommendation that the salaries of all investigators be fixed at $2200 per annum for beginners, and graduated, in accordance with length of service, to a maximum of $3000 per annum. The laborer is worthy of his hire."

38. Rev. St. 33:1-4.

39. Rev. St. 33:1-7.

public make many inquiries of the department for interpretations of the control act. These inquiries are handled by the legal division. An intelligent and informative response to an inquiry often involves a careful and detailed analysis of the problem and extensive research. Answers are prepared in draft form by the individual members of the division, but the answering letter is a personal one, dictated and signed by the commissioner.

2. *Preparation of Rules and Regulations*: In connection with the promulgation of rules and regulations, the legal division often conducts public hearings and conferences with interested parties and prepares reports thereon to be submitted to the commissioner. Constant research is undertaken into the laws and rules of other states, together with material furnished to and by the Federal Alcohol Administration in an effort to achieve intelligent, fair and workable rules and regulations.

3. *Prosecution of Cases*: A national function of the division is representing the department in proceedings leading to disciplinary action against licenses or to the forfeiture of seized goods. The division also represents the commissioner in appeals taken to the courts from his determinations.

4. *Hearings*: One of the most important functions of the division is the conducting of the various types of hearings afforded individuals under the act and the rules. Members of the division act in the capacity of "hearers" or "examiners" and are in great measure responsible for the character of the hearing. At the conclusion of the hearing, it is the duty of the "hearer" to prepare a synopsis or digest of the testimony and evidence adduced at the hearing, together with a recommendation of the appropriate action to be taken.[40]

40. The procedure will be outlined in greater detail later in this article. It should be pointed out here, however, that the power of the legal division over the final order or determination stops with the submission of the recommendations to the Commissioner.

B. The Licensing Division

The licensing division is headed by a deputy commissioner an dincludes a staff of assistants, clerks and stenographers.

The division is charged with the actual administration of the issuance of the several classes and types of licenses and permits. In addition, the division maintains complete records on the issuance of all licenses, those issued by municipal authorities as well as those issued by the department. These records disclose any violations of the act, surrenders, suspensions or revocations. The division also keeps the entire liquor industry advised as to all rules and regulations promulgated by the commissioner, as well as procedure in licensing and interprepations of the control act.

C. The Enforcement Division

The Enforcement Division likewise is headed by a deputy commissioner (currently, the Chief Deputy Commissioner) and includes a chief inspector, senior inspectors, inspectors, investigators, stenographers and clerks.

The division is charged with enforcing the control act and the rules and regulations promulgated thereunder. "Its work consists mainly of the detection of unlawful manufacture, transportation, sale and distribution of alcoholic beverages, the apprehension of violators and the seizure of illicit stills, alcohol and other unlawful property. Numerous complaints received daily from officials and the public generally throughout the state are thoroughly investigated. In addition, routine investigations and contacts with local, state and federal enforcement officials furnish valuable information.[41]

Specifically, the division investigates the character and fitness of all applicants for state licenses and submits reports of

41. Ann. Rep. 1936, p. 5.

its findings to the commissioner. Continual supervision over licenses and licensed premises is exercised by the division. The division is carrying out the recently instituted program of fingerprinting all licensees. An important function consists in detecting illicit stills, importation of bootleg liquor and unlicensed transportation, the arresting of violators and the seizing of unlawful property. Continuous inspections of municipal retail licensees are conducted to insure strict compliance with the act and to detect illicit retail outlets. The division maintains a complete chemical laboratory, wherein the department chemist prepares analyses of various alcoholic beverages for use in criminal prosecutions and revocation proceedings. The division submits complete reports of cases involving arrests and seizures to the various county prosecutors for use in the prosecution of criminal violators. The investigator's often appear in court as witnesses for the State.

The problems of internal organization stand in the forefront of any consideration of improvement of efficiency[42] and must be solved according to the requirements of the specific agency. Generally, the framework of an agency is established at the beginning of its life when no experience is available. In the instant department, the internal set-up of the three divisions mentioned is subject to constant study and revision. During the course of preparation for this article, no less than three changes took place within the Enforcement Division alone. That the organization of the department is conducive to a maximum efficiency in administration will be attested to in a study now being prepared by Mr. Melvin Goodman of the Graduate School of Public Administration of the University of Michigan, who has spent the past eight months working in the department gathering detailed information for his thesis. Discussions with him and a study of his notes show that he is of the opinion that

42. Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938), 47 YALE L. J. 647, 658.

the present organizational set-up is the best that can be obtained under present budgetary limitations.

The chart on pages 258 and 259 will serve to illustrate the organization of the department and the three divisions.

LICENSING

The theory of the act is control and regulation of the entire liquor industry by the administrative with the aid and cooperation of local "issuing authorities" in the several municipalities. Anyone in anyway engaged in the liquor business must secure a license, either from the state department or the local board, depending upon the type of activity to be licensed.[43]

From the inception of the department in 1933 to the last available compilation 3,943 state licenses had been issued, producing a total revenue in fees paid of $2,297,542.17.[44] Statistics compiled show a consistent yearly increase in the number of

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43. The State Department issues the following licenses: (1) *Manufacturers'*: which includes plenary and limited brewery; plenary winery; plenary, limited and supplementary distillery; rectifier and blender, and bonded warehouse blending: (2) *Wholesalers'*: including plenary and limited wholesale, wine wholesale, state beverage distributors, and plenary and limited export; (3) *Plenary retail transit*: (4) *Transportation;* and (5) *Public Warehouse*. See Rev. St. 33:1-18. For a description of the several classes of licenses, together with the various fees therefor, see Rev. St. 33:1-9 to 33:1-14.

Municipal authorities issue the following licenses: plenary and seasonal retail consumption, plenary and limited retail distribution, and club licenses.

The municipal "issuing authority" may be (a) the governing board or body of the municipality, or (b) in municipalities having a population of 15,000 or more, the "municipal alcoholic beverage control board." The provision in the act providing for the issuance of licenses in counties of the sixth class by judges of the Common Pleas was recently held unconstitutional, as repugnant to the state constitutional interdict against local and special laws. Dover Township v. Kirk, 123 N.J.L. 507 (Sup. Ct. 1939).

44. See Ann. Rep. 1938, p. 10.

state licenses,[45] and it is safe to predict that as the industry continues to grow in size and importance, the licensing activities of the administrative will increase in signifigance.[46]

A. The Issuance of Licenses by the Commissioner

It is the duty of the commissioner to administer the issuance of manufacturers', wholesalers', plenary retail transit, transportation and public warehouse licenses.[47]

1. *Applications*: Applicants for a license must be citizens of the United States and residents of New Jersey for five years next preceeding the submission of the application.[48] Application must be made to the commissioner at the department's principal office in Newark, New Jersey, must be on forms furnished by the department, and must be accompanied by the prescribed license fee,[49] prorated from the date of application.

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45. RECORD OF STATE LICENSES ISSUED

From Dec. 6, 1933 to June 30, 1934	660	
From July 1, 1934 to June 30, 1935	785	1445
From July 1, 1935 to June 30, 1936	827	2272
From July 1, 1936 to June 30, 1937	853	3125
From July 1, 1937 to June 30, 1938	818	3943

(Statistics compiled from annual reports for the several several years. The 1939 report has not yet been issued.)

46. The big advantage of placing the industry under a system of licensing is to provide the most effective method of control. The power to suspend or revoke licenses is an effective means of enforcing the substantive provisions of the act and the rules. A strict licensing system keeps from the industry the type of entrepreneur likely to again bring the industry into disrepute, with the possibility of conflict with public opinion and a resurgence of dry sentiment. See an excellent discussion of the "permit" system of the Federal alcohol administration in Gaguine, *Federal Alcohol Administration* (1939), 7 GEORGE WASHINGTON L. REV. 844, at pp. 849-858.

47. Rev. St. 33:1-18.

48. Rev. St. 33:1-25. Instruction No. 1, *Rules and Regulations*, p. 11, affords the privilege of obtaining a state license to aliens who are "afforded reciprocal privileges by a treaty between his country and the United States."

49. If the application is denied, 90% of the deposit fee is returned, and the

All applications must be sworn to and evidence furnished that licenses, permits and stamps required under federal law have been obtained.[50]

Applicants must advertise for two successive weeks in a newspaper published and circulated in the municipality in which the premises sought to be licensed are located.[51] The forms of the required advertisements are set out in the rules and regulations,[52] and, generally, contain the name of the applicant, the type of license sought, the location of the premises, and a statement that "obligations, if any, should be made immediately in writing" to the commissioner. Proof of publication must be submitted in prescribed form.

2. *Investigations*: Applications for licenses are referred to the Enforcement Division for investigation. The investigation includes a careful check of the assertions set forth in the application and an inspection of the proposed place of business. The act enjoins the commissioner from issuing a license to any one who has been convicted of a crime involving "moral turpitude."[53] This necessitates a thorough study of all possible sources of information of prior arrests and convictions. A complete report is transmitted to the commissioner and to the Licensing Division.

3. *Disposition of Applications*: The applications and the

---

remaining 10% is kept by the department as an "investigation fee." See Ann. Rep. 1934, p. 19: "this . . . prevents applicants from gambling on the issuance of a license at the expense of the state."

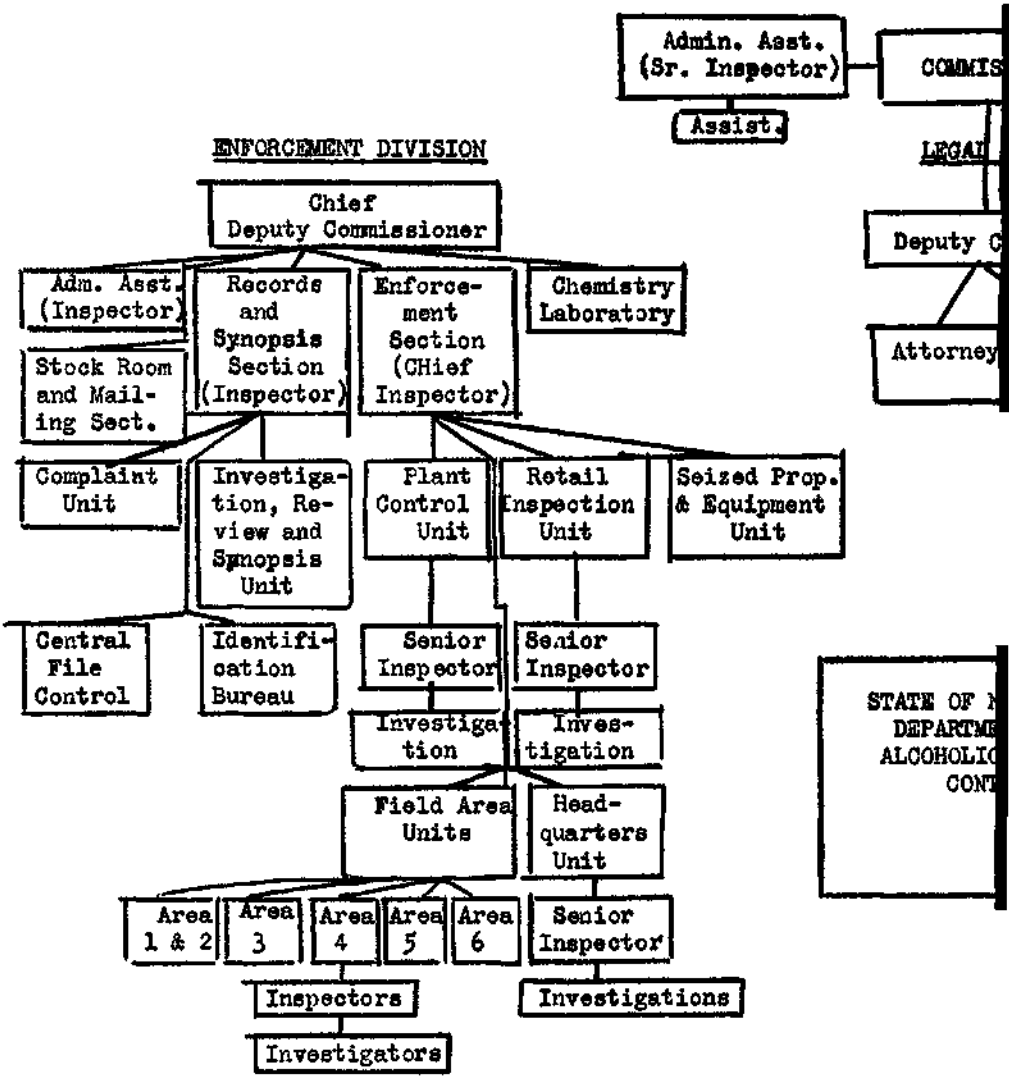
50. Instruction No 1, *Rules and Regulations*, p. 10.

51. *Ibidem.*

51. *Ibidem.*

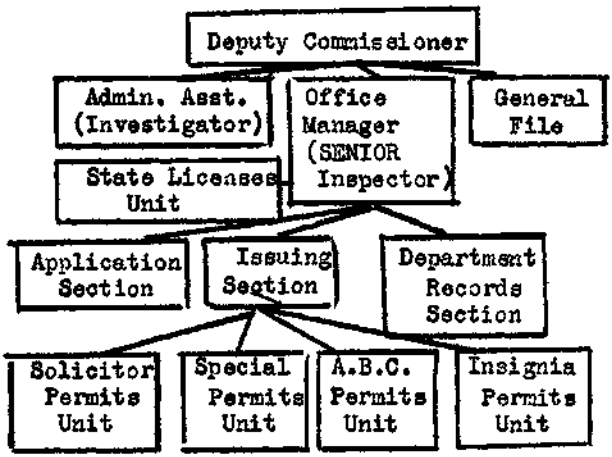
52. Regulation No. 1, *Rules and Regulations*, pp. 31-33.

53. Rev. St. 33:1-25. *Cf.*, Instruction No. 1, *Rules and Regulations*, p. 11: "No state license may be issued to any person who has been convicted of a crime involving moral turpitude, except where a period of five years has elapsed from the date of conviction and the Commissioner has entered an order removing the disqualification resulting from the conviction." This is authorized by Rev. St. 33:1-31.2, which was written into the act in 1937 (P. L. 1937, ch. 76, secs. 1-3).


Admin. Asst. (Sr. Inspector)
Assist.
COMMIS
LEGAL
Deputy C
Attorney
ENFORCEMENT DIVISION
Chief Deputy Commissioner
Adm. Asst. (Inspector)
Records and Synopsis Section (Inspector)
Enforcement Section (CHief Inspector)
Chemistry Laboratory
Stock Room and Mailing Sect.
Complaint Unit
Investigation, Review and Synopsis Unit
Plant Control Unit
Retail Inspection Unit
Seized Prop. & Equipment Unit
Central File Control
Identification Bureau
Senior Inspector
Senior Inspector
Investigation
Investigation
Field Area Units
Headquarters Unit
Area 1 & 2
Area 3
Area 4
Area 5
Area 6
Senior Inspector
Inspectors
Investigators
Investigations
STATE OF
DEPARTM
ALCOHOLIC
CONT

Accountant
Auditor

LICENSING DIVISION



ENFORCEMENT SECTION

Headquarter's Unit: 1 - Senior Inspector
11 - Investigators

Retail Inspection Unit: 1 - Senior Inspector
1 - Inspector
16 - Investigators

Plant Control Unit: 1 - Senior Inspector
9 - Investigators

Field Units: Area 1 & 2: Union, Essex, Hudson, Bergen, Passaic and Morris Counties
1 Inspector, 14 Investigators

Area 3: Hunterdon, Sussex, Warren and Somerset counties
1 Inspector, 2 Investigators

Area 4: Mercer, Middlesex, Monmouth and Ocean counties.
1 Inspector, 9 Investigators

Area 5: Atlantic, Cape May and Cumberland Co.
1 Inspector, 3 Investigators

Area 6: Burlington, Gloucester, Salem
1 Inspector, 8 Investigators

report of the Enforcement Division are received by the License Division and the commissioner for the purpose of ascertaining whether grounds exist for a denial. If the investigation reveals no valid objection a license will issue without the necessity of a hearing.

If there is doubt whether the license should issue, the application is referred to the Legal Division for its study and recommendation. Often the division will conduct a formal hearing[54] as an aid in investigation, which hearing is public and at which anyone may be heard. All testimony is transcribed and transmitted to the commissioner for his determination.

Upon the completion of its study of the application, the Legal Division prepares a report for the commissioner recommending the granting or the denial of the application. The commissioner studies every application with minute care and consults with individual members of the staff on doubtful points. If the commissioner determines not to issue a license, the applicant has no right to a hearing.[55]

In the majority of cases, an application for a license is either granted or denied by the department without giving the applicant an opportunity to be heard. A hearing in aid of investigation is granted by the Legal Division in its discretion. If the department receives a written objection "duly signed by a bona fide objector," a hearing is afforded, with the applicant and the objector being immediately notified of the date, hour and place thereof.[56]

The general practice differs materially from the procedure followed by the Federal Alcohol Administration in the granting or denying of federal permits, where an opportunity to be

54. A great number of these hearings involve the question of whether or not the applicant has been convicted of a crime involving "moral turpitude," a term which is difficult to define. The first commissioner recommended that the act be amended to read "convicted of a crime." Ann. Rep. 1934, p. 18.

55. Regulation No. 1 (13), *Rules and Regulations*, p. 34.

56. See Regulation No. 1 (11), (12), *Rules and Regulations*, p. 34.

heard is given before the administrative denies a permit.[57] Fairness would seem to dictate the granting of an opportunity to be heard; but in evaluating the present system, it must be remembered that the courts have held consistently that no one has a "right" to a license and that when a license is granted a "mere privilege" alone is conferred.[58] If the courts approve of the revocation without hearing of a "privilege"—after substantial interests have attached[59] they must surely sanction a denial of that "privilege" in the first instance.

If the commissioner, with or without hearing, determines that a license should issue, he so instructs the License Division, which attends to the actual administration of the issuance.[60]

All licenses are issued for a term of one year from the first day of July in each year,[61] and are transferable upon proper application and compliance with all conditions requisite to an original issuance.[62]

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57. See the monograph covering the Federal Alcohol Administration submitted by the Attorney General's Committee on Administrative Procedure (1940), pp. 11-14; also Gaquine, *The Federal Alcohol Administration* (1939), 7 GEORGE WASHINGTON L. REV. 844, at 851-852. The federal procedure may be outlined as follows: If, after investigation, it appears that sufficient grounds exist to contemplate the denial of an application, a notice stating the reasons for such contemplated denial is served upon the applicant, who may, within 15 days of the receipt of the notice, request an opportunity to be heard. When such a request is made, the administrative conducts a formal hearing before making its determination final, and from its determination the applicant may appeal to the Circuit Court of Appeals.

58. Authorities are cited *infra* this article.

59. Garford Trucking, Inc. v. Hoffmann, 114 N.J.L. 522, 531 (Sup. Ct. 1935).

60. After a determination that a license should issue, the applicant must (1) furnish a bond to the State Tax Department conditioned on the payment of all taxes, penalties and interests imposed upon the sale or delivery of alcoholic beverages, and (2) furnish the department a statement listing employees and answering questionnaires in compliance with regulations set by the commissioner. See Instruction No. 1, *Rules and Regulations*, p. 10; Regulation No. 10, *Rules and Regulations*, p. 53.

62. *Ibidem.*

Enforcement Activity

The primary objective of the act and the primary effort of the department is directed at regulation and control,[63] which is achieved through criminal prosecution and revocation or suspension of licenses.

A. Municipal Disciplinary Action

The spirit of the act is one of "home rule" and primary responsibility for enforcement is placed upon municipalities.[64] The attitude of the department consistently has been to refer all possible matters to local authorities in the first instance.[65]

Local disciplinary procedure is prescribed almost entirely by local authorities, subject to certain specific instructions set out by the commissioner.[66] The local board is instructed that a five day notice of the changes made and the date of the hearing thereon "should" be served upon the licensee or sent to him by registered mail; that at the hearing, testimony "should" be taken stenographically; that the licensee "must" be given "full opportunity to be heard"; that the determination should be made by resolution embodying a finding of facts and ordering appropriate action; that notice of determinations be served personally or by registered mail upon the licensee, and that copies of all resolutions and orders be forwarded immediately to the State Department. The department has drafted forms to be used by the local authorities, setting them out in the Rules and

63. Ann. Rep. 1934, p. 35: "The inborn and ingrowing evils and the attendant temptations of the traffic . . . are such that public policy demands that it should be absolutely controlled and kept in bounds." See also Ann. Rep. 1935, p. 3: "The objective of this department is to effect *control* of the liquor department. It must be controlled just because it is a moral and governmental matter to protect organized society against its own creation. . ."

64. Ann. Rep. 1935, p. 5.

65. See Instruction No. 6, *Rules and Regulations*, p. 20.

66. *Ibidem.*

Regulations, which forms are "merely illustrative" and "intend as general guides."

The department keeps close watch over local disciplinary action, and, if the municipal board abuses the power granted to it, the commissioner will take jurisdiction in the first instance to the total exclusion of the local authority.[67]

The act provides for an appeal from local action to the commissioner.[68]

B. State Enforcement Activity

It is somewhat axiomatic that the efficiency of a "regulatory" agency is largely dependent upon its inquisitional powers.[69] The acquisition of information is a condition to intelligent regulation.

Under the control act, the department possesses a wide power of search and seizure. Search warrants may be issued by any magistrate upon "probable cause"[70] of unlawful activity, provided proof, by way of affidavit or deposition, "tending to establish the grounds of the application or probable cause for be-

67. Such action was taken, for example, against the local board in the City of Newark. *Cf.* Ann. Rep. 1935, p. 5: "The attitude of the local governing boards of municipalities and of local excise boards has been, in general, highly cordial and cooperative. Occasionally, though, the tendency creeps out to deal supremely with proven offenders or to be quick on the trigger to acquit or not to see eye to eye what everybody else sees. It discourages public-spirited citizens from making complaints and sets enforcement back. Municipal revocations have been far too infrequent. The power to revoke or suspend must not be allowed to atrophy because of disuse. One revocation is worth more than fifty fines." See also, Ann. Rep. 1938, pp. 4-5: "In a few instances, notably Newark, I was obliged to displace municipal authorities in the handling of disciplinary proceedings because of their continued failure to impose adequate penalties. Some governing bodies have yet to see the light. Their ears are too attuned to the insidious voices of licensees and their friends—political and social."

68. Rev. St. 33:1-38.

69. See *passim*, Murphy, *Investigatory and Enforcement Powers of the Federal Trade Commission* (1940), 8 GEO. WASH. L. REV. 581.

70. Rev. St. 33:1-56.

lieving that such grounds exist" is first made.[71] The warrant may be served only by the officer[72] to whom it is directed,[73] and is returnable within 48 hours.[74]

Upon a seizure being made in the execution of a warrant, the officer must give the owner of the property a copy of the warwrant and an itemized receipt.[75] The return of the warrant must be accompanied by a written inventory of the property taken.[76]

The claimant of seized property may institute an action of replevin against the commissioner within thirty days from the date of seizure.[77] If no claim is presented, a hearing in the nature of an action to show cause why the seized property should not be forfeited is instituted and prosecuted by the department. If, after a hearing, the commissioner is satisfied that the property seized is not unlawful property, he returns it to the owner; if he determines the property to be unlawful, the commissioner orders it forfeited and may, in his discretion, order it sold, destroyed or retained for hospital use. Forfeiture terminates all outstanding interests in the seized property.[78]

The act further subjects to seizure and forfeiture all fixtures and personal property in or upon the premises wherein an illicit beverage is found,[79] and all alcohol manufactured, sold, imported or transported in violation of the department's rules and regulations and "any contrivance, preparation, compound, tablet, substance, or recipe advertised, designed or intended for

71. Rev. St. 33:1-57.

72. The word "officer" is defined as including any inspector or investigator of the department. Rev. St. 33:1-1 (p.).

73. Rev. St. 33:1-57.

74. Rev. St. 33:1-60.

75. Rev. St. 33:1-61.

76. *Ibidem.*

77. Rev. St. 33:1-66.

78. *Ibidem.*

79. *Ibidem,* sub-section b.

use in the manufacture of alcoholic beverages for personal consumption or otherwise in violation of this chapter."[80]

The apprehension of violators calls for constant inspection and investigation.[81] The department conducts two types of inspections of licensed premises: one is a "routine" inspection or periodic "check-up" in which the inspectors enter the licensed premises announced; the other is in the nature of an "entrapment." The inspectors enter the licensed premises with their identity unknown, in an effort to detect or induce violations of the act or regulations.[82]

The following statistical material will illustrate the persistent activity of the enforcement dvision: Since the inception of the department in 1933 to the date of the last available figures,[83]

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80. *Ibidem*, sub-section d. See Franklin Stores v. Burnett, 120 N.J.L. 596 (Sup. Ct. 1938).

81. The act empowers the commissioner to make such investigations as he deems necessary to the proper administration of the act, including inspections and searches of premises and the examination of books, records, amounts, documents and papers. Rev. St. 33:1-35. Such may be made without a search warrant. *Ibidem.*

For the purpose of investigation, examination or inspection, the commissioner may examine any person under oath and compel by subpoena the attendance of witnesses and the production of books, records, etc. Rev. St. 33:1-35. An enumeration of the investigatory powers of the department and the purposes for which they may be exercised is declared not exclusive, but investigation may be had and subpoena issued "for any purpose consonant with the administration and enforcement" of the act. Rev. St. 33:1-35.

82. "Entrapment" activity on the part of administrative officials has been upheld. See Fisher v. Milk Control Board, No. 276, October 1939 term of the Supreme Court (opinion filed February 17, 1940—not reported), wherein the prosecutor, on the return of a writ of *certiorari* to review an action of the milk board revoking a license for violation of a price-fixing regulation, argued that the violation was due to entrapment on the part of the board. Said the court, in a per curiam opinion: "The board having heard of the violation of the rules by the prosecutor, sent an investigator to make a purchase of milk. *There was no entrapment in a legal sense* by the action taken The prosecutor was not obliged to break the board's rules. The fact that he did was evidence of his guilt."

83. Statistics are available up to July 1, 1938. As before stated, the Annual Report for 1939 has not yet been released.

4,159 total seizures have been made, resulting in the confiscation of 1,416 stills, 685 motor vehicles, 605,635 gallons of alcoholic beverages and 47,379 gallons of denatured alcohol. In addition, the division has conducted a total of 62,640 inspections of retail licensed premises, which inspections uncovered 9,984 violations. Further, there is a yearly average of well over 1,000 inspections of other state licensees and an average of 9,000 election day inspections.

Disciplinary action is set in motion by a complaint being lodged with the department, either from without or on the initiative of a division inspector.

The complaint is just assigned to a "complaint unit" of the division, whose duty is to ascertain its merits and to post it with the central file control unit. Depending upon the type of complaint, it is then referred to the plant control unit, the seized property and equipment unit, the retail inspection unit or one of the six field areas. Within these various units, the complaint passes first from the senior inspector in charge of the unit to the individual inspectors detailed to "compile the evidence." After thorough investigation, the matter again goes to the senior inspector for a review and a recommendation.

The next step is dependent upon the type of action recommended by the senior inspector:

(*a*) When no disciplinary action is recommended, routine complaints are returned to the "investigation review" unit and the case closed or returned to the individual investigator for further investigation; special complaints are closed out by the complaint unit and are them sent to the deputy commissioner of the Enforcement division and through him to the commissioner.

(*b*) When disciplinary action is recommended, a complete review and synopsis of the investigation is compiled and drafted by the "records and synopsis" section of the division. If the violation calls for criminal prosecution, the review and synopsis is sent to the Legal division for further review and is

referred by them to the several county prosecutors. If the violation calls for disciplinary action by the department, the review and synopsis is sent to the Legal division for further review and a memorandum thereof sent to the commissioner. The commissioner then assigns the work of prosecuting the violation to one of the department's attorneys and the work of conducting a hearing to another of the department's attorneys.

The accompanying chart illustrates in detail the steps taken to effectuate disciplinary proceedings.

Disciplinary action by the department is in the form of a suspension or revocation of licenses.

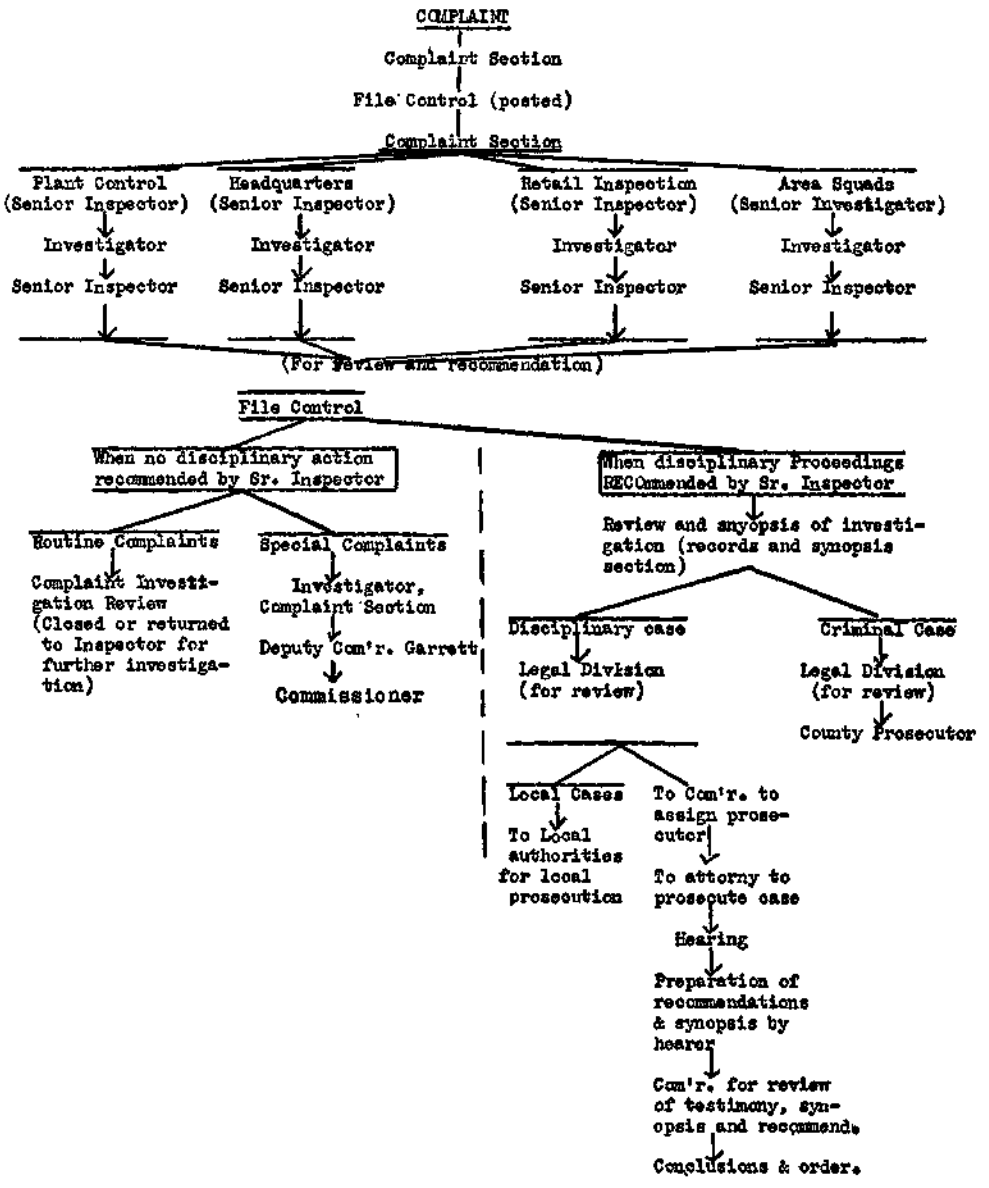
Appellate Functions

For causes enumerated, local issuing authorities are empowered to revoke or suspend licenses issued by them.[84] Appeals to the commissioner may be taken from municipal revocation proceedings, as well as from municipal action in granting or denying applications for the issuance or transfer of municipal licenses, from denials of applications for refunds, and from limitations imposed on the number of licenses and hours of sale. The power of the Commissioner on appeal is plenary,[85] he may "order the other issuing authority to issue a license,"[86] to "suspend or revoke a license," to "terminate the suspension or cancel the revocation of a license" and to "set aside, vacate and repeal" limitations on the number of licenses or hours of sale.

The appeal is open to an aggrieved licensee or applicant, and, from the issuance of a license, to any "taxpayer or other aggrieved person opposing the issuance.[87]

The appeal is instituted by filing with the department a

84. Rev. St. 33:1-31.
85. See Rev. St. 33:1-38 and Rev. St. 33:1-41.
86. See Conover v. Burnett, 118 N.J.L. 483 (Sup. Ct. 1937).
87. Rev. St. 33:1-22.


COMPLAINT
Complaint Section
File Control (posted)
Complaint Section
Plant Control (Senior Inspector)
Headquarters (Senior Inspector)
Retail Inspection (Senior Inspector)
Area Squads (Senior Investigator)
Investigator
Senior Inspector
(For review and recommendation)
File Control
When no disciplinary action recommended by Sr. Inspector
When disciplinary Proceedings RECOmmended by Sr. Inspector
Routine Complaints
Special Complaints
Complaint Investigation Review (Closed or returned to Inspector for further investigation)
Investigator, Complaint Section
Deputy Com'r. Garrett
Commissioner
Review and anyopsis of investigation (records and synopsis section)
Disciplinary case
Criminal Case
Legal Division (for review)
County Prosecutor
Local Cases
To Local authorities for local prosecution
To Com'r. to assign prosecuter
To attorny to prosecute case
Hearing
Preparation of recommendations & synopsis by hearer
Com'r. for review of testimony, synopsis and recommend.
Conclusions & order.

"Notice of Appeal," accompanied by a "petition of appeal" setting forth the subject matter under appeal, the action of the local authority, the relief sought and the grounds of appeal.[88] The notice of appeal must be filed within thirty days from the date of the service of notice of the local determination.[89]

The appellant is required to serve the notice and petition upon the respondent issuing authority and where the action appealed from is the granting or transfer of a license or the refusal to revoke or suspend a license, copies must also be served upon the licensee. An acknowledgment or affidavit of service must be filed with the commissioner.[90]

Within five days after the service of the notice and petition of appeal, each respondent must file an answer with the commissioner and serve a copy thereof on each of the other parties to the appeal. The answer of the local authority must contain a statement of the grounds for its action.[91]

Upon the filing of the proper papers, the commissioner sets a time and place for a hearing, giving at least five days' notice thereof to all parties. The character of the hearings are discussed in detail in the next section.

In deciding an appeal case, the commissioner pays high respect to "legitimate local sentiment,"[92] the reason being that "prohibition effectively taught us the pitfalls of a contrary position."[93] Municipal determinations are never upset unless arbitraary, discriminattory or unreasonable.[94]

The consistent frequency with which appeals are taken and

88. The forms, closely following those used in the law courts, are set out in Instruction No. 5, *Rules and Regulations*, pp. 18-19.
89. Rev. St. 33:1-22.
90. Regulation No. 14 (2).
91. Regulation No. 14 (3).
92. See Ann. Rep. 1937, pp. 1-2; Ann Rep 1938, p. 4.
93. Ann. Rep. 1937, p. 2.
94. *Ibidem.*

the weight given to municipal determination may be seen in the following statistics:[95]

Disposition	Dec. 1933 to June 30, 1938	July 1, 1938 June 30, 1939	July 1, 1939 Dec. 31, 1939	Total
Affirmances	385	67	37	489
Affirmed on condition	3	1	1	5
Dismissed	77	4	1	82
Remanded	9	2	0	11
Modified	0	1	3	4
Reversed	247	19	4	270
Reversed on condition	38	11	2	51
Withdrawn	86	25	6	117
			Total	1029
		Cases pending as of Dec. 31, 1939		46
				1075

HEARINGS

Hearings conducted by the department may be conveniently classified into four types: (1) disciplinary—leading to the revocation or suspension of a license;[96] (2) appellate—leading to an affirmance, reversal or modification of action taken by local authorities; (3) seizure—leading to the forfeiture or return of goods seiged by the department; and (4) application—leading to the issuance or denial of a state license.

Time and Place of Hearings. The vast majority of hearings are held at the offices of the department in Newark, New Jersey. The offices contain a satisfactory hearing room. It was noted that in several cases, in deference to the convenience of parties, the hearing was held elsewhere. In one appeal case, for example, the department's counsel travelled to Cape May to conduct the hearing.

Counsel: In all types of hearings, it is usual for the parties

95. Compiled and corrolated from the Annual Reports of 1936, 1937 and 1938 and various departmental bulletins issued to date.

96. This type hearing was characterized by a member of the legal division as a "quasi-criminal" proceeding.

to be represented by counsel. In disciplinary, seizures and license application hearings, the department is represented by a member of the legal division. Aside from the "hearer" no member of the legal division participates in an appellate hearing.

Hearers: Except in the rare case, the hearing is conducted by a member of the legal division assigned to hear the case by the commissioner. If the urgency of a particular case calls for a speedy determination and if it involves substantial issues, it may be heard by the commissioner, in which case a decision is generally rendered at the conclusion of the hearing.[97]

Conduct of the Hearing: The general method of conducting the hearing is not unusual. The case is opened by the side having the burden; in disciplinary and seizue cases by the department's attorney, and in appellate cases by the appellant. Witnesses are sworn by the hearer and the examination follows the customary line of direct and cross-examination. It is not unusual for the hearer to break into the examination by counsel and conduct his own examination of the witness. All testimony is stenographically recorded.

Many of the hearings achieve a high degree of informality—depending on the nature of the issue involved, the number of witnesses to be called and the attitude of counsel, rather than depending on the type of hearing. If the issue is complicated and numerous necessary witnesses are present, the hearing will assume a formality necessary to prevent it from running at cross purposes and from bringing into contest irrelevant issues. Informality is generally accepted by counsel, for it is not an "easy" informality—a requisite amount of dignity prevails. For example, smoking is not permitted in the hearing room. opposing attorneys refer to each other as "counsel," the hearer is respectful in addressing counsel and will brook no disorder

97. For example, the commissioner acted as the "trial examiner" in the celebrated case involving the Township of Andover and the Nazi bund, Camp Nordland (June, 1939).

or commotion on the part of those present in the hearing room during the course of examination, and other trivial observations which are of no moment in themselves but which exhibit a certain desirable regard for the traditions of judicial counterparts without leading to an impairment of efficiency.[98]

Often the hearer will confer with counsel before the hearing formally opens in an effort to narrow the question to the specific issues involved and to have counsel stipulate facts about which there is no real contest but which are necessary to a determination. This practice unquestionably expedites the hearing.

If subsequent witnesses are offered merely to corroborate the testimony of a previous witness, the hearer, with consent of counsel first obtained will stipulate into the record that their testimony would be of the same nature as that already offered.

Often, at the conclusion of the formal hearing, after all the testimony has gone into the record, the hearer and counsel will discuss the case informally, the result of which has no binding effect on anyone but which aids the hearer in submitting an intelligent report to the commissioner.

The character of the hearing, of course, varies with the hearer. Attendance at numerous hearings conducted by different members of the legal division has shown that fairness is prevalent. On one or two occasions, a "prosecuting spirit" on the part of the hearer was noted, but it is equally true that on other occasions, the hearer seemed to "lean over backwards" in an attempt to be fair. On more than one occasion the hearer was highly critical of the way the department's attorney was presenting his case. No conclusion can be drawn to the effect that the hearers possess any misguided zeal to enforce the act.

98. It is interesting to compare the "easy" informality which characterizes hearings conducted by the Federal Alcohol Administration. Therein parties often "address each other by their given names," "occasionally remove their coats," "smoking is permitted," etc. These characteristics were mildly criticized by the Attorney General's Committee on Administrative Procedure. See Monograph No. 5, "Federal Alcohol Administration" (1940), p. 40.

The interrogation of adverse counsel, at the conclusion of hearings, for reaction to the conduct of hearings, without exception produced favorable comment.

Evidence. As previously pointed out, parties and witnesses at hearings are required to be under oath when testifying. They are subject to cross examination both by counsel and by the hearing officer.

Nothing in the act liberates the department from the common law rules of evidence, and the commissioner has not seen fit to adopt any rules of evidence. The hearings proceed, however, upon the theory that the department is not bound by the common law rules and as a result they are considerably relaxed.

As a general rule, the hearer will seldom pass on the admissibility of evidence, but will allow the testimony to go into the record over objection.

Hearsay evidence is never excluded as it may later prove valuable. However, the commissioner has made it a policy not to base a conclusion upon hearsay evidence alone. The evidentiary value which will attach to the hearsay depends upon the strength of corroboration.

The hearers do not require the production of original documents, but will receive any document that is offered which will aid the hearer and the commissioner in obtaining a clear picture of the issue. If the document is extremely important to the main issue involved and the competency of the copy is strongly contested, the production of the original may, in the discretion of the hearer, be required.

During the course of the several hearings attended, a frequent objection was one directed to leading questions. These objections were never sustained. The same fate was met by objections to the frequent use of opinion evidence[99]

99. However, during an appeal hearing, the complaining taxpayer, on cross

Taking advantage of the relaxed rules, counsel cross examining often exceeds the scope of the direct. This is seldom objected to, but when an objection is made, it is invariably overruled and the question allowed.

On the whole, it is felt that the department's treatment of evidence is consonant with fair play and a full hearing. No decision is based upon evidence not in the record; and, if the evidence is legally incompetent, it must be competently corroborated. Moreover, relaxation of the strict common law rules is as much to the advantage of adverse counsel as to the department. As a matter of general principle the technical rules, which grew out of the practical exigencies of trial by jury, are more or less superfluous in an administrative proceeding; moreover, it is generally conceded that the principles of due process do not require a rigid adherence to those rules. The department's treatment of evidence has not been the subject of judicial discussion, but it is felt that the relaxation would be sanctioned. Such has been the experience with other agencies. For example, the organic act creating the Federal Trade Commission contains no provision concerning evidence, but it was held that the commission was not restricted to the taking of legally competent and relevant testimony.[100]

Two suggestions may be made with respect to the department's use of evidence:

(*a*) Through the departmental bulletin, subsequently incorporated into the regulations, the attitude of the department should be expressed. General policy should be set out as a guide to those practicing before the department. This would be

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examination, was asked, "On the whole, do you think the town is a well-planned town?" An objection was sustained.

100. John Bene & Sons, Inc. v. Federal Trade Commission, 299 Fed. 468 (C.C.A. 2d, 1924): "We are of the opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done."

helpful not only to the practicioner but to the department, in that it would tend to eliminate the taking of many objections, and thus expedite hearings.

(b) The hearing officers should be instructed to more frequently rule immediately upon objections. The practice of withholding rulings may make for a "full" record, but the same result, without the attendant uncertainty, by a more frequent disposition of objections. The one hearing the case is in a better position than the parties to know the commissioner's attitude toward certain types of evidence. If he refuses to divulge that attitude, the party offering the evidence cannot be certain that he has accomplished anything tangible by getting the material into the record and the objecting party is equally uncertain whether the record will be regarded as containing evidence which he had best attempt to rebut. Moreover, the hearers are attorneys trained in the law of evidence; there is no requirement that the commissioner be an attorney, and in the future decisions may be made, inadvertently, on the basis of wholly incompetent and irrelevant matter.

Procedure After the Record is Closed

The Hearing Officer's Report. As soon as possible after the hearing, the hearing officer prepares his report upon the evidence. The dispatch with which the report is prepared necessarily depends upon the time it takes to transcribe the record. Three stenographers functioning under the direction of one "reporter" is a grossly inadequate staff to handle the large amount of cases before the department. A study of the dockets demonstrates that the time consumed in transcribing the record is a frequent cause for delay in arriving at a final determination. Out of two hundred cases studied, for example, the transcript was not prepared in over fifty per cent of them until from two to seven weeks from the date of the hearing. In 18

out of the same two hundred cases, the transcript took over eight weeks.

The hearer's report itself contains a digest of the testimony and all evidence produced at the hearing, together with the hearer's findings on both issues of fact and law. It is the general practice to incorporate in the report recommendations for final action. The report is a one man job and is not subject to editing in any manner by any other member of the staff.

There is no procedure for the submission to parties of the hearer's proposed findings. The parties never see the report. There is, therefore, no procedure for the filing of exceptions to the report and the opportunity to submit briefs and argue orally before the commissioner, such as is the practice before many of the federal agencies.[101] There is no evil in this procedure, however, for the first commissioner invariably read the entire record.

Considering the vast amount of work handled by the department's comparatively small legal division, the hearing officers complete their reports with the greatest possible dispatch. For example, in two hundred cases studied, the report was sent to the commissioner in over fifty per cent within one week from the date the hearer received the transcript and in 93% of the cases the report was completed within four weeks. Occasionally, however, the report will rest on the hearer's desk for well over a month. It is often a question of selecting the case considered the most important.

The Commissioner's Order

Every case is carefully reviewed by the Commissioner, who not only studies the report of the hearing officer but also reads the entire record. While it was the policy of the first commis-

101. *Cf.* Morgan v. United States, 298 U.S. 468 (1936); 304 U.S. 1 (1938). See Note (1940) *Aftermath of the Morgan Decisions,* 25 Iowa L. Rev. 622.

sioner to "decide" the case himself, he often conferred with the hearer regarding the facts or the conduct of the hearing. Such a practice is not unusual among those agencies wherein the determination is made by one other than the person who conducted the hearing,[102] and has been defended on the ground that it brings to the commissioner the result of the hearing officer's opportunity to observe the witnesses and the presentation of the evidence.[103]

The first commissioner, being an able lawyer, decided for himself all questions of the admissibility and weight of evidence, conclusions of law, and interpretation of the rules and the act. The hearer's report served merely as a guide and frequently the commissioner disagreed with the recommendation therein contained.

The final order is in the nature of a judicial opinion. It contains findings of fact, conclusions of law, an argumentative opinion stating the reasons for the decision, and an order. The form of the order, containing, as it does, the reason underlying the determination serves as an effective check upon the exercise of discretion and judgment.[104] All orders are published in the departmental bulletins, released periodically.

As pointed out, all determinations are made and all orders drawn by the commissioner after an extensive study of the entire record. No one subordinate to the commissioner makes any sort of a determination. This is a highly commendable administrative practice, but results in a considerable impairment

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102. *E.g.*, the Federal Trade Commission. See Monograph, No. 6, p. 56, Attorney General's Committee.

103. *Ibidem.*

104. See report of the Attorney General's Committee, Monograph No. 6: "Federal Trade Commission" pp. 52-53: "There can be little doubt that the act of deliberation is more likely to be performed with a maximum of thoroughness and care when the reasons for the conclusions are required to be articulated and subjected to appraisal by critical observers. A further advantage to be derived from the preparation of argumentative opinions is the development of uniformity in the application of the law."

of efficiency. The extreme conscientiousness of the first commissioner created a "bottle-neck" which impeded the speedy determination of a controversy. No letter in answer to the simplest inquiry left the department unless personally written by the commissioner after thorough study.

The following chart illustrates the amount of time it takes before a final determination is forthcoming:

TIME ELAPSING BETWEEN DATE OF HEARING AND DATE OF ORDER

	Type of Case					
	Appeal	Seizure	State Discip.	Fair Trade	Local Discip.	Total
Decided within one week	8	0	6	2	3	19
Decided within 1-2 weeks	5	8	4	9	1	27
Decided within 2-3 weeks	3	14	6	7	1	31
Decided within 3-4 weeks	3	9	1	5	1	19
Decided within 4-5 weeks	3	11	5	2	1	22
Decided within 5-6 weeks	9	10	8	1	0	28
Decided within 6-7 weeks	10	9	6	1	0	26
Decided within 7-8 weeks	5	7	4	1	0	17
Decided within 8-9 weeks	9	6	4	1	0	20
Decided within 9-10 weeks	2	9	3	3	0	17
Decided within 10-11 weeks	2	10	2	0	0	14
Decided within 11-12 weeks	4	3	3	2	0	12
Decided within 12-13 weeks	1	4	6	1	0	12
Decided within 13-14 weeks	2	4	2	0	0	8
Decided within 14-15 weeks	2	2	2	0	0	6
Decided within 15-16 weeks	1	2	1	2	1	7
Decided within 16-17 weeks	2	2	4	2	0	10
Decided within 17-18 weeks	2	2	1	0	0	5
Decided within 18-19 weeks	1	3	2	0	0	6
Decided within 19-20 weeks	2	3	1	0	0	6
Decision not rendered until more than 20 weeks	12	19	7	2	1	41
Total	88	137	78	41	9	
Orders pending [105]	11	7	41	4	2	65
Total cases studied	99	144	119	45	11	418

In another type of hearing, not previously described and not included in the above chart, the figures illustrate delay in

105. The cases in which a decision is still pending do not help the general average: (a) of the eleven appeal decisions pending, five were heard more than twenty weeks from the date of the compilation; (b) of the forty-one state disciplinary decisions pending, twenty-one were heard more than twenty weeks from the date of compilation. Some were heard over a year ago; *e.g.* Docket No. S 207 was heard on February 20, 1939; No. S 213 was heard on February 28,

reaching a determination. That type of hearing is what the department has termed an "elibility" hearing. The act provides that "no person who would fail to qualify as a licensee under this chapter shall be knowingly employed by or connected in any business capacity whatsoever with the licensee."[106] This often makes it necessary for the department to rule upon the eligibility of a person who seeks or has opportunity of employment. By petitioning the department, the legal division will afford the person seeking eligible status a hearing and will determine whether proper qualifications exist. It is obvious that a speedy determination is desirable. An honest livlihood often depends on the outcome and the petitioner's status should be left in abeyance only so long as is absolutely necessary. That there is unnecessary delay is to be noted from the fact that out of 54 eligibility cases studied, only 11 were decided within one week, 27 within one month, 17 within the second month, 4 within eight to nine weeks, and six took over ten weeks for determination.[107]

Additional Material Relative to Adjudication

One of the admitted advantages of administrative adjudication resides in the fact that parties are afforded a "speedy"

1939; S 226 was heard March 20, 1939, and S 238 was heard March 28, 1939. This compilation was made in the Spring of 1940 and at that time no determination of the above cases had been noted in the dockets. It was impossible to check the general files as the cases were said to be "on the commissioner's desk."

106. Rev. St. 1937, 33:1-26. See Regulation No. 11, *Rules and Regulations*, p. 54.

107.

Eligibility docket No. 269 heard Feb. 7, 1939, order dated April 26, 1939
Eligibility docket No. 285 heard April 26, 1939, order dated Aug. 16, 1939
Eligibility docket No. 288 heard April 27, 1939, order dated Sept. 8, 1939
Eligibility docket No. 290 heard May 29, 1939, order dated Sept. 8, 1939
Eligibility docket No. 291 heard May 17, 1939, order dated Sept. 11, 1939
Eligibility docket No. 292 heard June 12, 1939, order dated Sept. 10, 1939

hearing. The delays attendant upon the law courts in maturing a case to hearing are theoretically eliminated. Therefore, the material below relative to the time consumed in maturing a case to a hearing before the department appears of special interest:

ELAPSED TIME BETWEEN INITIAL STEPS[108] AND DATE OF HEARING

	Appeal	Seizure	Fair Trade	State License	Local License	Total
Between 1 and 2 weeks...	19	3	4	70	11	107
Between 2 and 3 weeks...	21	11	35	43	10	125
Between 3 and 4 weeks...	28	52	17	12	3	112
Between 4 and 5 weeks...	14	46	3	-	-	63
Between 5 and 6 weeks...	11	18	-	1	-	25
Between 6 and 7 weeks...	3	5	-	-	-	8
Over 7 weeks.....	8[109]	7[110]	-	-	-	15
Total	104	137	59	131	24	455

Guilty Pleas. In many revocation proceedings, the violating license will enter a "guilty plea" after receipt of notice of the contemplated action and before a hearing is had. Two reasons are advanced for the frequency of such pleas: (1) the licensee perceives the futility of availing himself of the opportunity to be heard, or (2) he seeks to take advantage of the policy to show leniency to those who admit their guilt.[111]

Out of 82 fair trade cases studied, a guilty plea was entered before hearing in 23, and after hearing in 14. In 132 state disci-

108. In appeal cases: the date appeal filed. In seizure cases: the date seizure made. In fair trade cases: the date charges preferred. In state license cases: the date charges preferred. In local license cases: the date charges preferred.

109. Six of the eight appeal cases taking more than seven weeks to a hearing were cases wherein an earlier scheduled hearing was adjourned by counsel.

110. Outstanding in this group is Seizure case, *Docket No.* 5199 which took 330 days from the date of seizure to reach a hearing; seizure was made January 3, 1939, hearing was held November 3, 1939, and the conclusion and order dated January 8, 1940.

111. But *cf.* Lou's, Inc, Bulletin 377 (1940): "The licensee will get no credit for his plea of guilt in advance of the date set for hearing, for in cases of this kind [involving immoral activity on the premises] the State is not interested in the saving of time and expense of conducting a trial, but rather in cleaning up the mess, whatever the cost."

plinary cases studied, a guilty plea before hearing was entered in 10 cases and after hearing in 7; and out of 34 local license disciplinary cases studied, a guilty plea was entered before hearing in 10.

RULE MAKING

Under the act, the commissioner is given the broad power to promulgate rules and regulations "necessary for proper regulation and control,[112] covering not only the comprehensive list of subjects set forth in the act but also "such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of this chapter."[113] In pursuance of this power, the commissioner has specified detailed rules of behavior governing the entire state liquor business.[114] His constitutional right to do so has been upheld.[115]

The act is silent on any procedure to be followed in the promulgation of the rules and regulations.[116] The matter of notice and hearing, conference and consultation, and other considerations are left to the discretion of the commissioner.

The first set of rules promulgated were the result of detailed study by the legal division and were formulated without a hear-

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112. Rev. St. 1937, 33:1-39.

113. *Ibidem.*

114. See pamphlet issued by the department, *Rules and Regulations* (Sept. 1939).

115. Franklin Stores Co. v. Burnett, 120 N.J.L. 596 (Sup. Ct. 1938), on the authority of State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504 (E. & A. 1935).

116. The absence of specified procedure is not unusual. See BLACHLY and OATMAN, "Federal Regulatory Action and Control" (Brookings Institute, 1940), p. 58: "Except in rare instances . . . the statutes do not lay down requirements as to the procedure to be employed in making rules and regulations. The authority charged with the function of rule-making can generally exercise that function at its discretion." That no formal procedure in rule-making is necessary, see State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 522 (E. & A. 1935).

ing and without notice to the industry. In the main these regulations dealt with a course of conduct generally prescribed by the legislature and with the details attendant upon the issuance of a license.

Since then the commissioner has issued many regulations, the object of which is to crystallize into concrete form a general legislative purpose. In the formulation of these rules involving "substance" it has been deemed advisable to conduct hearings. Regulation No. 30,[117] dealing with the sale of alcoholic beverages subject to "fair trade" contracts may be taken as a good example of the procedure followed:

Experience or knowledge of a particular course of conduct being followed by the industry revealed the necessity of a regulation, as, for example, constant "price wars" and numerous complaints received by the department. The commissioner delegated the task of studying the necessity of a rule, together with the duty of making a comparative study of the handling of the problem in other jurisdictions, to a member of the legal division. As a part of the study, the staff member held informal conferences with members of the industry or the branch thereof to be affected. Upon the completion of the study, the commissioner and the staff member drafted a form of the proposed rule. Notice was then sent, in some instances with a copy of the proposed rule, to members of the trade. Notice also was placed in the department bulletins. Included in the notice was a time and place set for a hearing, to which all interested parties were invited. The hearing was conducted by the legal division at the department's general offices and was of an informal character. The department welcomed suggestions from anyone.

With the material adduced at the hearing and as a result of the divisions study, the final draft of the rule was drawn by the commissioner. The rule as promulgated was distributed to the trade and printed in the bulletin.

117. *Rules and Regulations*, p. 75.

One authority has classified rule-making into the following types: investigational, consultative, auditive, and adversary.[118] On the basis of this classification, the procedure of the instant authority might be generally investigational, or consultative, perhaps auditive, but never adversary. It is investigational because, while it may take the form of a hearing, other methods of obtaining information are used. It is consultative in that the authority may call in leaders in the trade to aid in the drafting of a contemplated rule, or the draft might be submitted to such a group for suggestions or objections. It is not known whether the auditive procedure has ever been used, but the range of discretion makes possible its future employment. This procedure consists of periodic informal hearings, which may be held but are not necessarily held in connection with investigations and consultations. These informal hearings "are valuable to the extent that notice of them can be brought home to affected parties, that they are accessible to these parties, and that the questions involved are susceptible to intelligent discussion by those who do appear."[119] Adversary proceedings are "judicial in form" and consist of a formal hearing, the production of evidence, and a full record of the proceeding. The administrative is required to base its conclusions of fact upon the evidence received and to set them forth as findings.[120] This procedure, advocated by some opponents of the present system of administrative procedures, places discretion at a minimum, and, in the absence of statutory requirements, it is safe to assume that it will not be followed by the instant authority.

It should be pointed out that the rules are being constantly increased and revised. Experience rather than a hazardous foresight dictates the promulgation of a rule or regulation.

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118. Fuchs, *Procedure in Administrative Rule Making* (1938), 52 HARVARD L. REV. 261, 273.

119. *Ibidem*, at p. 276, quoted in BLACHLY and OATMAN, *supra*, note 116, at p. 59.

120. BLACKLY and OATMAN, *supra*, note 116, at p. 59.

To date it can be fairly said that there has been nothing arbitrary in the department's rule making. The commissioner acts only when forced to do so by a situation calling for regulation and then only when fortified with facts. Support for this conclusion may be seen in the attitude the commissioner exhibited toward "fair trade" regulations:

The department was aware of disasterous "price wars" carried on by large scale liquor stores throughout the state and had received numerous complaints, both from the trade, which was "ruptured," and from the public, aware that the result was that many who would not otherwise have purchased liquor did so and those who ordinarily purchased, bought and consumed more. In spite of the fact that the commissioner felt regulation desirable,[121] he was reluctant to adopt any regulation dealing with prices, feeling that the "control of prices, as such, is not within the purview of the control act and hence not within the jurisdiction of this department."[122] Accordingly, rather than rule where he doubted jurisdiction, he recommended and awaited legislative expression.[123] The legislature followed his recommendation and supplemented the act by empowering the commissioner to promulgate rules and regulations prohibiting the sale of liquor in violation of a fair-trade contract.[124] Regulations were then adopted by the commissioner, after public hearing.

An interesting aftermath is provided by the fact that when the regulations so adopted were attacked in the courts, they were held to be within the *general* rule-making power of the

121. Ann. Rep. 1937, p. 1: "True, the selfish interests of the consumer is gratified when these 'price wars' intermittently occur, but it is to the public interest that disturbing elements and resulting temptations be eliminated and the industry stabilized rather than ruptured."

122. *Ibidem.*

123. *Ibidem.*

124. P. L. 1938, ch. 208.

commissioner.[125] The court held the enabling act unnecessary, the power to regulate prices being within the commissioner's inherent power.

PUBLICATIONS

Important to the lawyer practicing before an administrative agency to the availability of administrative determinations and departmental rules and regulations.[126] The availability of material respecting the instant department is anything but lacking.

No decision, determination or order emanates from the department without it being incorporated in what is known as the department "bulletin." Also incorporated therein is any letter sent out by the commissioner which in any way involves an interpretation or construction of the act or the regulations. The bulletins are in mimeographed form, stapled together, properly indexed and are issued periodically—generally once a week, often more frequently, depending upon the amount of available material. These bulletins are available at an annual fee of $3.50 and enjoy a large circulation throughout the state.

It has been noticed that the rule of *stare decisis* is often invoked in the commissioner's decisions.[127] This is a necessary concomitant of the policy of incorporating into orders reasons therefor together with argumentative discussion. A study of the decisions demonstrates that the commissioner often quotes at length from one of his previous opinions, in accepted judicial manner.

If anything, it might be said that too much is issued in the bulletins, which, as bound by the department, already consist

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125. Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct. 1939): "The act of 1938 was unnecessary to confer power to enact the regulation in question."

126. See Griswold, *Government in Ignorance of Law* (19), HARVARD L. Rev. ___; also 59 Amer. Bar Ass'n Rep., at 553 (1939).

127. See for example the case of Smith v. Township of Winslow, Bulletin 334 (1939), where in one short paragraph no less than nine previous cases are cited.

of over a half-dozen massive volumes. It soon becomes not a simple matter to find a "case on point" and the reason for publication in the first place is vitrated.

The department also makes available upon request a bound pamphlet embodying all of the rules and regulations.

Conclusions

A detailed study of the department dictates the conclusion that the department, under the extremely able leadership of the late Commissioner Burnett, has made a largely successful effort to perform a difficult assignment, through procedures and attitudes which fully preserve the just rights of those over whom it exercises control. An efficiently stringent control has not produced arbitrariness. The approval of the trade is fulsome. It is a splendid commentary that the industry, over whom he exercised a rigid control, should urge the appointment of a successor who will carry on the policies of the late commissioner.

Clark Crane Vogel.

Elizabeth, N. J.