STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
P.O. BOX 2039
U.S. ROUTE 1-9 (SOUTHBOUND), NEWARK, N. J. 07114

BULLETIN 2285 June 1, 1978

TABLE OF CONTENTS

ITEM

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BULLETIN 2285 June 1, 1978

1. COURT DECISIONS - JAMES V. SYLVESTER, INC. - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3995-76

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

James V. Sylvester, Inc.
179-181 Kearny Avenue
Kearny, N. J.

HOLDER OF PLENARY RETAIL DISTRIBUTION
LICENSE D-8, ISSUED BY THE TOWN COUNCIL
OF THE TOWN OF KEARNY.

Submitted February 14, 1978 - Decided February 28, 1978.

Before Judges Fritz, Botter and Ard.

On appeal from the Order of the Director of the Division of Alcoholic Beverage Control.

Messrs. Farley & Rush, attorneys for the appellant (Mr. Thomas R. Farley, on the brief).

Mr. John Degnan, Attorney General of New Jersey, attorney for the respondent Division of Alcoholic Beverage Control (Mr. William F. Hyland, former Attorney General of New Jersey, and Ms. Erminie L. Conley, Deputy Attorney General, of counsel; Mr. Mart Vaarsi, Deputy Attorney General, on the brief).

PER CURIAM

(Appeal from the Director's decision in Re James V. Sylvester, Inc., Bulletin 2269, Item 4. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. COURT DECISIONS - MIRAPH ENTERPRISES, INC. v. PATERSON - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1950-76

MIRAPH ENTERPRISES, INC.,
t/a THE CABARET,

Appellant,

v.

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

Respondent.

Submitted Febaury 22, 1978 - Decided - March 2, 1978

Before Judges Lora, Seidman and Milmed

On appeal from Division of Alcoholic Beverage Control

Mr. William F. Nesbitt, attorney for appeallant

Mr. Joseph A. LaCava, corporation counsel, attorney for respondent Board of Alcoholic Beverage Control of the City of Paterson (Mr. Ralph L. DeLuccia, Jr., assistant corporation counsel, of counsel and on the brief).

Mr. John Degnan, Attorney General of New Jersey, attorney for Division of Alcoholic Beverage Control (Mr. William F. Hyland, former Attorney General of New Jersey, and Mr. Mart Vaarsi, Deputy Attorney General, submitted statement in lieu of brief).

PER CURIAM

(Appeal from the Director's decision in Re Miraph Enterprises, Inc. v. Paterson, Bulletin 2256, Item 3. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

3. APPELLATE DECISIONS - CASINO ROYAL v. UNION CITY.

#4165 Casino Royal, Appellant, v. Board of Commissioners of the City of Union City, Respondent.	)	ON APPEAL CONCLUSIONS and ORDER

Leonard J. Altamura, Esq., Attorney for Appellant.
Edward J. Lynch, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Board of Commissioners of the City of Union City (hereinafter Board) which, on September 1, 1977, suspended appellant's Plenary Retail Consumption License C-182, for premises 2118 Bergenline Avenue, Union City, for ninety days, following a "guilty" finding to charges alleging that appellant sold alcoholic beverages to five minors on April 1, 1977.

Upon the filing of the Petition of Appeal, the Director of this Division by Order of September 23, 1977, stayed the effective dates of the suspension pending determination of this appeal.

Appellant's Petition of Appeal is silent as to the specifics of alleged error on the part of the Board, other than the assertion that due to a scheduling "mix-up", the appellants were not afforded proper opportunity to defend the charges against it which it denies. That contention is devoid of merit by virtue of this appeal which permits a de novo hearing, held pursuant to Rule 6 of State Regulation No. 15, at which, the parties are permitted to introduce evidence and to cross-examine witnesses.

The Board, in its Answer denies any procedural or substantive error in its determination.

At the de novo hearing held in this Division, the Board produced the testimony of Detective Ronald C. Karabatsos of the Union City Police Department. He described a visit he made to appellant's premises on April 17, 1977, at which time,

in the company of a fellow detective, he observed five youths whose apparent ages were under the minimum age for alcoholic beverage consumption.

He listed the names and ages of the youths, whom he identified as Patricia P---, Ruth G---, Doris O---, Carmen R--- and Jose M---, all of whom were inder the age of 18. Patricia P--- was only 15 years of age. Each of the youths were drinking alcoholic beverages.

One of the minors, Patricia P---, appeared to testify in this Division. She affirmed that on the date of the charge she was fifteen years old, but is now sixteen years of age. She and her adult sister were both drinking alcoholic beverages.

Testifying on behalf of the appellant, the bartender-principal officer Ivan DeMoya denied sales to under-age patrons, and denied having seen or served the minor Patricia on the evening in question. Following lengthy testimony concerning his retention of a special officer to be present on Friday evenings, he was reminded that the date of the charge related to a Saturday and not on a day when a special officer was employed. DeMoya indicated that he and his wife were the sole corporate officers of the corporate licensee.

The burden of establishing that the action of the respondent Board was erroneous and should be reversed rests entirely with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way: Could the members of the Board, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Cf. Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E. & A. 1947).

In determining this matter it is observed preliminarily that we are dealing with a disciplinary action which is civil in nature and not criminal. In re Schneider, 12 N.J. 449 (App. Div. 1951). Thus, the proof must be supported only by a preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

In evaluating the evidence presented, the testimony of the police detective was concise and detailed; providing the names, addresses and the dates of birth of each of the minors found drinking on appellant's premises. The testimony of the minor was clear as it applied to her and was completely corroborative of that of the detective. The testimony of the bartender consisted solely of a general denial that he had

served minor patrons. His recollection was particularly faulty with respect to the evening in question, the details of which were vague in his memory.

I conclude that appellant has failed to sustain the burden of establishing that the Board's action was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15.

It is, therefore, recommended that an order be entered affirming the Board's action, dismissing the said appeal, vacating the Order staying the suspension and reimposing the suspension of ninety days originally imposed by the Board.

CONCLUSIONS AND ORDER

No Exceptions to the Hearer's Report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony and the Hearer's Report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 12th day of January, 1978,

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

ORDERED that my Order of September 23, 1977, staying the suspension imposed by the Board, pending the determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-182, issued by the Board of Commissioners of the City of Union City to Casino Royal, A Corporation for premises 2118 Bergenline Avenue, Union City be and the same is hereby suspended for ninety (90) days commencing 3:00 A.M. Tuesday, January 24, 1978 and terminating 3:00 A.M. Monday, April 24, 1978.

JOSEPH H. LERNER
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - LEWDNESS - INDECENT ENTERTAINMENT - PRIOR DISSIMILAR OFFENSE - LICENSE SUSPENDED FOR 65 DAYS.

In the Matter of Disciplinary Proceedings against Anthony De Gennaro t/a Tondia Lounge 468 14th Avenue Newark, N.J. 07106 Holder of Plenary Retail Consumption License C-473, issued by the Municipal Board of Alcoholic Beverage Control for the City of Newark.	CONCLUSIONS AND ORDER

Sobel and Lyon, Esqs., by Allan M. Goldstein, Esq., Attorneys for Licensee.
Mart Vaarsi, Deputy Attorney General, Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded not guilty to the following charge:

> On October 19, 1976, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you allowed, permitted and suffered a female person, while performing on your premises for entertainment of your customers and patrons, to engage in conduct, by herself and in association with patrons and customers on your licensed premises, of a lewd, indecent and immoral manner and to commit and engage in acts, gestures and movements of and with her hands, legs and other parts of her body, by herself and in association with patrons and customers, in a manner and form having lewd, indecent and immorally suggestive import and meaning; in violation of Rule 5 of State Regulation No. 20.

I

At the hearing in this Division, several motions were made by the licensee's attorney on procedural and substantive

legal grounds. In addition, the licensee served subpoenas upon the Director, this Hearing Officer and others in the Division, who refused to respond to same.

Concerning the subpoena applications, in a proffer made at the Hearing Officer's request, the licensee's attorney stated that, he desired to have the Director give testimony as to the factual basis for the complaint, his knowledge of the facts, what was stated to him by employees of the A.B.C. and, lastly, what he considered to be obscene and what rules and regulations there are concerning obscenity and lewd behavior. The Director declined to respond to the subpoena stating that he had no personal knowledge of the facts.

The licensee noted his exception and maintained that due process affords him the right, as an attorney..."to personally know from his lips..." what information the Director does, or does not possess. He then moved to adjourn the proceeding until such time as the Director is present, which motion was denied.

No specific reason was offered, on the record, for the subpoena served upon the Hearing Officer, nor was any exception taken to his statement that he had no specific knowledge and would not testify.

Licensee also moved to dismiss the charges maintaining that Rule 5 of State Regulation No. 20, was unconstitutional. He cited, as his authority, an unspecified recent decision of the Appellate Division involving a theatre in Newark which featured alleged pornographic films.

He also contended that the Rule is too broad. Additionally, he moved that, if the request for dismissal is not granted, the said hearing should be adjourned without date, pending the Appellate Division's ruling in another matter, presently on appeal from a Conclusions and Order of this Division, allegedly on this specific point. Re Hondo, Inc., Bulletin , Item . (On Appeal - A-1330-76).

The last motion made was for an independent Hearing Officer to preside, citing for support Mazza v. Cavicchia, 15 N.J. 498 (1954).

After the above motions were made, and decision reserved for the Director's resolution, the licensee requested an adjournment to enable the Director to decide them prior to hearing, which request was denied.

II

At the hearing in this Division, the following testimony was adduced. Pursuant to a specific assignment to in-

vestigate subject premises, A.B.C. Agent B testified that, on October 19, 1976, accompanied by Agent D, he entered the subject premises at about 11:55 a.m. He described the interior as having a straight bar on the left side with a small stage behind the bar. To the right there was a pool table, tables and chairs, and in the rear, booths.

A go-go dancer was observed to be performing on a small stage behind the bar, as they entered. Agent B testified that, soon after entering, he observed the dancer push aside the bra portion of her costume and expose her bare breasts to the patronage. She also, at another occasion, inserted her hands beneath her bra and pushed it aside. While keeping her breasts concealed within her cupped hands, she danced in that manner.

Lastly, he stated that, using an overhead rafter she swung onto the bar, where, crawling on all fours, proceeded from patron to patron. He observed a male patron place a dollar bill into the lower portion of her costume. His hand remained there several seconds and movement was observed. The patron, the dancer and other patrons in the immediate vicinity laughed at the occurrence, which was witnessed by one of the barmaids.

He described other actions and movements which were part of the routine, including exposure of the breasts or pubic hair, body movement and mouth and hand gestures.

His description of the next set was, to a large extent, repetitive of the first, with some minor variations. During the dances on both sets, two barmaids were present and in positions which afforded them unobstructed views of the routine. At no time did either one caution the dancers or attempt to intervene.

Agent D's testimony was essentially corroborative of Agent B's with the additional description of activity wherein the dancer allowed a patron to fondle her buttocks, and, at another time, allowed a (different) patron "...to give her a kiss below the navel."

Anthony De Gennaro, who is the licensee, testifed on his behalf that, although he actively manages the lounge, he was not present during the time of the alleged occurrence. He stated that there is no rafter on the ceiling that could be used be a dancer to swing from the stage to the bar, a distance of 26 inches.

A series of professional color photographs were introduced in evidence and disclose a false (dropped) ceiling in the barroom, except in the area over the stage to enable the dancers to stand upright and perform. In the recess thus created over the stage, a ventilator cut-out is visible which he stated, dancers have grasped and have been able to swing from in the past; but not capable of permitting the performer to reach the

bar.

Jack Spaeth, a flooring contractor, testified in behalf of the licensee that he visits the bar two or three times a week. He stated that it is adjacent to the Garden State Parkway, and is a convenient place to meet his employees. He testified that it was "bar knowledge" that this Division was going to have undercover agents in the premises that day, and, probably, as a result, he observed the dancer's routine more closely than usual.

Spaeth denied that the dancer did any of the acts as described by the agents. He went so far as to deny that she even crossed from the stage to the bar and crawled on her hands and knees.

Jack Thyfault, a business man and self confessed "pool fanatic", testified in behalf of the licensee. He too, denied seeing the dancer commit any of the acts testified to by the agents. He stated that he played "many games of pool" that day, and that each game takes, on the average, about fifteen minutes.

Stephanie De Gennaro, who is married to, but separated from, Anthony De Gennaro, also testified in behalf of the licensee. She denied that any of the acts described by the agents were committed by the go-go dancer. She stated that she had prior knowledge "through friends" that agents would be on the premises, but declined to be more specific. Her testimony varied from Spaeth in that she admitted the dancer performed on the bar once or twice that day.

III

Before evaluating the evidence, the licensee's numerous motions will be considered.

Preliminarily, I observe that the various motions serve only to obfuscate the issue as they have little or no relevance to the matter under consideration.

In 1608 New York Avenue Corp. v. Division of Alcoholic Beverage Control, Bulletin 2119, Item 1 (Unreported App. Div. affirmal of Director's decision, Docket No. A-2099-71), which involved an appeal from the conviction of a licensee of the charge that it permitted an entertainer to perform in the licensed premises in a lewd, indecent and immoral manner, the court considered the same contention, namely, that the said regulation does not contain a precise standard. The court held therein:

> We conclude that the language of the regulation in question, when measured by

> common understanding and practice, conveys sufficiently definite warnings as to the proscribed conduct, and that it is sufficiently precise so that the regulation can be administered fairly and not arbitrarily. Roth v. United States, 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511 (1957).

Statutes and regulations of this Division may be deemed of sufficient certainty by the application of several criteria, the most pertinent of which in the instant matter is that there is "on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing the statute." Cox v. State of Louisiana, 379 U.S. 559, 13 L. Ed. 2d 487, 495, 85 S. Ct. 476, 483 (1965).

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Winters v. New York, 333 U.S. 507, 515, 92 L. Ed. 840, 848, 68 S. Ct. 665, 670 (1948). Although many statutes "might be extended to circumstances so extreme as to make their application unconstitutional...a close construction will often save an act from vagueness that is fatal." Williams v. United States, 341 U.S. 97, 101, 95 L. Ed. 774, 778, S. Ct. 576, 579 (1951). And "If the statute should be construed as going no farther than it is necessary to go in order to bring defendant within it, there is no trouble with it for want of definiteness." Fox v. Washington, 236 U.S. 273, 277, 59 L. Ed. 573, 575, 35 S. Ct. 383, 348 (1915). With respect to the definition of words such as "obscene, lewd, lascivious, filthy and indecent", see Roth v. United States, 354, U.S. 476, 1 L. Ed. 2d. 1498, 77 C. Ct. 1304 (1957).

The specific Rule sub judice, Rule 5 of State Regulation No. 20, which licensee alleges is unconstitutional, provides as follows:

> RULE 5. No licensee shall engage in or allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy, indecent or obscene language or conduct, or any brawl, acto of violence, disturbance or unnecessary noise; nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance.

It is noted that violation of the rule constitutes a civil, not a criminal, offense. Kravis v. Hock, 137 N.J.L. 252 (Sup.Ct. 1948). Sanctions are by suspension or revocation of a liquor license. Rule 5 has been upheld in the State courts in numerous cases. See McFadden's Lounge, Inc. v. Division of

Alcoholic Beverage Control, 33 N.J. Super. 61, 66-67 (App. Div. 1954); In re Club "D" Lane, Inc., 112 N.J. Super. 577 (App. Div. 1971).

In Club "D" Lane, supra at 579, the court stated:

> A license to sell intoxicating liquor is not a contract nor is it a property right. Rather, it is a temporary permit or privilege to pursue and occupation which is otherwise illegal. Since it is a business attended with danger to the community, it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. Mazza v. Cavicchia, 15 N.J. 489, 505 (1954).
>
> We are not here concerned with the censorship of a book, nor with the alleged obscenity of a theatrical performance. "Our immediate interest and attention is confined to the disciplinary action taken against the licensee of a public tavern, whose privileges may lawfully be tightly restricted to limit to the utmost the evils of the trade." McFadden's Lounge, Inc. v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 61, 68 (App. Div. 1954). Lewdness or immorality for the purpose of alcoholic beverage control may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally. Davis v. New Town Tavern, 37 N.J. Super. 376, 378 (App. Div. 1955); Jeanne's Enterprises, Inc. v. New Jersey, etc., 93 N.J. Super. 230 (App. Div. 1966), aff'd o.b. 48 N.J. 359 (1966).

Finally, it should be pointed out that, although statutes penal in character normally must be strictly construed, the Legislature enjoined the courts otherwise in N.J.S.A. 33:1-73 which provides that this chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed. See Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947); Kravis v. Hock, 135 N.J.L. 259 (Sup. Ct. 1947); Re Starshock, Inc., t/a Lido, Bulletins 2101, Item 2 and 2111, Item 1. Therefore, I find this contention to be frivolous, and without merit.

Similarly, I find the other motions to have been made frivolously and not worthy of further serious consideration.

IV

We are dealing here with a purely disciplinary matter and its alleged infraction. The Division need establish its case only by a fair preponderance of the believable evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960). In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042 (1964).

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

Using the said principle as a guide, I have carefully evaluated the testimony produced both on behalf of the Division and the licensee. I have had the opportunity to observe their demeanor as they testified. Thus, I am persuaded that the testimony of the ABC agents was forthright, concise, credible and fully supportive of the charge.

There was no showing of any improper motivation on their part, nor any bias against the licensee. They were assigned to pursue an investigation and it was natural that their observations should be directed at the full activities during their visit. Consequently, their testimony was of a positive nature, specific and entirely corroborative.

I make this finding notwithstanding that the agents erred in stating that the dancer employed a rafter or rail to swing from the stage to the bar. This detail is insignificant and does not affect the overall impression of accuracy and veracity which their testimony created.

I reject the implication of "false in one, false in all" that the licensee asserts is applicable. Likewise, I reject his contention that their testimony was incredible because the agents had to refresh their recollection by the use of their previously written reports; or that they could not recollect exactly how they were dressed, what they drank at the bar, etc. One has to consider that over eight months elapsed between the investigation and hearing, during which time they may have participated in as many as one hundred and fifty different investigations.

On the other hand, I find the testimony of the witnesses for the licensee to be negative, vague, imprecise, inconsistent, and, indeed, incredible. This is readily understandable because, although the witnesses were friends or em-

ployees of De Bennaro and perhaps tried to help him, it is obvious that, in these circumstances, they did not enter the premises on the date herein alleged for the sole purpose of making these special observations. I specifically reject the testimony that it was "bar knowledge" that ABC agents were going to visit that day, as being incredible without further testimony as to how this knowledge was obtained.

I am particularly unimpressed with the testimony of Thyfault. His testimony indicates that he is a "pool fanatic" and played a number of games that day, estimating each game, on average, lasted fifteen minutes. To give credence to his testimony that he could only more than occasionally observe the dancer, taxes ones credulity.

Most of the testimony of the witnesses for the licensee was to the effect that "I did not see it occur", not that it did not, in fact, occur. On the other hand, the testimony of the agents was of a positive nature. The fact that a witness did not see an occurrence does not mean that it did not take place. The positive testimony of the agents whose express purpose in being in the licensed premises was to make observations of the "go-go" dancers performance has a much stronger impact.

In State v. Jones, 105 N.J. Super. 493, 503-504 (Essex Cty. Ct. 1969), the court in commenting upon such testimony cites 4 Jones on Evidence (5th Ed. 1958) Sec. 985, pp. 1856-1857, as follows:

> Testimony is affirmative or positive if it consists of statements as to what witness has heard or seen; it is negative if the witness states that he did not hear or did not see the phenomenon in question. This being the distinction between testimony which is affirmative and testimony which is negative, it is an established rule that, where the one form of statement is opposed to the other, the affirmative testimony must be deemed to outweigh that which is merely negative.
>
> In other words, 'the testimony of a credible witness, that he saw or heard a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place.' The reason for this rule is that the witness who testifies to a negative may have forgotten which actually occurred while it is impossible to remember what never existed.

> Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively...

Vide, Honey v. Brown, 22 N.J. 433, 438 (1956); Rapp v. Public Service Coord. Transport, Inc., 15 N.J. Super. 305, 311 (App. Div. 1951), aff'd 9 N.J. 11 (1952).

Furthermore, the testimony clearly establishes that there was actual audience participation by the fondling of the dancer and the placing of dollar bills inside her costume.

Finally, with respect to the issue of credibility, it is noted that two employees of the licensee, who were actually present during the alleged occurrences, have not been produced. It would appear reasonable and natural for the licensee to have produced the dancer to testify with respect to her performance that day. There is nothing to show that she was unavailable, that reasonable efforts were made to produce her as a witness, and that she could not be produced.

This similarly applies to the other barmaid on duty in the licensed premises during the performance of this go-go dancer. No explanation was offered why she was not produced. Therefore, a permissible inference may be drawn that, had these witnesses been produced, they could not have truthfully contradicted the testimony of the Division's witnesses, and their testimony would have been unfavorable to the licensee. Re Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1966); Grandview Cafe v. Jersey City, Bulletin 2124, Item 1.

After a careful consideration of the entire record herein, I find that the charge has been established by a fair preponderance of the credible evidence, indeed, by substantial evidence. I, therefore, recommend that an order be entered finding the licensee guilty of the said charge.

It is also recommended that the license be suspended for sixty days, to which five days should be added for a prior dissimilar offense committed within the past five years, making a total suspension of license of sixty-five (65) days.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the licensee, and written Answers thereto were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In his first Exception, the licensee attributes error to the denial of counsel's request to examine the Director of the Division of Alcoholic Beverage Control as to his basis for

not recognizing the licensee's subpoena ad testificatum. The licensee failed to establish that the Director had first-hand knowledge or direct involvement in the disciplinary proceeding, (which I did not), or that his testimony was essential to prevent injustice. Hyland v. Smollok, 137 N.J. Super 456, 460 (App. Div. 1975), cert. denied, 71 N.J. 328 (1976). Thus, I find this Exception to be without merit.

The next two Exceptions alleging (1) a due process deprivation and lack of impartial hearing by the merger of functions within the Division, and (2) an impermissible constitutional vagueness of Rule 5 of State Regulation No. 20, are devoid of merit. The constitutional support of my holding of the aforesaid has been consistently upheld.

As to the merger of functions in administrative agencies, see Mazza v. Cavicchia, 15 N.J. 498, 503-04 (1954); Kelly v. Sterr, 119 N.J. Super. 272, 275 (App. Div. 1972), aff'd 62 N.J. 105, 110 (1973); In re Information Resources, 126 N.J. Super. 42, 52 (App. Div. 1973); In re Blum, 109 N.J. Super. 125, 129 (App. Div. 1970). As to the constitutionality of Rule 5 of State Regulation No. 20, see Howell's Sportsman's Inn v. Division of Alcoholic Beverage Control, (unreported App. Div. opinion, Docket No. A-445-75) Bulletin 2206, Item 1; 1608 New York Avenue Corp. v. Division of Alcoholic Beverage Control, (unreported App. Div. opinion, Docket No. A-2099-71) Bulletin 2119, Item 1.

The licensee next advances several Exceptions relating to the nature and scope of the direct and cross-examination of the Division's witnesses. I find no error concerning the use of reports by Division agents. It was clearly stated that the use of same was to refresh the witnesses' recollection, and appropriate foundation was established.

I further reject the claim of error in the Hearer's refusal to permit cross-examination of witnesses as to promotion procedures in the Division. While said questioning is obviously of little probative value, and its limitations are well within the discretion of the Hearer (N.J.S.A. 52:14B-10 (a), I am persuaded that the proposed conclusion sought by licensee is erroneous. An investigator's status with the Division is not directly correlated with his "conviction" record.

Lastly, I find no basis for requiring that the direct testimony of the Division witness, as to the placing of a dollar bill in the dancer's costume, be corroborated by a voucher. Accordingly, I find these Exceptions to be lacking in merit.

Licensee argues in his next Exception that the credibility of the Division's witnesses is so tainted by their inability to recall various facts, as to render said testimony insufficient to sustain the charges.

My review of the record finds to the contrary their testimony was concise, direct and clear on all factors relevant to the incidents the agents were assigned to investigate. I find this Exception to be without merit.

There is no basis for the Exceptions referable to the credibility of witnesses for both parties. The record supports the Hearer's factual findings and conclusions. Similarly, those Exceptions dealing with inferences drawn by the Hearer are consistent with the stated principles of law cited in the Hearer's Report, and, more importantly, are accorded little, if any, weight in arriving at my conclusions herein.

The argument advanced by the licensee in his Exceptions that the dancer was an independent contractor, for which he has no responsibility, is without basis in law, Kravis v. Hock, 137 N.J.L. 252, 255 (Sup. Ct. 1948), and rejected.

Having fully considered the entire record herein, including the transcript of the testimony, the exhibits, the written summations, the Hearer's Report, the written Exceptions to the said Report and written Answers thereto, I concur in the findings and the recommendations of the Hearer, and adopt them as my conclusions herein. I find the licensee guilty as charged and shall suspend the license for sixty-five (65) days.

Accordingly, it is, on this 11th day of January, 1978,

ORDERED that Plenary Retail Consumption License C-473, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Anthony De Gennaro, t/a Tondia Lounge, for premises 468 - 14th Avenue, Newark, be and the same is hereby suspended for sixty-five (65) days commencing 2:00 A.M. Monday, January 23, 1978 and terminating 2:00 A.M. Wednesday, March 29, 1978.

JOSEPH H. LERNER
DIRECTOR