

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

BULLETIN 2370

October 10, 1980

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October 10, 1980

1. APPELLATE DECISIONS - FACES, INC. v. WEST ORANGE.

#4368
Faces, Inc.,
t/a Creation,

Appellant,

v.

Municipal Board of Alcoholic
Beverage Control of the
Town of West Orange,

Respondent.

CONCLUSIONS

AND

ORDER

MUN. REV. 7396

Maurer & Maurer, Esqs., by Harry D. Maurer, Esq., Attorneys
for Appellant.
Matthew J. Scola, Esq., Assistant Town Attorney, Attorney
for Respondent.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: November 29, 1979 - Received: December 4, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision Below
were filed by the parties pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein,
including the transcript of the testimony and the Initial
Decision, I concur in the factual findings of the Administra-
tive Law Judge and adopt same as my conclusions herein.

I further adopt the amendment of the charge to reflect
the correct citation of the Administrative Code violation as
ascertained, sua sponte, by the Administrative Law Judge.
The very function of a de novo appeal is to cure procedural
defects, such as this, where no prejudice results therefrom.
Cino v. Driscoll, 130 N.J.L. 535 (E. & A. 1943).

I do, however, reject those portions of the Initial
Decision which applies incorrect terminology and standard of
review; as an example, the statement that "to suspend same
(a license) rests in the sound discretion of the counsel (sic)
in the first instance."

Initially, the local issuing authority of the Town of West Orange is the Municipal Board of Alcoholic Beverage Control. N.J.S.A. 33:1-19. Thus, the Initial Decision's references to "Council" or "Town Council" are inappropriate and are modified by reference herein to the proper designation, Municipal Board of Alcoholic Beverage Control of the Town of West Orange.

More importantly, in disciplinary proceedings pursuant to N.J.S.A. 33:1-31, the issuing authority must find by a preponderance of the credible evidence only that the licensee is guilty of the alleged violation. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). There is no discretion in such determination, Fanwood v. Rocco, 59 N.J. Super. 306, 317 (App. Div. 1960). Upon review of same by this Division, the Director's function on appeal is to affirm the determination if there is reasonable support from the competent evidence presented to support the findings below. Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957).

I shall affirm the action of the Board based upon reasonable support for its determination in the record presented herein. While the initial altercation may have been spontaneous, the subsequent incidents of violence could have or should have been avoided by the appellant. See Middle Earth, Inc. v. Clifton, Bulletin 2248, Item 2.

Accordingly, it is, on this 14th day of January, 1980,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange be and the same is hereby affirmed, and the appeal herein be and is hereby dismissed; and it is further

ORDERED that my Order of July 2, 1979, staying the suspension pending determination of the appeal, be and is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0722-33-017-001 issued by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange to Faces, Inc., t/a Creation for premises 414 Eagle Rock Avenue, West Orange, be and the same is hereby suspended for three (3) days commencing 2:00 a.m., Friday, January 25, 1980 and terminating 2:00 a.m., Monday, January 28, 1980.

JOSEPH H. LERNER
DIRECTOR

APPENDIX

INITIAL DECISION BELOW

In the Matter of:)
FACES, INC. t/a CREATIONS)

INITIAL DECISION

OAL DKT. NO. ABC 2871-79

Appearances:

Barry D. Maurer, Esq., attorney for Licensee

Matthew J. Scola, Esq., attorney for Respondent

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

This is an appeal from an action of the Town Council of West Orange which by Resolution and Order dated June 21, 1979 suspended Appellant's Plenary Retail Consumption License No. 0722 33 017 001 for the premises located at 414 Eaglerock Avenue, West Orange, New Jersey. Said suspension was to become effective August 18, 1979 and continue until August 21, 1979 for total suspension period of three days. Upon the filing on June 28, 1979 of the Petition of Appeal, the Director of the Alcoholic Beverage Control granted a stay on July 2, 1979 of the Order of Suspension pending determination of this appeal. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The hearing was held on October 18, 1979 and final papers were received by the Office of Administrative Law on October 22, 1979.

The issues of the hearing are whether or not the action of the Council was discriminatory, arbitrary, capricious and unreasonable and therefore contrary to law.

The Council's answers indicate that they heard sufficient credible testimony supporting their conviction of Appellant for allowing, permitting or suffering a brawl on their licensed premise on January 1, 1979 and that they are not guilty of any discriminatory conduct towards Appellant.

The parties stipulated that the matter was to be heard and decided based upon a stenographic transcript submitted to the Court on October 22, 1979 from a hearing held on June 4, 1979 before the Municipal Board of Alcoholic Beverage Control of the Town of West Orange.

The Town presented three witnesses, Gregory Menza, David D'Antonio and Patrolman Dennis Maney of the West Orange Police Department, who testified as follows.

Mr. Menza stated that he and five or six of his friends went to Creations on December 31, 1978 at approximately 11:00 p.m. and that while he was at the premises he observed one of his friends to become involved in a fight. He attempted to intercede and break up the fight which resulted in his being held by two men, whom he did not know and being struck by a third, who he later learned was an employee of Creations named Phillip Sqroi, III. He was unable to identify the individual who struck him but could only state that it was someone wearing a black suit with black hair. He said it happened so fast that he was unable to get a good look at the person. He stated that he was injured as a result of being struck in the face and that he received two stitches in his lip and had a crooked tooth. After the altercation he and his friends were ushered out of the premises and approximately 20 minutes later while he was in his vehicle on the corner of Eaglerock Road and Mt. Prospect Avenue he stopped a patrol vehicle passing by and informed the police officer of what had occurred.

Under cross-examination Mr. Menza stated that he had been to the establishment once before, the prior year. When questioned with regard to who was involved in the fight he stated that his friend Joseph Pepperotto and that his observations as to what occurred prior to the fight was that an individual came running across the floor and appeared to tackle his friend, at which point he and several others attempted to separate the parties. He was then knocked down by someone and as he was getting up his arms were held by a person or persons unknown to him and at that time the party wearing the black suit punched him in the mouth. After that the two persons who were holding his arms led him outside of the premises. Approximately five minutes later his friends were led outside. Outside he observed two police officers who were employed by Creations and he informed them as to what had occurred and they told him he would have to call the West Orange Police Department. He then went to call his father from a phone booth on the corner of Mt. Prospect Avenue and Eaglerock Road. While calling his father, police officers from the West Orange Police Department stopped and asked him what had happened and he informed them that he had been assaulted at Creations. The officers returned to the premises, requested Mr. Menza to wait outside while they went in to investigate the matter. Mr. Menza stated that the officers returned from inside the premises and one of the officers informed him that the management would not cooperate with them.

Mr. Menza could not identify any of the individuals involved in the fight with his friend nor could he identify the two individuals who escorted him out of the premises. He said that there was no loud language or words used before the fight occurred. He stated that he filed a complaint with the West Orange Police Department against the individual who struck him but never heard anything with regard to same afterwards. He said the initial fight took place very quickly but it took several minutes for the matter to be brought under control. After his friend was tackled several individuals joined in the assault on his friend and that he and several of his friends attempted to pull the persons off of his friend

and stop the fight. It was at this time that someone hit him, knocking him to the ground and as he was getting up both of his arms were grabbed and he was struck by the employee of Creations.

Mr. D'Antonio testified that he was at Creations on January 1, 1979 with Mr. Menza and while there, though he did not observe the fight to break out, he observed four or five individuals on the ground fighting and other individuals moving in towards the fight from outside. He stated that he first observed Mr. Menza being held by a couple of people and that he saw someone strike him. He stated there was a lot of confusion and commotion after Mr. Menza was hit at which time a bartender, who he knew, held him and moved him towards the back after which he let go of him. At that time he did not observe any of his friends and he walked outside with the bartender. Outside he observed his friends and saw Mr. Menza sitting in his van, his lip bleeding and holding a handkerchief to his face. While waiting a few minutes a police car came by which they stopped and informed them of what had occurred and returned to Creations.

Under cross-examination he stated that he was approximately 10 to 15 feet away from where the fight occurred, that at no time did he hear any loud argument or voices that would indicate something was taking place. He first learned that a fight was going on by the expression of the face of the person whom he was speaking to at the time. He turned around and observed approximately four or five people scuffling on the ground and that he was unable to distinguish any of the individuals in the fight. He then tried to move towards the fight at which time a person who he knew to be a bartender came and restrained him. He stated the only friend he observed in the fight was Mr. Menza and that all he saw with regard to him was his being restrained by two individuals and being struck by a third. He could not identify the individual who struck Mr. Menza but stated that he was a big person with dark hair.

Under redirect he stated that the person he observed to strike Mr. Menza was very large, about six feet tall and had dark hair.

Dennis Maney, a policeman with the West Orange Police Department, stated that he was on duty on January 1, 1979 and his tour was from 11:00 p.m. to 7:00 a.m. While on duty he observed a van on the sidewalk in front of Pal's Cabin on the corner of Mt. Prospect Avenue and Eaglerock Road, which he first thought had had an accident. He observed a couple of guys waving their arms signaling him and that when he stopped his vehicle he was informed by one of the individuals that he was assaulted at Creations. He identified the person who informed him that he was assaulted as being Mr. Menza and observed Mr. Menza to have a split lip and to be very excitable.

They transported Mr. Menza back to Creations while a friend of his, who was much calmer drove the van back. He was informed by Mr. Menza that he and his friends were in the bar when a fight broke out involving some of his friends and other patrons, that the bouncers attempted to break up the fight and he was assaulted by one of the bouncers. Ptl. Maney said either Mr. Menza or one of his friends informed him that the person who struck him was named Phil, that he had a black mustache and was wearing a black vest. He then went into Creations

and tried to get what information he could out of them and that while there he spoke to Richie Mayers who, he was able to ascertain, is the owner. He inquired of Mr. Mayers whether or not he had an employee named Phil, who was a bouncer and that Mr. Mayers did not give him any information at all. He then attempted to ascertain whether there was a Phil employed by the premises from other individuals inside but was unsuccessful. He observed that most of the bouncers were wearing black vests and were all pretty big individuals.

He characterized Mr. Mayers as being uncooperative and stated that he then spoke with a Mr. Argenci who did help him in finding the liquor license but was unable to inform them of an individual employed by the name of Phil.

Both parties were described as being polite and courteous but did not cooperate in identifying anyone with the name of Phil. He then informed Mr. Menza that he would have to make a complaint with the Court Clerk of the Town of West Orange and that a detective would follow it up.

Under cross-examination he stated that Mr. Menza, who he had observed with a split lip, could not identify his assailant other than describing him as being large and having a black vest. He had attempted to locate the individual named Phil within the premises and wished to bring him out to be identified but since he could not locate anyone named Phil he was unable to do so. He was advised by Mr. Menza that he had been involved in a ruckus inside prior to being ejected and that Mr. Menza felt there was no reason why he should have been assaulted after he was restricted by two bouncers.

Mr. D'Antonio, who appeared to be much calmer than Mr. Menza, was questioned by the officer and advised the officer that Mr. Menza was assaulted by a bouncer or an employee of Creations. He also said that he questioned Mr. Menza and his friends as to whether or not they would be able to identify the person who struck Mr. Menza and that someone said that they could.

When he first arrived at Creations after having spoken with Mr. Menza he observed two special police officers outside who informed him that they did not see anything and that whatever occurred had happened inside. He then met Mr. Mayers outside the premises prior to entering and Mr. Argenci was with him. He related to Mr. Mayers and the other individual the reason he was there but was unable to ascertain anything from Mr. Mayers. He was never informed of anyone named Phil that was employed with the place and it was Mr. Argenci who identified himself as the manager who gave him the address of the premises. He was then asked if it was possible that he was spelling the name incorrectly, that the name of the party he spoke with was Ragonesi and the officer said it was possible. The officer was unable to identify the party who identified himself as the manager and in fact pointed out a Mr. Luongo as being the party. He testified that both individuals admitted to him that there was a fight in the place and that the individuals standing outside where the persons ejected. He did not recall ever seeing an employment list.

Under redirect Ptl. Maney stated that both Mr. Mayers and Mr. Argenci were uncooperative and evasive in responding to whether or not there was an individual named Phil employed with the premise but other than that they were courteous. He also said that he never received a call from Creations about the disturbance and only became aware of same after observing the van.

The Township rested its case and Respondent then presented two witnesses, Mr. Phillip Anthony Sqroi, III and Thomas Ragonesi. Mr. Sqroi testified that he is in charge of security with the Respondent, Creations, and has been for the past three and one half years. More specifically he was on duty and acting in such capacity on the date the incident occurred. He said he detected a skip in the record, looked in the direction of the DJ's booth and observed what he described to be a couple of guys more or less scuffling. He then noticed the emergency light, which is a flood light which flashes on and off, to indicate there was some kind of disturbance, either a fight or a problem with someone at the bar who didn't want to pay. He observed two other bouncers already there, he made the third. The bartender made a fourth and two additional individuals from the other side of the room assisted, making the total six in assisting in the stopping of the fight. When he first observed the individuals he stated that they were merely squared off and not fighting. He did not observe anyone get hit and did not observe Mr. Menza and the group of individuals involved in the scuffle.

Upon bringing the matter under control he observed Mr. Menza as he was being escorted out of the premises and observed that he seemed to be bleeding from his face. Prior to his being escorted from the premises Mr. Sqroi asked Mr. Menza what was going on and was informed it was none of his business that he would take care of it. At this point he was told that if he would not tell him what the fight was about he would have to leave. Mr. Menza was then ejected from the club. He said approximately five or six people were ejected from the club because they were involved in the disturbance and he did not want any repercussion. He said that the individuals did not understand why they had to leave. The fight took approximately four to five minutes to bring under control. He admitted that his name was Phillip and he is known as Phil but denied striking Mr. Menza or anybody else on that night.

When questioned with regard to his training in the security field he stated that he was not trained specifically in security but by using his physical prowess, weight lifting, strength and parts of martial arts, he is able to control crowds and fights. He did not report this incident to anybody in management superior to himself nor were the police notified. He said that management, particularly Thomas Ragonesi, who was the manager, was present on the premises and was knowledgeable as to what had happened. According to his admission there were no other individuals employed or connected with the establishment by the name of Phil.

Under cross-examination he stated that he had the mustache on January 1, 1979, was six feet one inch, weighs 240 pounds and was wearing a black vest. He admitted to being involved in breaking up the fight but denied laying a hand upon any person or ushering anyone out. He did not observe any police officers in the premises that evening nor was he aware of anyone making any inquiry with regard to whether or not there was a "Phil" employed on the premise that evening. Additionally he did not notify anyone from West Orange Police Department directly nor was he aware of anyone else contacting them either that night or the following day. It was the general practice of the establishment to maintain peace and order within their own premises and settle any fights that broke out themselves.

Mr. Ragonesi testified that he was employed as a manager of Creations on the night in question and had been employed by them for approximately 14 months. He was on duty on the night in question and part of his duties was to supervise the security force. He admitted to witnessing an incident or altercation at approximately 1:30 a.m. January 1, 1979. He observed the end of the scuffle and when he arrived, Phil, one of the security men, was requesting some of the people to leave and the bartender was arguing with someone he was restraining. The bartender informed Mr. Ragonesi that he knew the fellow that he was talking to and that he agreed to leave the premises and was escorted off same. He did not observe anyone fighting but admitted to observing Mr. Menza after the altercation and noted that he was bleeding from his lip. He stated that he asked Mr. Menza what the problem was and was informed that it was a private matter and he did not give it any additional thought. Subsequently thereto he became aware that police officers of the West Orange Police Department were outside. He made these observations when he went outside to inform his special policemen that the persons previously ejected from the club were not to be admitted under any circumstances. While outside the premises, he observed Mr. Rich Mayers, the owner of the club, who appeared to be upset, conversing with the police officers. He approached Mr. Mayers and the officers but did not hear any questions or inquiries made as to a bouncer or employee named Phil. He informed Mr. Mayers that he would handle the matter personally. He was then asked for the liquor license of the establishment and informed the officer that he could come back to the establishment with him and look at same and anything else that he wished to. At that time the officer said fine, but informed him that he had another matter that he had to attend to and left. He said that he made known to the officers that on behalf of the management he would display any personnel list for their identification. He was at the premise until 4:00 a.m., left, showered, shaved and returned at 9:00 a.m. and was on the premises for the next 23 hours thereafter. During the period that he was there no one came to look at the employees list nor were any additional inquiries made to his knowledge.

Under cross-examination he stated that he remembered the officer saying that the person who assaulted Mr. Menza was an employee and that he had the officer come inside the club and showed him the employees list. In addition the officer passed Phil, who at that time was operating the door, but the officer never said anything to him. He also informed the officer that he could return at 9:00 a.m. and look at the entire staff and identify the individual he wished. He was positive that the officer did not ask him whether or not there was an employee named Phil nor did Phil ever come out into the parking lot.

Under redirect he stated that it was not his testimony that he was not asked about Phil but merely that he did not recall being asked and due to the various parties arguing back and forth he could have possibly been asked the question and did not hear it. He also said that he felt that Mr. Mayers did not handle the matter correctly and informed him that he would take care of it since that was what he was getting paid for. Mr. Mayers left and went back into the premises. He admitted that he did not contact West Orange Police Department and did not feel it was necessary since they appeared at the premises shortly after the incident.

The patrolman was then recalled for one question and both parties rested their case.

After having reviewed all of the testimony of the witnesses for both sides and having considered the entire record together with the arguments of counsel, the Court makes the following findings of fact:

1. There was a proposed suspension of the liquor license in question for a three day period for allowing, permitting or suffering a brawl on the licensed premises and that said suspension was held in abeyance pursuant to an Order of Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control.
2. That on January 1, 1979 at approximately 1:30 a.m. a fight occurred involving four or five patrons in the establishment.
3. That approximately six employees of the establishment were involved in breaking up the disturbance.
4. That Gregory Menza was a participant in the fight.
5. That two employees removed Mr. Menza from the fight by restraining both of his arms.
6. That Phillip Sqroi, III did strike Mr. Menza in the face causing him to sustain a split lip and crooked tooth.
7. That all participants involved in the fight were ejected from the club.
8. That no one employed or directly connected with the club notified the West Orange Police Department with regard to the disturbance.
9. That Ptl. Maney was informed with regard to the disturbance by Mr. Menza.
10. That Ptl. Maney investigated the matter at the club.
11. That Mr. Ragonesi, the manager, and Mr. Mayers, the owner, did not fully cooperate with the officer in his making his inquiry.

To grant or deny an alcoholic beverage license or suspend same rests in the sound discretion of the counsel in the first instance. In order to prevail in this appeal the Appellant must show the actions of the counsel were unreasonable and constitute a clear abuse of their discretion. The burden of proof in establishing that the action of the Council was erroneous rests entirely with the Appellant and the decision of the Town Council should not be reversed unless the Court finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Council.

The responsibility of the licensee is to maintain its premises in an orderly and lawful fashion and be responsible for conditions both inside and outside of the licensed premises that are caused by the patrons thereof. It is also clear that a licensing authority such as a Town Council has the right to exercise discretion to determine what, in light of the surrounding circumstances or conditions, is good for the Town of West Orange.

The Court notes that the Town Council cited the Respondent for violation of N.J.A.C. 13:2-23.1. The Court, by its own motion, hereby amends same to a violation of N.J.A.C. 13:2-23.6. The Court makes this amendment based upon the following. N.J.A.C. 13:2-23.1 specifically deals with the serving of minors and intoxicated persons while N.J.A.C. 13:2-23.6 deals with brawls, acts of violence, disturbances or unnecessary noises. Since this matter specifically pertains to a brawl, act of violence or disturbance, the Court must amend the complaint to cite the proper administrative code.

Since the Court has found as a fact that a fight did occur on the premises through it might have been spontaneous the Court also found as a fact that one of the employees, more particularly Phillip Sqroi, III, did involve himself in the matter and assaulted one of the witnesses who testified on behalf of the Township. I make this determination based upon what I contend to be the credible testimony. More particularly that testimony presented by Mr. Menza, Mr. D'Antonio and Ptl. Maney. Mr. Menza and Mr. D'Antonio's testimony was circumstantial in nature but Ptl. Maney's testimony, as a disinterested party in the matter, was more convincing. He stated he inquired whether or not there was an employee by the name of Phil with the establishment, and that he never received an answer with regard to same, and that he did not see an employee list as testified to by the Respondents. Since this Court may only reverse the Council's action if it finds that the Council was unreasonable in it's findings or that same constituted a clear abuse of its discretion and the Court did not so find the Court must affirm, the Municipal Board of Alcoholic Beverage Control of the Town of West Orange. Therefore the COURT CONCLUDES that there was substantial evidence in the record before it to support and justify the decision of the Town Council of the Town of West Orange. I find that the Council's action was not unreasonable nor was it arbitrary or capricious. Accordingly it is HEREBY ORDERED that the suspension of the license of Creations by the Town Council of the Town of West Orange is UPHELD.

This decision shall not become final until forty-five (45) days after agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

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

2. APPELLATE DECISIONS - FACES, INC. v. WEST ORANGE.

#4369
Faces, Inc.,
t/a Creation,

Appellant,

v.

Municipal Board of Alcoholic
Beverage Control of the
Town of West Orange,

Respondent.

CONCLUSIONS

AND

ORDER

Maurer & Maurer, Esqs., by Barry D. Maurer, Esq., Attorneys
for Petitioner.
Matthew J. Scola, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: December 4, 1979 - Received: December 6, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision below
were filed by the parties pursuant to N.J.S.A. 13:2-17.14.

Having carefully considered the entire record herein,
including the transcript of the testimony and the Initial
Decision, I concur in the factual findings of the Adminis-
trative Law Judge and adopt the same as my conclusions
herein.

However, I must again note, as I did in the previous
matter involving the appellant, my rejection of the principle
of law which was applied as a determinant in this matter.
The Administrative Law Judge states: "In order to prevail
in this appeal the appellant must show that the action of
the Council was unreasonable and constituted clear abuse
of their discretion."

This is an appeal from the action of the respondent
in disciplinary proceedings instituted pursuant to N.J.S.A.
33:1-31. Respondent found, by a preponderance of credible
evidence, that the appellant was guilty of the alleged

violation. Discretion has nothing to do with this matter reasonable or otherwise. In disciplinary matters, such as the one sub judica, the respondent's discretion has nothing to do with the findings of the underlying facts. If the evidence is not there, no amount of discretion can supply the deficiency.

Thus, the Director, on appeal, is called upon, on review, merely to decide disputed questions of facts. Fanwood v. Rocco, 59 N.J. Super. 306, 317 (App. Div. 1960); Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super (App. Div. 1956). See Nordco, Inc. v. State, 43 N.J. Super 277 (App. Div. 1957).

I also want to point out that although I will affirm and reimpose the penalty recommended in the Initial Decision, I believe that is considerably less than the usual fifteen (15) day suspension precedentially imposed for similar violations by this Division, I emphasize this because I believe that there are aggravating circumstances reflected in the record herein.

Accordingly, it is, on this 16th day of January, 1980,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange 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 dated July 2, 1979 staying the suspension pending determination of this appeal be and is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0722-33-017-001 issued to Faces, Inc., t/a Creation for premises 414 Eagle Rock Avenue, West Orange, be and the same is hereby suspended for three (3) days commencing 2:00 a.m. on Friday, February 1, 1980 and terminating 2:00 a.m. on Monday, February 4, 1980.

JOSEPH H. LERNER
DIRECTOR

APPENDIX
INITIAL DECISION BELOW

In the Matter of:)	
FACES, INC. t/a CREATIONS)	<u>INITIAL DECISION</u>
vs.)	OAL DKT. NO. ABC 2872-79
WEST ORANGE BOARD OF ALCOHOLIC BEVERAGE CONTROL)	Agency Dkt. No. 4369
)	

Appearances:

Barry D. Maurer, Esq., attorney for Petitioner

Matthew J. Scola, Esq., attorney for Respondent

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

This is an appeal from an action of the West Orange Board of Alcoholic Beverage Control, which by Resolution and Order dated June 21, 1979, suspended Appellant's Plenary Retail Consumption License No. 0722 33 017 001 for premises located at 414 Eaglerock Avenue, West Orange, New Jersey. Said suspension was to become effective on August 15, 1979 and continue until August 18, 1979 for a total suspension period of three days. Upon the filing on June 29, 1979 of the Petition of Appeal, the Director of the Division of Alcoholic Beverage Control granted a stay on July 2, 1979 of the Order of Suspension pending determination of this appeal. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The hearing was held on October 18, 1979 and the final papers were received on October 19, 1979.

The issues of the hearing are whether or not the action of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange was discriminatory and therefore unconstitutional and whether or not the action of the Council was arbitrary, capricious and unreasonable and therefore contrary to law. Council's answers indicate that they heard sufficient credible testimony to support a conviction. They also contend that the proposed suspension for a period of three days was not excessive or discriminatory in view of the serious nature of the complaint.

The Town presented two witnesses, Pamela Louise Parillo and Albert Michael Parillo.

Ms. Parillo stated that on February 2, 1979 she went to Creations in West Orange with her boyfriend to see the Johnny Winter group perform. At the time she went she was only 17 years old and her birthday was not until October 23, at which time she would be 18. She arrived at Creations at approximately 10:30 p.m., produced her ticket for admission and entered the premises without being asked her age or for any identification. She was at the performance until 12:30 a.m. when she left due to her feeling ill from consuming two beers and a White Russian while on the premises. After she left the premises she was stopped by a policeman and did not remember anything else except being at police headquarters and being brought home by her parents.

Under cross-examination she stated that on February 2, 1979 she was still attending high school. On the night in question, which was a Friday, her boyfriend picked her up at her home and that she arrived and entered the premises at approximately 10:30 p.m. The ticket she presented to the collector had been purchased by her boyfriend the week prior. When questioned as to the age of her boyfriend she responded that he was 19 years of age. She admitted that she was aware that she was going to attend the concert of the Johnny Winter group and that the premises served alcoholic beverages, however, she was not aware that she would need proof of age to attend the performance. When questioned with regard to a description of the exterior of the premises from which she entered she stated that her boyfriend parked his vehicle in the rear of the premises and they proceeded to the front, went up to the door where there were several people waiting to enter ahead of her. She went up some steps but did not recall whether or not the door was open or closed and proceeded to enter the premises. Her boyfriend entered prior to her and she entered with a group of her friends who arrived at approximately the same time that she did. She entered what she said was the front of the premises, that after entering she possibly might have had to enter another door in order to get into the actual premises, but she did not recall where the ticket taker was located. She stated he was either at the door or inside the door but she was not certain. She said she entered the establishment with four friends, two boys and two girls. She vaguely recalls seeing persons asking other people for their identification as to age but felt that she might have been confused with the ticket taker versus a person taking identification. She said she was never asked for any form of identification nor questioned as to her age. She did not observe any signs posted in the hall or lobby having to do with age or identification.

Once she entered the premises she and her boyfriend proceeded in the direction of the bar and sat on a ledge next to it. She admitted that while on the premises she consumed two beers and a White Russian. She did not purchase all of the beverages and believed that she purchased only a beer.

She left the premises with her girlfriend at approximately 12:30 a.m. and intended to go home in her boyfriend's car. She was not certain whether or not her boyfriend left with her and candidly admitted that she was drunk and that everything that occurred was rather foggy in her mind. She did not recall anything else and only remembered being in the police station and seeing her

parents come in and take her home. She was then showed an incident report with regard to the matter and asked whether it refreshed her recollection to which she answered that she did not even remember what had occurred the day after the incident.

When questioned with regard to whether or not she had any identification on her on the date in question she replied no. She did not have her pocketbook with her on the night in question. She also admitted that she did not have any money on her and the money she used to purchase the beer with came from her boyfriend.

When questioned where she had been immediately prior to attending Creations she said she had attended school that day, after which she went home, had dinner and did not consume any alcoholic beverages while at home or at her boyfriend's home.

Under redirect examination, when asked whether anyone at Creations asked her to sign any papers as to her age she responded no. She also admitted to being drunk when she left the establishment. When questioned as to physical characteristics on the night in question she stated that her height was about five foot one and a half inches and she weighed approximately 100-102 pounds.

Under recross-examination she was shown a cardboard sign and asked if she could identify it and she stated that she had never seen it before.

Mr. Albert Parillo, father of Pamela, testified that on February 2, 1979 his daughter was 17 years old and that her date of birth was October 23, 1961. When questioned with regard to what time his daughter left home he could not remember and in fact believed that she left prior to his arriving home from work at around 7:30 p.m. or 8:00 p.m. that evening.

The municipality then rested its case.

Respondents called the following witnesses, Phillip Anthony Sqroi, III, Louis Dominick La Torre, Robert Clyde MacMoyle, who testified as follows.

Mr. Sqroi, III, who was the floor manager and head of security on the date in question testified that he had been so employed for approximately the past two and one half to three years and was employed by Faces all together for five years. He was working the door on February 2, 1979 and had instituted the policy that all persons entering upon the premises when the doors are open must be checked for identification by presenting two forms of identification. This policy included ticket holders as well as nonticket holders. He and another individual manned the door on the night in question and checked all parties entering the premises except those individuals he knew personally or individuals who it was quite obvious are over the required age. To his knowledge this policy of checking identification had been in existence for the past five years.

On the night in question there were approximately 500 patrons attending the performance and the doors for the club opened at 8:30 p.m. At that time he yelled to the crowd that if they had a ticket hold it up plus present their two

forms of identification and come forward. The individual would then enter the front lobby doors at which point he was standing with another employee and they checked each individual's forms of identification. Upon leaving the entrance they would then proceed to the second set of doors where the ticket collector is located, present their ticket and enter the premises. The other person working the door with him on the night in question was Louis LaTorre. They took turns admitting persons, he would take the first person and LaTorre would take the second person, checking their identification and admitting them. They continued this routine and remained at the door from approximately 8:30 p.m. until 11:00 p.m. or 11:30 p.m. At that point he entered the actual main room of the club and checked on the other security personnel he had working for him. He said Mr. LaTorre remained at the door to continue to check identification and to regulate the amount of patrons that would be admitted to the premises.

He had three or four police officers outside of the premises to maintain the orderly inflow of patrons to the premises and parking lot. He could only recall that Robert MacMoyle was one of the officers on duty on the night in question. He was then asked to look at Pamela Parillo and asked if he had ever seen her prior to her testifying before the Board on June 4, 1979 to which he responded no. He also stated that Ms. Parillo did not fall within the category of individuals who, in his judgment, were obviously over the proper age.

He identified the sign advising patrons to have two forms of identification ready as being physically removed from the lobby of Creations. The poster, according to his testimony, was on a podium as you enter the first set of doors on the premises.

Under cross-examination he said that the Johnny Winter group was performing on Friday and Saturday night and that his performance on Friday night began at approximately 12:00 p.m. There was a group which preceded them whose name he did not recall but he remembered that Johnny Winter began performing at approximately 12:00 p.m.

When questioned with regard to when most of the people arrived for the performance it was his testimony that the bulk of them arrived at approximately 10:00 p.m. or 10:30 p.m. When questioned with regard to whether or not he remembered Ms. Parillo he said that he could not say whether she was or was not at the performance and that he did not get any written statement from her as to her age.

Under redirect examination he could not recall her leaving the premises either.

The Counsel then questioned him with regard to the lighting in the lobby and he stated that there are four flood lights which hit the actual front of the building and in the lobby there are approximately 12 track lights which illuminate same. He was asked whether or not persons are proofed when they purchase their tickets and he stated no because they get proofed when they enter the premises. Additionally he was asked whether or not any precautions are taken by the bartenders to prevent serving minors and it was his testimony that there are none because the bartenders rely totally upon the doormen to check identification.

Under redirect examination he stated that the general forms of identification required are a drivers license accompanied by a county ID or a county ID accompanied by a birth certificate or a college ID accompanied by a drivers license. Of all the forms of identification he named he prefers a drivers license since it contains all the material necessary for a proper identification on the face of it.

Louis LaTorre testified that he was employed by Creations in the capacity of a doorman, which is connected to the security force, and was so employed on the night of February 2, 1979. The purpose of his job was to stand at the door and check ID's as parties enter and that he did so on the night in question from 8:30 p.m. on. He said that Mr. Sqrio also worked the door with him on the night in question and that he observed him to also check two forms of identification of parties entering.

When questioned as to how many persons might enter the premises at any one time he stated that only two could enter at any given time due to the manner in which he and the other doorman were positioned to check ID's. He was then asked to view Ms. Parillo and state whether or not he had seen her before and he said he had not. He said on the night in question he did not allow anyone to be admitted to the premises who did not furnish at least two forms of identification. He did not remember Ms. Parillo to enter or leave the premise that night.

When questioned whether or not he was aware that the young lady was found drunk in the parking lot on the night in question he stated he was not and that it was never brought to his attention by the West Orange Police Department or any of the officers they had employed. He said that from his observations of Ms. Parillo he would have double checked her identification because she looked very young and would have had her sign her name so that it could be checked against her license for further verification.

When asked whether he had her sign her name on the night in question he answered that he had never seen her before. He said on the night in question he had approximately 10 to 20 people sign their names to be checked against the signature on their drivers license but clarified that figure that it was only a guess and not actual figures.

He recalled people leaving prior to the completion of the Johnny Winter performance but could not identify any of them. He said that when he testified that he did not see her it was only that he did not recall seeing her on the night in question.

When questioned with regard to approximately how much time it took to properly handle the review of identification presented, he stated from one minute to two minutes depending upon the age appearance of the individuals. Additionally when parties are standing waiting to be admitted there is no space between them for another party to squeeze through. He admitted to having admitted several individuals who did not satisfy the requirements of proof.

Robert MacMoyle then took the stand and testified that he was the special police officer on duty on the night in question. He said that during various times of the evening he would go inside the first entrance to warm up and observed the doorman to check identification of parties entering the premises. He remained inside approximately five to ten minutes on the various occasions that he was there.

He arrived, on the night in question, at work at approximately 8:00 p.m. and there was a large crowd outside but the doors were closed. His duties at the time when the doors opened were to see that the crowd was orderly, to separate those individuals having tickets from the non-ticket holders and to prevent anyone from being injured while trying to enter the premises.

While in the premises he observed there to be two sets of double doors, the closest being the ones you immediately enter and present your identification and the second set are the ones you enter and present your ticket for entry into the premises. He stated that he observed, on the night in question, persons being turned away at the door for not having the proper identification. He did recall Ms. Parillo being questioned by police officers towards the end of the evening. He recalled, just prior to observing Ms. Parillo, that he had been touring the rear of the parking lot and that he observed an unmarked police vehicle. He and the occupant of the unmarked vehicle spoke and then it proceeded to drive out of the property and he began walking towards the front of the premises. When he got to the driveway at Eaglerock Avenue he observed the officers questioning a young lady. He went over to give what assistance he could and noted that Ms. Parillo was drunk. He also observed that she did not have a pocketbook or coat with her and she was given a jacket or coat by another female. His observations were made approximately 30 feet from the front door of the premises. He did not see her exit the premises on the night in question.

After having reviewed all the testimony and the witnesses for both sides and having considered the entire record together with the arguments of counsel, the Court makes the following findings of fact:

1. There was a proposed suspension of the liquor license in question for a three day period for serving, selling, delivering or allowing, permitting or suffering the sale or services or delivery of an alcoholic beverage directly or indirectly to any person under the age of 18, and that said suspension was held in abeyance pursuant to an order of Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control.
2. On February 3, 1979 at approximately 12:30 a.m. Ms. Parillo was arrested for being under the influence of an alcoholic beverage while on the premises of Creations.
3. That she was served said beverage by Faces t/a Creations.
4. That at the time of her consuming said alcoholic beverage she was 17 years of age.
5. That Petitioner presented false identification in order to gain admission to the premises.

The grant or denial of an alcoholic beverage license rests in the sound discretion of the Council in the first instance. In order to prevail in this appeal the Appellant must show that the action of the Council was unreasonable and constituted clear abuse of their discretion.

The burden of proof in establishing that the action of the Council was erroneous rests entirely with the Appellant and the decision of the Town Council should not be reversed unless the Court finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Council.

The Court notes that N.J.A.C. 13:3-23.1 deals with serving minors and intoxicated persons and in Paragraph A states that no licensee shall sell, serve or deliver or allow, permit or suffer the sale, serve or deliver of any alcoholic beverages directly or indirectly to any person under the age of 18 years or allow, permit or suffer the consumption of any alcoholic beverage by any person in or upon the licensed premises. Additionally N.J.S.A. 33:1-77, which also deals with sales to minors and characterizes it as a misdemeanor outlines the defenses that must be established in order to rebutt the state's case. N.J.S.A. 33:1-77 reads as follows: "Anyone who sells any alcoholic beverage to a minor is a disorderly person provided, however, that the establishment of all the following facts by a person making any such sale shall constitute a defense to a prosecution thereof:

- (A) That the minor falsly represented in writing that he or she was 21 years of age or over
- (B) That the appearance of the minor was such that an ordinary prudent person would believe him or her to be 21 years of age or older
- (C) That the sale was in good faith, relying upon such written representation and appearance in the reasonable belief that the minor was actually 21 years of age or over.

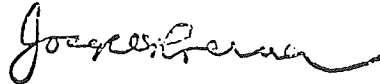
State v. Conner 149 N.J. Super. 319 (1977) at page 322 states, with regard to the issue of presentation of bogus identification cards falling within the pervue of representations in writing so as to satisfy Section A that "a false presentation of identification does not satisfy the writing provision of Section A because the drivers license, draft card, social card, is not a writing in the hand of the minor falsely representing their age as over 18."

I THEREFORE CONCLUDE that even if the minor did present false identification it is not sufficient to satisfy the defense to the statute. Therefore this court finds that there is substantial evidence in the record before it to support and justify the decision of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange in suspending Plenary Retail Consumption License No. 0722 33 017 001 for a period of three days for the premises located at 414 Eaglerock Avenue, West Orange, New Jersey.

Accordingly, IT IS HEREBY ORDERED that the suspension of the license of Faces, Inc. t/a Creations by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange BE AFFIRMED.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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



Joseph H. Lerner
Director