Deputy Director Stockburger

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

BULLETIN 1621 July 1, 1965

TABLE OF CONTENTS

ITEM

1. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (INDECENT ENTERTAINMENT) - PREVIOUS SIMILAR AND DISSIMILAR RECORD - LICENSE SUSPENDED FOR 130 DAYS. (Atlantic City)

2. SEIZURE - FORFEITURE PROCEEDINGS - SPEAKEASY IN BUTCHER SHOP - ILLICIT ALCOHOLIC BEVERAGES, FURNISHINGS, EQUIPMENT AND COMMINGLED CASH ORDERED FORFEITED.

3. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA. (Lodi).

4. STATE LICENSES - NEW APPLICATION FILED.

New Jersey State Library

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

BULLETIN 1621 July 1, 1965

1. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (INDECENT ENTERTAINMENT) - PREVIOUS SIMILAR AND DISSIMILAR RECORD - LICENSE SUSPENDED FOR 130 DAYS.

In the Matter of Disciplinary Proceedings against

Jeanne's Enterprises, Inc.
t/a Le Bistro
2201 Pacific Avenue
Atlantic City, N. J.,

Holder of Plenary Retail Consumption License C-166, issued by the Board of Commissioners of the City of Atlantic City.

CONCLUSIONS and ORDER

Warren W. Wilentz, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensee has pleaded not guilty to the following charge:

"On September 1, 1964, you allowed, permitted and suffered lewdness and immoral activity and foul, filthy and obscene language and conduct in and upon your licensed premises in that you allowed, permitted and suffered a female to perform for the entertainment of your patrons in a lewd, indecent and immoral manner; in violation of Rule 5 of State Regulation No. 20."

At the outset of the hearing the attorney for the licensee made a motion to dismiss the said charge on the ground that the charge was not outlined specifically and, therefore, could not be properly defended. Elaborating upon this in the memorandum submitted at the conclusion of this case, counsel asserted that the notice violated due process because it failed to name the specific female person, "[her]alleged lewd, indecent and immoral manner and failed to specify and describe said lewd, indecent and immoral performance."

Counsel cites a Pennsylvania case, without name, which was referred to in Administrative Law Treatise by Kenneth Culp Davis on Page 530, to the effect that failure to inform licensee of the nature of the violation constitutes a denial of procedural due process. 138 Pennsylvania Super., at p. 247. He therefore argues that, since the name of the performer was omitted from the notice and the specific language was not set forth, such notice was defective.

In answer thereto counsel for Division cites 1 Davis, Administrative Law,525, to the following effect:

> "The key to pleading in the administrative process is nothing more than opportunity to prepare. Pleading is only one of many ways of providing opportunity to prepare. Deficiencies in a pleading may be cured by informal communications, by formal amendment, by a bill of particulars, by pre-hearing conferences, or by ample continuances of the hearing."

Further, it should be pointed out that a complaint in an administrative proceeding need not be drawn with the same nice refinement and subtleties as pleadings in a court of record. A complaint alleging discharge of employees from employment for union activity has been held to be sufficient notwithstanding the lack of any names of the employees in question. N.L.R.B. v. Pacific Gas & Electric Co., 118 F. 2nd 780 (9th Cir., 1941). "It is well settled that in the conduct of such hearings, governmental bodies being primarily administrative and not judicial, should not be held to strict conformity with the judicial procedure required in a court of law, but that the employee shall be given a fair and impartial trial." Dutcher v. Department of Civil Service, 7 N.J. Super. 156, 163 (App.Div. 1950).

The licensee in the instant matter was afforded full opportunity to defend itself against the preferred charge. In fact, the licensee requested and was granted a continuance to present evidence at a future date after the Division had completed its presentation of its case. Also, the licensee knew in advance the name of the performer in question and was familiar with her performance, as shown by the testimony of its manager. Under all the circumstances, no prejudice was suffered by the licensee by reason of the non-inclusion of this information in the charge.

Finally, it should be emphasized that, in accordance with long practice in this Division, where the licensee is represented by counsel the Division has always been willing, upon request, to give the information requested. As counsel for the Division observed, although the information was available in this case the Division was not contacted for that purpose nor was any request or attempt ever made to obtain it. Under these circumstances it is recommended that this motion be denied.

The Division's case was established through the testimony of two ABC agents and the factual setting was as follows: The licensee is the operator of a tavern and night club known as Le Bistro. On Tuesday, December 1, 1964, at approximately 9:50 p.m., the agents arrived at the licensed premises and observed a sign on the outside of the premises advertising the fact that certain entertainers were scheduled for that evening, including a special added attraction, namely, Pearl Williams. Agent H testified that, in the company of Agent R, he entered the premises; noted that there were five bartenders on duty at three bars in the premises; also approximately ten waitresses dressed in a playboy bunny type of costume. They seated themselves in the rear room and, by the time Miss Williams went into her act, the patronage had increased to approximately ninety persons. Prior to Miss Williams' act there were several other acts performed, and then Miss Williams was introduced as "that stylist of song and story, the unpredictable Pearl Williams." Miss Williams then proceeded with her act which consisted of unquestionably obscene, vulgar references to sex and sexual behavior, which were described in great detail at this hearing. No purpose would be served in repeating herein the language, expressions and comments which punctuated the performance except to state that this entertainer expressed indecorous language to impart indecorous concepts, clearly catering to the prurient interests of the patrons, and her performance was geared on a pornographic level with "dirt for dirt's sake." The agent specifically set forth and delineated

both the words and the actions of this performer, using the exact language of the said performer. At approximately midnight the agents departed the premises. On cross examination the agent admitted that he made no notes to any of the other performers, and he also admitted that Miss Williams sang "one, possibly two straight songs", but no note was made of those songs.

It was stipulated that Agent R, on being sworn, would testify to the same effect on direct examination as to the incident upon which the said charge is based, subject to the right of cross examination by counsel for the licensee. He was asked no questions on cross examination.

A newspaper clipping from the August 30, 1964 issue of the Atlantic City Sunday Press advertising the fact of Miss Williams' appearance at these premises was also admitted, without objection, into evidence. There was also admitted into evidence a copy of the Division's warning letter of May 29, 1962 to the licensee concerning improper entertainment, and the licensee's response by undated letter received by this Division on June 5, 1962. Also introduced into evidence was a letter dated July 10, 1964, addressed to the licensee by the Director of this Division, which reads as follows:

"Gentlemen:

It has come to my attention that Miss Belle Barth has been engaged by you to perform as an entertainer at your licensed premises commencing July 14, 1964.

As you are aware, your license was suspended for 55 days effective October 18, 1961 for two instances of permitting Miss Barth to entertain at your premises since it was determined that her performance was lewd and indecent. Re Jeanne's Enterprises, Inc., Bulletin 1422, Item 2.

This Division takes a very serious view of this situation, and I want to advise you that, if the same type of entertainment is presented, it may result in the revocation of your license.

A word to the wise should be sufficient."

Irving Kolker, secretary of corporate licensee and general manager of the licensed premises, testifying in its behalf stated that the licensee has received a letter from the Director of this Division "telling us about Belle Barth and Pearl Williams and we abided by the letter." He stated that he instructed Miss Williams not to use "any four letter words and she abided by that, and that was it; that was the act." He insisted that her act was not obscene and in fact a number of public officials had viewed her act and did not find it objectionable. On cross examination he admitted that, although he had heard Miss Williams perform her act on a number of occasions, he could not state definitely whether these public officials actually heard the performance on the date and time alleged in the charge. However, he was certain that she performs generally the same act so that there would be no real difference from her prior performances; "she has the same act every night. She don't deviate; that's her routine and that's it." He further insisted that there had been no complaints about her act and that, indeed, this was the first complaint that he had received.

My examination and evaluation of the testimony herein convince me that the performance was unquestionably obscene, vulgar, digusting and patently offensive. While the performer did not use the four-letter words, which the licensee apparently feels is the criterion of whether or not a performance is obscene, the words used by the performer are equally obscene and impart the same meaning. As the court noted in G.P. Putnam's Sons v. Calissi, 86 N.J.Super. 82, at p. 98, in an application by the Prosecutor of Bergen County for injunctive relief against the distribution or sale of a book of allegedly indecent nature, in its discussion of the said book:

> "There are proponents of a trend that would uphold a work although 'trashy' and 'disgusting,' because there are no 'four-letter' words and because 'in all their erotic descriptions they maintain a clever, and apparently deliberate, avoidance of socially unacceptable language.' But this position does not recognize the appropriate tests established by the United States Supreme Court. I cannot accept the baseless conclusion of these purveyors that there must be a place in our society for such writings because of compliance with the aforementioned trend. It is our duty to prevent the circulation of such pornographic literature as the United States Supreme Court has held is not within the protection of the First Amendment. (citing cases)."

Counsel for the licensee argues that the Hearer cannot decide whether the performance done by Miss Williams in the licensed premises was obscene unless he can come to the conclusion that the dominant theme of the material taken as a whole appeals to the prurient interest, citing Roth v. United States, 354 U.S. at p. 489. He insists that, because the agents did not testify as to the "straight songs", it is impossible to come to a conclusion as to the obscenity of the act of Miss Williams. He also argues that the question of alleged obscenity must be determined on the basis of a national standard, citing Nico Jacobellis v. State of Ohio, 32 LW at p. 4655. In this connection he further argues that the performance is not obscene because the performer "has done the same act" in other States and her records are distributed throughout the country, including New Jersey.

Personally I want to state with great emphasis that under any standards -- national, regional or community -- the words reflected in the record as being used by this performer and her actions were so clearly objectionable, obscene and offensive that they are clearly violative of such established standards. The absence of four-letter words, as hereinabove noted, does not put this performance within the proper bounds of propriety. Here there was a flagrant and deliberate use of double-entendre stories and songs connoting sexual activities and illicit relationships of an immoral and indecent nature.

Furthermore, a distinction should be noted in the cases cited by counsel for the licensee in their applicability to licensed premises. As Judge Jayne pointed out in McFadden's Lounge v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 62 (App.Div. 1954), affirming Re McFadden's Lounge, Bulletin 1003, Item 5:

"Experience has firmly established that taverns where wine, men, women, and song centralize should be conducted with circumspect respectability. Such is a reasonable and justifiable demand of our social and moral welfare intelligently to be recognized by our licensed tavern proprietors in the maintenance and continuation of their individualized privilege and concession."

In the cited case the court held objectionable the performance on licensed premises, similar to the one involved herein, which did not indulge in profanity, but exemplified "a crude and smutty exercise in semantics - decent words procreating indecent ideas, decorous language utilized to impart indecorous concepts." As the court pointed out:

"... we are not presently concerned with the preliminary censorship of a book or of an oral address or lecture. 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. Vide, Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888); Kravis v. Hock, 135 N.J.L. 259 (Sup.Ct. 1947); reversed on other grounds, 136 N.J.L. 161 (E. & A. 1947); Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); In re Schneider [12 N.J. Super. 449, 454 (App.Div. 1951)]."

Said the court further, at p. 68:

"Judge Francis defined obscenity in his charge to the jury in State v. Weitershausen [11 N.J. Super. 487, 492], 'offensive to the chastity of the mind, to the delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality' and 'would tend to deprave the morals *** by suggesting lewd thoughts and exciting sensual desires.'"

And the court further remarked:

"Not alone the general public but liquor licensees themselves should realize that the Alcoholic Beverage Control statute and the rules promulgated by the administrative representative of the Legislature are designed to guard the permissive sale of intoxicating beverages against the broad variety of abuses which if consciously condoned or ignored will inevitably again outlaw the presently sanctioned pursuit."

See also <u>In re Olympic, Inc.</u>, 49 N.J. Super. 299, and <u>Davis v. New Town Tavern</u>, 37 N.J. Super. 376 (App.Div. 1955), in which the court ruled.

"What is lewdness or immorality for purposes of a rule regulating premises licensed for the sale of alcoholic beverages may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally."

I therefore conclude that the Division has proved its

case by a preponderance of the believable evidence; indeed, by substantial evidence. Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501; Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373; In re Schneider supra.

I therefore recommend that the licensee be found guilty of said charge.

Licensee has a prior adjudicated record. Effective October 18, 1961 its license was suspended by the Director for fifty-five days for similar indecent entertainment (Re Jeanne's Enterprises, Inc., Bulletin 1422, Item 2); effective December 13, 1963 its license was suspended by the municipal issuing authority for ten days for hostess activity, and effective April 19, 1964 its license was suspended by the municipal issuing authority for ten days again for hostess activity.

The established minimum penalty for a first offense of this kind is suspension for sixty days. See, for example, Re Jeanne's Enterprises, Inc., supra; Re 500 Cafe, Inc., Bulletin 1584, Item 2. For a second similar offense within five years, it is established practice to double the first offense penalty. See, for example, Re Markowitz, Bulletin 1538, Item 1; cf. Re Lanin Corporation, Bulletin 1601, Item 1; Re 1643 Atlantic Avenue Corporation, Bulletin 1515, Item 2. Likewise, it is established practice to increase the penalty by ten days where, as here, the licensee has a record of two suspensions for dissimilar violations within the past five years. See, for example, Re Bozzone, Bulletin 1577, Item 8.

The prior record of suspension for similar and dissimilar violations occurring within the past five years considered, I further recommend that an order be entered herein suspending the license for one hundred thirty days.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, the licensee filed exceptions to the Hearer's Report and written argument thereto. The licensee argues (1) that its motion to dismiss the charge because of insufficient statutory notice should be granted because the licensee had no way of knowing that the Division would supply additional details of the charge upon request, (2) that the "Hearer's finding that the public officials who were present did not see the act" was erroneous, and (3) that the recommended finding that the performance in question was obscene is legally impermissible as contrary to freedom of speech guaranteed by the Federal Constitution and interpreted by the Roth and Jacobellis cases, in that (a) the entire performance was not reproduced at the hearing; (b) the Hearer did not accept the national standard in determining the question of obscenity; (3) there may not be a separate obscenity standard for alcoholic beverage licensed premises, and (d) the performance was not obscene since, on national television, "remarks are made which are far more obscene than anything that was done in this act."

As to the first point raised, I cannot conceive that the licensee failed to receive a fair hearing by reason of the Division not informing it of the availability of further particulars supplementing the charge. If the licensee felt that it needed additional information concerning the charge, it was incumbent upon the licensee to request it from the Division. No such request was received. In any event, the licensee, at its request, was granted a continuance to present evidence at a future date after the Division had completed presentation of its case. Under the cir-

cumstances, including the reasons set forth in the Hearer's Report, the licensee suffered no prejudice by reason of the non-inclusion in the charge of the name of the female performer or a description of her performance, but received "a reasonable opportunity to be heard" on the charge within the purview of R.S. 33:1-31. I therefore deny the motion to dismiss the charge.

With respect to the second point, there is nothing in the record to establish that any of the law enforcement officials in question observed the particular performance of Pearl Williams described by the Division agents. Kolker, the licensee's only witness, testified that these officials had observed Miss Williams' performance at the licensed premises, but did not know whether any of them had been there on the night in question. None of these officials was called to testify and Kolker himself admitted that he did not recall whether he had watched the same act of Miss Williams that the agents had seen.

But, aside from the insufficiency of proof on this point, I find that it is immaterial whether or not these officials observed the act in question. The act speaks for itself. In the absence of any explanatory testimony from the officials, no inferences should be drawn from their failure to take any action against the performer or the licensee.

This brings us to the third and principal exception of the licensee, namely, the freedom of speech question. New Jersey courts have heretofore dealt with cases involving disciplinary proceedings against alcoholic beverage licensees who have permitted objectionable entertainment on their licensed premises. Mitchell v. Cavicchia, 29 N.J. Super. 11 (App.Div. 1953); McFadden's Lounge, Inc. v. Division of Alcoholic Beverage Control and Davis v. New Town Tavern, both cited in the Hearer's Report. The standard applied has been more restrictive than for entertainment on non-licensed premises. Davis v. New Town Tavern, supra, at p. 378. Cf. In re Olympic Inc., 47 N.J. Super. 299, 309 (App.Div. 1958), certif.denied 27 N.J. 279 (1958).

The late Judge Jayne, speaking for the Appellate Division of the Superior Court in the cited McFadden case, rejected the licensee's claimed abridgement of a constitutional right to freedom of speech in a case very similar to this one. He first noted (at P. 65) that the entertainers' lyrics were communicated "for the titillatory amusement and entertainment of the patrons, and not for any purpose of academic indoctrinination" and were predicated upon their "implied suggestiveness of illicit sexual relations ... the propriety of such deliverances is perhaps basically estimated in view of the time, place, the appropriate conventional standards, and the object, purpose, and effect of their theme."

He further stated (at p. 66) that the stringency of Rule 5 of State Regulation No. 20, "a disciplinary rule governing the conduct of those who have been granted the special privilege of vending alcoholic beverages at a designated location", "must be measured in its relation to the reasonably apprehended evils of the trade. Its infraction must be determined from the factual circumstances of the particular occurrence or course of conduct."

Also:

> "It seems both prudent and proper for us to consider the natural and probable tendency of these songs and stories to arouse sex impulses in the particular and in some respects exceptional environment normally existing in the exhilarated gaiety of a licensed tavern. Certainly the consumption of alcohol itself promotes in some degree and in the case of many a relaxation of concern in proprieties and a transient indulgence in regretful indiscretions at such privileged resorts. Such places, if not otherwise tilled, become fertile pastures in which risque songs and stories sprout, grown to the height of vulgarity and ultimately to that of obscenity if the appetites of the patrons are thereby satiated." (at pp. 67-68)

In the New Town Tavern case, the court upheld a finding of lewdness and immoral activity based upon a dance performance on licensed premises by a female entertainer where the "predominant object and natural effect upon the observers-patrons of one portion of the performance was erotic excitation" (at p. 377).

Rule 5 of State Regulation No. 20, with respect to its prohibition against licensees allowing, permitting or suffering lewdness or immoral activity on licensed premises, was construed in the case of In re Schneider, 12 N.J. Super. 449, 458 (App.Div. 1951), as follows:

> "The object manifestly inherent in the rule with which we are here concerned is primarily to discourage and prevent not only lewdness, fornication, prostitution, but all forms of licentious practices and immoral indecency on the licensed premises. The primary intent of the regulation is to suppress the inception of any immoral activity, not to withhold disciplinary action until the actual consummation of the apprehended evil.
>
> "'Immorality' is not necessarily confined to matters sexual in their nature. In a given context the word may be construed to encircle acts which are contra bonos mores, inconsistent with rectitude and the standards of conscience and good morals. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right. Webster's International Dict. (2d ed.)." (Emphasis added.)

In arriving at this construction the Court (at pp. 455-6) thusly reviewed the sui generis nature of the alcoholic beverage business:

> "Anent the intent and construction of the Alcoholic Beverage Control Law the Legislature declared, 'This chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed.' R.S. 33:1-73.
>
> "The governmental power extensively to regulate the conduct of those privileges to maintain premises for the sale of intoxicating liquors, especially by retail, has uniformly been accorded broad judicial support. Meehan v. Excise Commissioners, 73 N.J.L. 382 (Sup.Ct. 1906), affirmed 75 N.J.L. 557 (E. & A. 1908); Franklin Stores Co. v. Burnett, 120 N.J.L. 596 (Sup.Ct. 1938); Phillipsburg v. Burnett, 125 N.J.L. 157 (Sup. Ct. 1940); Grant Lunch Corp. v. Driscoll, 129 N.J.L. 408 (Sup.Ct. 1943), affirmed 130 N.J.L. 554 (E. & A. 1943), cert. den. 320 U.S. 801, 88 L. Ed. 484, 64 S. Ct. 430 (1944).

"'The whole machinery of the Alcoholic Beverage Control statute is designed to control and keep within limits a traffic which, unless tightly restrained, tends toward abuse and debasement.' Kravis v. Hock, 135 N.J.L. 259 (Sup.Ct. 1947), reversed on other grounds, 136 N.J.L. 161 (E. & A. 1947)

"'The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner.' Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct. 1946).

"And then, moreover, it must be understood that a license to vend intoxicating liquor is not a contract. Lantz v. Hightstown, 46 N.J.L. 102, 107 (Sup. Ct. 1884); Meehan v. Excise Commissioners, supra. It is not property. R.S. 33:1-26. In reality it is merely a temporary permit or privilege to pursue an occupation otherwise illegal. Voight v. Board of Excise, 59 N.J.L. 358 (Sup. Ct. 1896); Drozdowski v. Sayreville, 133 N.J.L. 536 (Sup. Ct. 1946); Takacs v. Horvath, 3 N.J. Super. 433 (Ch. Div. 1949).

"And so the words of Justice Van Syckel speaking for the Court of Errors and Appeals in Paul v. Gloucester County in 1888, 50 N.J.L. 585, continue to reverberate: 'The sale of intoxicating liquor has, from the earliest history of our state, been dealt with by legislation in an exceptional way. It is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied.' Hudson Bergen, &c., Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Essex Holding Corp. v. Hock, 135 N.J.L. 28 (Sup.Ct. 1947). It is a business which may be restricted by 'such conditions as will limit to the utmost its evils.' Crowley v. Christensen, 137 U.S. 86, 34 L. Ed. 620 (1890). The responsibility of a licensee may in some circumstances be imposed where, regardless of his knowledge, there is a failure to prevent the prohibited conduct by those entrusted with the management of the licensed premises. Essex Holding Corp. v. Hock, supra; Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156 (Sup. Ct. 1947); Galsworthy, Inc. v. Hock, 3 N.J. Super. 127 (App.Div. 1949)."

See also Grand Union Co. v. Sills, 43 N.J. 390, 398-9 (1964) and cases cited therein reaffirming "the State's 'practically limitless' power to regulate the liquor industry."

Notwithstanding these firmly established precepts, the licensee herein argues that this decisional law has been superseded by the recent Roth and Jacobellis cases, and that "when speaking of freedom of speech, it makes no difference whether the speech was made in licensed premises or at the corner of Broad and Market Street in Newark, New Jersey." With this I cannot agree.

In Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, the Supreme Court held that the unconditional phrasing of the First Amendment prohibiting Congress from abridging freedom of speech, incorporated in the liberty protected from state action by the due process clause of the Fourteenth Amendment, "was not intended to protect every utterance", and that "obscenity is not within the area of constitutionally protected speech" because "utterly without redeeming social importance." It went on to state that "Obscene material is material which deals with sex in a manner appealing to prurient interest", that is, "material having a tendency to excite lustful thoughts", and adopted this obscenity test: "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In Jacobellis v. Ohio, 12 L. Ed. 2d 793, decided June 22, 1964, the Supreme Court stated that "the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters'" and that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard", rather than "the standards of the particular local community from which the case arises." In discussing the protection of children from objectionable material, the decision, at page 802, contains the following paragraph:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' Butler v. Michigan, 352 U.S. 380, 383, 1 L ed. 2d 412, 414, 77 S.Ct. 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution."

On the question of entertainment (motion pictures) being protected by freedom of speech, the Supreme Court has said:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule." Burstyn v. Wilson, 343 U.S. 495, 502, 96 L. ed. 1098, 72 S. Ct. 777. (Emphasis added.)

It has been held that a state may totally proscribe various forms of entertainment on liquor licensed premises. 48 C.J.S. Intoxicating Liquors, sec. 199; 30 Am.Jur., Intoxicating Liquors, sec. 256; 151 A.L.R. 1185: 4 A.L.R. 2d 1216, and cases cited therein. If this is not in conflict with freedom of expression, may not the state in such area constrict the limits of free speech that would elsewhere prevail? Is not the public interest, as embodied in the police power of the state and manifested by its statutory and regulatory measures, sufficiently

strong enough to curtail expression in order to "suppress the inception of any immoral activity" on licensed premises prior to the "actual consummation of the apprehended evil"? If the state may prescribe restrictive measures to protect children from harmful material and may differentiate its treatment of motion pictures from its treatment of other media of communication of ideas, may it not also employ special measures in connection with liquor licensed premises? Nothing presented by the licensee herein, either in logic or precedent, compels any negative response to these questions.

I have carefully reviewed the entire record of this case, including the transcript of hearing and brief, exceptions and argument submitted by the licensee. As a result, I find that the performance in question, although presented in a jocular vein, geared to amuse the licensee's patrons, also contained songs, stories, and acts which were lewd, indecent and immoral, being risque and vulgar and predicated upon actual and implied suggestiveness of illicit sexual relations and unnatural sex acts, for the purpose of erotic excitation of the licensee's patrons, in violation of this Division's long-standing interpretation of what type of entertainment is permissible on licensed premises under Rule 5 of State Regulation No. 20.

Further, I find that such performance was lewd, indecent and immoral under the standard established by the hereinabove mentioned Federal cases. In support thereof, I find that the record herein reflects a sufficient portion of the entertainer's performance to determine the dominant theme thereof, taken as a whole; that such theme deals with sex in a manner having a tendency to excite lustful thoughts; that the performance went substantially beyond the customary limits of candor in the description and representation of sex and sexual organs; and that, to the average person, applying a contemporary national standard, the dominant theme of the material taken as a whole appeals to the prurient interest. I cannot agree with the licensee's unsubstantiated contention that this type of entertainment may be seen on national television.

There is no dispute that the licensee <u>permitted</u> Miss William to entertain on its licensed premises in the manner described. Consequently, I conclude that the licensee allowed, permitted and suffered lewdness and immoral activity and foul, filthy and obscene language and conduct in and upon its licensed premises on the date alleged, and that the charge in question has been established by more than a preponderance of the believable evidence adduced herein. I therefore concur in the Hearer's findings and conclusions and adopt his recommendations. I shall suspend the license for one hundred thirty days.

Accordingly, it is, on this 10th day of May 1965,

ORDERED that Plenary Retail Consumption License C-166, issued by the Board of Commissioners of the City of Atlantic City to Jeanne's Enterprises, Inc., t/a Le Bistro, for premises 2201 Pacific Avenue, Atlantic City, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1965, commencing at 7 a.m. Monday, May 17, 1965, and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 7 a.m. Friday, September 24, 1965.

JOSEPH P. LORDI
DIRECTOR

2. SEIZURE - FORFEITURE PROCEEDINGS - SPEAKEASY IN BUTCHER SHOP - ILLICIT ALCOHOLIC BEVERAGES, FURNISHINGS, EQUIPMENT AND COMMINGLED CASH ORDERED FORFEITED.

In the Matter of the Seizure on January 17, 1964 of a quantity of alcoholic beverages, $125.77 in cash, various fixtures, furnishings, equipment, and foodstuffs in a butcher shop known as Lou's Market, located at 302 Centennial Avenue, in the Township of Cranford, County of Union and State of New Jersey.	Case No. 11,187 On Hearing CONCLUSIONS AND ORDER

Richard P. Muscatello, Esq., attorney for claimant, Louis M. Dalessandris.
David S. Piltzer, Esq., appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This matter came on for hearing pursuant to R.S. 33:1-66 and State Regulation No. 28 and further, pursuant to a stipulation dated January 14, 1965 signed by Louis M. Dalessandris to determine whether a quantity of alcoholic beverages, $125.77 in cash, various fixtures, furnishings, equipment, and foodstuffs, more particularly described in an inventory attached hereto, made part hereof, and marked Schedule "A", seized on January 17, 1964 in a butcher shop known as Lou's Market, located at 302 Centennial Avenue, in the Township of Cranford, New Jersey, constitute unlawful property and should be forfeited; and further to determine whether the sum of $2,000.00, representing the retail value of said fixtures, furnishings, equipment and foodstuffs, exclusive of the alcoholic beverages and $125.77 in cash, paid under protest by Louis M. Dalessandris, upon said stipulation, should be forfeited or returned to him.

When the matter came on for hearing pursuant to R.S. 33:1-66, Louis M. Dalessandris, represented by counsel, appeared and sought the return of the money deposited by him, on the basis of the stipulation herein signed. At this hearing, it was further stipulated that the records of this Division, including the reports of the investigation herein, the affidavits of mailing and publication, the complete inventory of the seized items and a complete inventory of the stored items of the said seizure, the stipulation dated January 14, 1965 and the receipt and certificate of cash payment shall be admitted into evidence.

The records of this Division reflect the following facts: On January 15, 1964 ABC Agent H Purchased a case of Schaefer beer, 24 - 12 oz. "snap-on" cans, for $3.75 from Louis Dalessandris at a butcher shop located at the above address. This transaction was observed by Agent D at a point of observation outside the premises.

On January 17, 1964 Agent H. again visited Dalessandris' place of business in the company of three other ABC agents and local police officers. Agent H entered the premises alone and again purchased a carton of Schaefer beer and two cartons of Rheingold beer, for which he paid Dalessandris with dollar bills, the serial numbers of which had been previously recorded. Upon emerging from the said premises he showed these alcoholic beverages to the other ABC agents and the local officers who immediately entered the premises and identified themselves.

An examination of the cash register revealed that the "marked" bills were commingled with other cash therein. In the rear of the storeroom, these officers found a large quantity of cans and bottles of beer, as reflected in the inventory herein, which was seized and adopted by this Division.

The records of this Division disclose that no permits were issued to either Dalessandris or to the premises in question authorizing the sale of alcoholic beverages.

Upon questioning Dalessandris, he made a voluntary signed and sworn statement wherein he admitted that he had been a "drop" for one William H. Gall, a truck driver employed by the Pabst Blue Ribbon Company. Gall had delivered to his premises numerous cases of beer consisting of Pabst, Budweiser, Carling's Black Label and Schaefer Beer, for which Dalessandris paid Gall $3.50 a case. The last delivery of this beer was made by Gall to these premises on January 3, 1964. Dalessandris would re-sell these cases at $3.75 a case. He also admitted that he had sold Agent H the beer as hereinabove set forth.

Louis M. Dalessandris was thereupon charged with selling alcoholic beverages without a license on January 16 1964 and January 17, 1964 in violation of R.S. 33:1-50 (a) and possession of alcoholic beverages on January 15 and 17, 1964 with intent to sell the same in violation of R.S. 33:1-50 (b) and R.S. 33:1-2. He was subsequently arraigned in the Cranford Township Municipal Court, indicted by the Union County Grand Jury and convicted in the Union County Court of the said charges.

In his testimony before me Louis M. Dalessandris gave the following account: He admitted selling the beer to "my steady men that came from different companies, like Swift and Company". Also he gave some of the beer away to other customers as Christmas presents and used some of it for himself and his family. He was then asked, "....did you knowingly and with intent to violate this statute sell any beer? A I did".

He stated that he had made a profit of twenty-five cents per case but stated that he didn't know that he had to have a liquor license to sell it at the price that he did. He knew that the retail price was $4.40 per case and he felt that since he was selling it at $3.75 he did not need a license for such transactions. He admitted, however, that when he sold the beer to the agent he said to him, "Look, I have a case of beer. I'll give it to you for what I got it, but I don't have a license to retail it. I'll give it to you for $3.75". Further, "If any one questions you I'm not selling it".

He further admitted that he had sold beer to other customers at his place of residence and that he knew that he had no right to sell alcoholic beverages.

The evidence herein clearly and convincingly supports the Division's contention that the claimant possessed alcoholic beverages, intended the same for unlawful sale and that they were, in fact, sold by him with the full knowledge that such sale was unlawful. Hence, such beverages were illicit. R.S. 33:1-1(i). In addition to the alcoholic beverages, all the furnishings, fixtures, foodstuffs, equipment and all the property seized in the establishment, including the cash, constitute unlawful property and are subject to forfeiture. Seizure Case No. 10,898, Bulletin 1500, Item 2.

Particularly with reference to the cash, the testimony is undisputed that the "marked" bills were clearly commingled with the other cash found in the cash register.

Counsel for the claimant argued that since the claimant has been already sufficiently penalized in criminal proceedings, the Director should exercise his discretionary authority to return the money on deposit.

However, the fact that he was penalized in criminal proceedings is immaterial and does not warrant or justify relief herein Seizure Case No. 7263, Bulletin 812, Item 2. The Director's discretionary authority to return property subject to forfeiture is limited to those cases where it has been established to his satisfaction that the claimant, whose property has been seized, pursuant to the provisions of this section, has acted in good faith and has unknowingly violated the provisions thereof. The admission of the claimant that he knowingly violated the law argues forcefully to the contrary.

Thus, under these circumstances, the Director is without authority to return the seized property. Seizure Case No. 9833, Bulletin 1343, Item 3: R.S. 33:1-66.

The preponderance of the credible evidence herein imperatively requires a recommendation that the claimant's application for the return of the deposit be denied; that an order be entered forfeiting the $125.77 in cash and the alcoholic beverages; and that the sum of $2,000.00 deposited by this claimant, under protest, upon stipulation, pursuant to R.S. 33:1-66 likewise be forfeited and disposed of in accordance with law. Seizure Case No. 10,321, Bulletin 1377, Item 3; Seizure Case No. 10,557, Bulletin 1419, Item 3; Seizure Case No. 10,500, Bulletin 1411, Item 6; R.S. 33:1-1 (y); R.S. 33:1-2.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 4 of State Regulation No. 28.

After carefully considering the entire record herein, including the transcript of the testimony, the exhibits, the argument of counsel for the claimant, and the Hearer's Report, I concur in the recommended conclusions in the Hearer's Report and adopt them as my conclusions herein.

Accordingly, it is on this 3rd day of May, 1965,

DETERMINED AND ORDERED that the cash seized in the sum of $125.77 be and the same is hereby forfeited in accordance with the provisions of R.S. 33:1-66; and it is further

DETERMINED AND ORDERED that the sum of $2,000.00, representing the appraised retail value of the various fixtures, furnishings, equipment and foodstuffs, exclusive of the alcoholic beverages and the aforesaid cash, paid under protest by Louis M. Dalessandris aforesaid, pursuant to the stipulation signed by him, shall be and the same is hereby forfeited in accordance with the provisions of R.S. 33:1-66; and it is further

DETERMINED and ORDERED that the alcoholic beverages, more fully described in Schedule "A", attached hereto, constitutes unlawful property, and the same is hereby forfeited in accordance with the provisions of R.S. 33:1-66, and shall be retained under State Regulation No. 29 for the use of hospitals and state, county and municipal institutions, or destroyed in whole or in part at the direction of the Director of the Division of Alcoholic Beverage Control.

JOSEPH P. LORDI,
DIRECTOR

SCHEDULE "A"

1085 - containers of alcoholic beverages
1 - ice box
2 - meat cutters
2 - freezers
1 - cube steak machine
1 - adding machine
Assorted knives & butcher saws
1 - cash register
2 - scales
1 - meat display box
4 - cutting blocks
1 - cigarette machine
1 - bread rack
1 - check writer
1 - radio
25 - cases of assorted can goods
80 - lb. hams
20 - lbs. miscellaneous cold cuts
30 - lbs. of butter
40 - lbs. of American Cheese
50 - packages of assorted foods (frozen)
50 - cans of frozen juices
1 - gas stove
1 - unit heater
1 - air conditioner
$125.77 - cash

3. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against Nick's Highway 46 Bar and Grill, a N. J. Corp. t/a La Casa Mia 77 Route 46 Lodi, New Jersey Holder of Plenary Retail Consumption License C-19, issued by the Mayor and Council of the Borough of Lodi	CONCLUSIONS AND ORDER

Licensee, by Crescenzo Cutillo, President, Pro se.
Morton B. Zemel, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on April 26, 1965, it possessed an alcoholic beverage in one bottle bearing a label which did not truly describe its contents, in violation of Rule 27 of State Regulation No. 20

Absent prior record, the license will be suspended for ten days, with remission of five days for the plea entered. leaving a net suspension of five days. Re McEvoy, Bulletin 1594 Item 8.

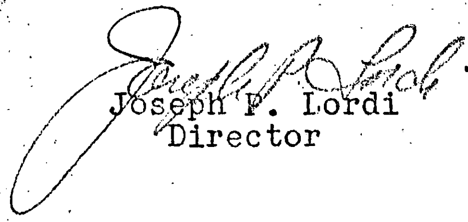
Accordingly, it is, on this 17th day of May, 1965,

ORDERED that Plenary Retail Consumption License C-19, issued by the Mayor and Council of the Borough of Lodi to Nick's Highway 46 Bar and Grill, a N. J. Corp., t/a La Casa Mia, for premises 77 Route 46, Lodi, be and the same is hereby suspended for five (5) days, commencing at 3:00 a.m. Monday, May 24, 1965, and terminating at 3:00 a.m. Saturday, May 29, 1965.

JOSEPH P. LORDI
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Dodd Importers & Distributors, Inc.
337 Fifth Street
Newark, New Jersey
Application filed June 29, 1965 for Plenary Wholesale License.



Joseph P. Lordi
Director

New Jersey State Library