STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Dr. Cranford, N.J. 07016

BULLETIN 2119 October 16, 1973

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ITEM

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1. COURT DECISIONS - 1608 NEW YORK AVENUE CORP. v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2099-71

1608 NEW YORK AVENUE CORP.,

Defendant-Appellant,

v.

STATE OF NEW JERSEY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Plaintiff-Respondent.

Argued January 22, 1973 - Decided August 23, 1973.

Before Judges Fritz, Lynch and Ackerman

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

Mr. Vincent L. Verdiramo argued the cause for defendant-appellant.

Mr. Michael S. Bokar, Deputy Attorney General, argued the cause for plaintiff-respondent (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

PER CURIAM

(Appeal from the Director's decision in Re 1608 New York Avenue Corp., Bulletin 2046, Item 2. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. APPELLATE DECISIONS - BELL BEEF CO., INC. v. MATAWAN.

Bell Beef Co., Inc., t/a Foodtown of Matawan,

Appellant,

v.

Borough Council of the Borough of Matawan,

Respondent.

On Appeal

CONCLUSIONS and ORDER

DeMaio & Yacker, Esqs., by Vincent C. DeMaio, Esq., Attorneys for Appellant
William E. Russell, Esq., Attorney for Respondent
Melvin N. Fine, Esq., by Joseph P. McManemin, Esq., Attorney for Objectors
Kalman Geist, Esq., Attorney for Objectors

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal initially taken to the action of the Borough Council of the Borough of Matawan (hereinafter Council) which on December 4, 1972 denied appellant's application for a person-to-person and place-to-place transfer of the plenary retail distribution license from Joanne W. Hartman to appellant and from 116 Main Street to 124-126 Main Street, Matawan. On January 29, 1973 the appeal was listed for hearing in this Division and it appeared that the action of the Council was predicated upon an imperfect application rather than the substance of the application itself. Thereupon the parties were advised to correct the imperfections, resubmit the application and, if further appeal was necessitated, to return for a de novo hearing upon proper notice.

A revised application for person-to-person and place-to-place transfer of said license followed, which resulted in a resolution of the Council adopted May 15, 1973, by which the person-to-person transfer to appellant was approved but the application for place-to-place transfer of the said license from premises 116 Main Street to 124-126 Main Street was denied; whereupon appellant reinstituted its petition of appeal.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with the parties being afforded full opportunity to introduce evidence and cross-examine witnesses.

Appellant contended that the action of the Council was

arbitrary, particularly in that it had advanced before the Borough an application meeting all of the requirements of the Borough for anticipated approval of its application. The Council denied this contention.

The factual area of the controversy is not in significant dispute. A distillate of the factual background leading to this appeal, as well as the testimony taken before this Division, is as follows: Appellant owns and operates what may be termed a supermarket on Main Street, which is the major commercial thoroughfare of the municipality. Along the same side of Main Street, about two hundred feet distant, is the location of the subject plenary retail distribution license the Cork 'n Bottle, being the trade name of the licensed premises from which application to transfer had been made. Midway between them is another retail distribution licensee - the Matawan Wines & Liquors - one of the objectors in this proceeding.

The initial application for transfer by appellant was rejected by the Borough on the basis that the application did not define the specific area of appellant's store in which alcoholic beverages would be purveyed, hence was deficient in that regard. As noted above, appellant did thereafter submit a detailed floor plan of its store and sketches showing the proposed location of the liquor dispensing facility, which plans and sketches were admitted into evidence at the hearing in this Division.

Prior to the hearing on the application by the Council, petitions numbering several hundreds were received, both in favor of and objecting to the grant of transfer. These petitions were likewise accepted into evidence. An extract copy of the minutes of the meetings of the Council for its meetings of May 1 and May 15, 1973 were offered into evidence in conjunction with testimony of Mrs. Madeline H. Bucco, Borough Clerk.

By stipulation of counsel, copies of running correspondence between appellant's counsel and the Council's attorney, covering a period from January 30, 1973 to March 22, 1973, were also admitted into evidence along with plans of proposed location, alternative preliminary plans and a final plan, all of which had been discussed with the Council.

Appellant introduced testimony of one of its officers and a corporate owner Calvin M. Bell. He recounted in detail all of appellant's efforts to satisfy the many requirements of the Council preliminary to its hearings on May 1 and May 15. By reference to the sketches in evidence, he explained that a portion of appellant's store was to be set aside for the liquor establishment and that portion would embrace about 740 square feet of an estimated 10,000 to 12,000 square feet of the entire store. Additionally, a separate storage area in the basement would be set

aside for alcoholic beverages and would be locked. A long dairy counter in the store would serve as one interior wall to the liquor area, above which would be a lattice enclosure to prevent any ingress over the dairy cases. Additionally, there would be a separate entrance to the area within the store with a separate cash register. In short, the licensed area would be a closed, self-contained, partitioned unit within the store itself. Bell further explained that he had the clear impression that, as the separation of the area within the store was as a result of the composite suggestions of the members of the Council, its initial objections had been fully satisfied.

Councilman Donald T. Day testified on behalf of the Council and referred to the Council minutes of the meeting of May 1, an extract of which had been received into evidence. He described the May 1 meet .ng as an active session at which sixty or more protestors appeared to register objections to the transfer. He recounted a meeting with the Council prior to a caucus meeting of the Council at which several questions had been posed by councilmen, to which appellant responded. He denied that assurance had been given to appellant that the Council would act favorably upon its application.

Councilman Day outlined his reasons why the approval of the place-to-place transfer would not be in the best interests of the community: (1) the proposed transfer to a supermarket would reduce the value of satelite stores in the area; (2) police protection is more difficult when the licensed premises has no public entrance independent of the main store; (3) younger people employed in a supermarket would find an easy access to alcoholic beverages, and (4) a family-type store dispensing alcoholic beverages is preferable to a supermarket.

The councilman also noted that he and his colleagues had been influenced both by the petitions and objectors, but were more strongly influenced by the latter. The resolution had been adopted by a three-to-two vote, with the Mayor abstaining for personal reasons.

The burden of establishing that the action of the Council in granting the transfer was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15. It has been consistently ruled that no one has a right to the issuance or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct. 1946); Biscamp v. Teaneck, 5 N.J. Super. 172 (App.Div. 1949). The decision as to whether or not a license will be transferred to a particular locality rests in the first instance within the sound discretion of the local issuing authority. Hudson-Bergen County Retail Liquor Dealers Assn. v. North Bergen et als., Bulletin 997, Item 2. Where there is an honest difference of opinion in the exercise of discretion for or against the transfer of a liquor license, the action of the issuing authority relative to transfers should not be disturbed. Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App.Div. 1954). A local

issuing authority has been held to possess wide discretion in the transfer of a liquor license, subject, of course, to review by this Division in the event of any abuse thereof. Passarella v. Atlantic City, et als., 1 N.J. Super. 313 (1949).

In Fanwood v. Rocco, 33 N.J. 404, 414 (1960), Justice Jacobs stated:

> "Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for a tavern or package store license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him.... Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable ...."

In short, the action of the municipal issuing authority should not be reversed by the Director unless he finds the "act of the board was clearly against the logic and effect of the presented facts." Hudson-Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502, 511. Cf. Teofilak v. Wildwood et al., Bulletin 1782, Item 2.

The adopted resolution complained of articulated the Council's reasoning: (a) all of the plans, petitions and testimony of interested parties were considered; (b) the residents were overwhelmingly against the transfer; (c) the security plan presented was not satisfactory; (d) the present close proximity of existing liquor stores is preferable to a license being issued to appellant's food store. The minority voicing approval of the transfer, as indicated in the resolution, reasoned that the transfer would not increase the present number of licenses and hence the grant of application would not be unreasonable.

Reference was made to the value of the numerous petitions filed both for and against the application. From the text of the petitions it is apparent that they represent petitions of convenience rather than positive expressions of local sentiment. Furthermore, while a petition serves as a convenient medium for presenting to the governing body the views of a group, the weight to be accorded to it, after proper discount for self-interest and the irresponsible way in which petitions are often signed as friendly accommodations without considered thought of contents or effect on the arguments on the other side, depends on what the petition states, who signs it and how it accords with the policy and common sense of the officials responsible for the administration of the law and whose duty and privilege it is to hear both sides. Jay-Bar, Inc. v. Clifton, Bulletin , Item ; Joa v. Pine Beach, Bulletin 1572, Item 3; Rolling Greens Civic Assn. v. Cinnaminson et al., Bulletin 1474, Item 1.

The action of the Council was not precipitious; there was the

lengthy meeting on May 1 at which audience was given to counsel for both appellant and objectors, as well as to individual objectors. No decision was reached following that meeting but on May 15, after further hearing and review of the matter, the aforementioned resolution was adopted.

The guiding principle was expressed by Justice Francis in Lyons Farms Tavern v. Newark, 55 N.J. 292, 303 (1970):

> "The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion ...."

The primary contention of appellant, that it had satisfied all of the reasonable requirements that could be imposed upon it by the Council, does not in itself preclude the Council from exercising, as it did, its sound discretion in determining whether or not the proposal would or would not benefit the community. Lakewood v. Brandt, 38 N.J. Super. 462 (App.Div. 1955); Zicherman v. Driscoll, 133 N.J.L. 586 (1946). It is well established that there is no inherent right to a liquor license. No one has a right to demand a license which is a special privilege granted to the few, denied to the many. Meehan v. Jersey City, 73 N.J.L. 382 (1906). In matters involving transfers of liquor licenses, the responsibility of the municipal issuing authority is "high", its discretion "wide", and its guide "the public interest." Lubliner v. Paterson, 33 N.J. 428 (1960).

For the reasons set forth herein, as well as on the applicable legal principles cited, it is recommended that an order be entered affirming the action of the Council and dismissing the appeal.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by appellant pursuant to Rule 14 of State Regulation No. 15.

The exceptions challenged the opinions expressed by the Mayor as well as on the alleged "assumption" by the Hearer that the residents present at the hearing before the Council appeared in opposition to appellant's application. The opinions are expressed by the Mayor on behalf of the majority of the Council who voted to deny the application indicated a decision based upon their convictions after consideration of all of the relevant facts.

Under the doctrine of Fanwood v. Rocco, 33 N.J. 404 (1960), cited by the Hearer, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable. Under the totality of

the evidence, I agree with the Hearer that the determination of the Council was not unreasonable or an abuse of its discretion. The record further reveals that the distinct majority of the persons present at the hearing before the Council came to object to the application; and that the Hearer clearly found.

As the Court stated in Lyons Farms, supra (55 N.J. at p. 305):

> "We have no doubt that a municipal alcoholic beverage control board may reasonably honor local sentiment against the grant of a new liquor license or a place-to-place transfer of an existing one. Fanwood v. Rocco, supra, clearly expounded that view."

The Court continued (at p. 306):

> "We regard the rule of Fanwood v. Rocco as sound, and we consider its basic thesis as providing the determinant for this case. Service of the public interest in licensing, in transferring of licenses, and in controlling this exceptional business requires an attentive and sympathetic attitude toward the sentiments of substantial numbers of persons in the locality, whether they be residents, commercial operators, or representatives of a nearby church, school or hospital."

The Court added that the board would be remiss in its duty if it failed to give the views of objectors serious consideration.

It is clear that in the judgment of the Board, the paramount equities favored the objectors. Taking that into consideration together with the other factors, it mandated its ultimate determination, which, I find, to be reasonably grounded.

I, therefore, find that the exceptions are without merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the writtin exceptions filed with respect thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is on this 17th day of August, 1973

ORDERED that the action of the respondent, Borough Council of the Borough of Matawan in denying appellant's application for a transfer of its plenary retail distribution license be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Robert E. Bower,
Director

3. DISCIPLINARY PROCEEDINGS - POSSESSION OF ALCOHOLIC BEVERAGES WITHOUT INVOICES IN VIOLATION OF RULE 6 OF STATE REGULATION NO. 39 - SUSPENSION OF 30 DAYS.

In the Matter of Disciplinary Proceedings against

Spencer's Inc., A Corp. of N.J.
263 Valley Boulevard
Wood Ridge, N.J.,

Holder of Plenary Retail Distribution License D-4 (for the 1972-73 licensing period) issued by the Mayor and Council of the Borough of Wood Ridge.

CONCLUSIONS and ORDER

Robert M. Zweiman, Esq., Attorney for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On Friday, November 10, 1972 you failed to retain and produce for inspection a copy of a delivery slip, invoice, manifest, waybill or other similar document truly dated and signed by you or your agent on the date of actual delivery of 91 bottles of alcoholic beverages, viz; 15, 4/5 Qt. bottles of Hennessy Cognac, 12, 4/5 Qt. bottles of Mohawk Creme De Cacao, 12 4/5 Qt. bottles of Pedro Domecq Three Vines Imported Brandy, 12 Quart bottles of Mohawk Creme De Cacao, 16 4/5 Qt. bottles of Pedro Domecq Fundador Brandy, 12 4/5 Qt bottles of Myer's Rum, 12 Qt bottles of Myer's Rum; in violation of Rule 6 of State Regulation No. 39."

The Division's case was presented through the testimony of ABC agents who acted pursuant to a specific assignment to investigate the possession of certain alcoholic beverages at the licensed premises for which the licensee allegedly did not have a proper delivery slip, invoice, manifest, waybill or other similar document, and which may have been obtained from an unauthorized source.

On November 10, 1972 ABC agents M and T visited the licensed premises and identified themselves to Miss Sylvia Grasso.

Miss Grasso was then employed as a clerk and was in charge of the premises. She accompanied the agents to the basement of the premises, where they found this large quantity (ninety-one bottles) of alcoholic beverages described in the above charge. Miss Grasso stated that she "would order what she needed and give the order to Mr. DeSanctis" who was employed as the manager of these premises as well as for another licensed premises. When she received the invoices they would be handed over to DeSanctis who handled all the records for this facility.

John A. DeSanctis was then summoned by Miss Grasso to the premises and he was requested by the agents to produce documentation with respect to the delivery of these alcoholic beverages. He was unable to do so, except that he produced one invoice which reflected the delivery of three of the bottles. He could not explain where the invoices were or how the alcoholic beverages happened to be in the premises except that "they were probably left over when the premises was purchased, as far as he knew."

Miss Grasso stated that she had no knowledge with respect to the delivery of said alcoholic beverages. She explained that she was hired several months before the date of the investigation by Richard M. Tikijian, who was the true owner of these premises as well as several other licensed premises. Tikijian was not available because he was out of the country.

Agent N continued the investigation and interviewed Mrs. Elizabeth Tikijian, the principal stockholder of the corporate licensee. She executed a statement in which she stated that she knew nothing about the operation of the business and did not participate in the business. Her husband actually ran the business through the manager and clerk. The witness stated that he examined the invoices that were produced and found that none of them reflected the delivery of the subject alcoholic beverages for one year prior to the date of the investigation. However, he found one invoice dated February 16, 1972 issued by the Federal Wine and Liquor, a licensed wholesaler, with respect to three bottles of Hennessy Bras Arme, a cognac. The manager could not explain why this order was made in view of the fact that a substantial quantity of a similar type of liquor was included among the said alcoholic beverages. This agent did interview Tikijian after a delay of several months because Mr. Tikijian was out of the country, did considerable traveling,and was previously unavailable.

It was established that there were no invoices for the said alcoholic beverages within a year from the date of the investigation.

In behalf of the licensee, Elizabeth Tikijian testified that these licensed premises were purchased in June 1971, and

that although she intended to operate these premises, she became pregnant and was unable to participate in the management of the business. Her husband acted in her behalf and he hired the manager who "really ran the store and ordered the liquor."

Richard M. Tikijian testified that ninety-nine percent of the corporate stock was held by his wife, Elizabeth I. Tikijian, and the purchase price for this business included the "sealed stock which was submitted to us on a gallonage basis." The transfer was actually effected in September 1971, and he undertook the hiring of the manager and the administration of the business. However, no physical inventory was taken of the stock then purchased.

The entire operation of the business, including the ordering and receiving of merchandise was done by the manager. He does not have any knowledge of any alcoholic beverages obtained from any source other than from invoices. His only explanation for the fact that these alcoholic beverages detained by the agents were not reflected by invoices was that they were probably part of the stock purchased at the time the licensed premises were taken over. He admitted, however, that he could not of his personal knowledge "unequivocally say I saw them and checked them" at the time of the closing of title. He further explained that the beverage tax reports were prepared by his accountant and signed by his wife, although she had no actual knowledge of the truth of the information set forth therein.

The attorney for the licensee explained that the seller of the premises, a Mr. Woltz, who might have explained the whereabouts of these invoices was unavailable at the time of the hearing because he had "just returned from his vacation."

We are dealing here with a purely disciplinary measure and its alleged infraction. Such measures are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948). Thus the Division need establish its case only by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373. In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32 C.J.S. Evidence, sec. 1042.

The licensee is charged with violation of Rule 6 of State Regulation No. 39. This rule provides that the licensee must retain a copy of every delivery slip, invoice, manifest, waybill or similar document dated and signed by him or his agent at the time of the actual delivery of any alcoholic beverages for a period of one year from the date thereof by the manufacturer or wholesaler, and must be available for inspection by agents of the Division.

The Division has established a prima facie case by establishing that no such documents reflecting the delivery of the said alcoholic beverages within one year from the date of the said delivery was made available to the agents. Thereupon, it became the burden of the licensee to establish that they were, in fact, delivered to the time required by the applicable rule.

I am persuaded that the licensee did not offer a plausible explanation for the absence of such documents. Miss Grasso who orders alcoholic beverages appeared to know nothing about such documents and the manager was equally ignorant of the whereabouts of any such documents or invoices. Tikijian, who put this license in the name of his wife because he has an interest in two other liquor licenses, could not state from his own personal knowledge that the subject alcoholic beverages were, in fact, part of the inventory which was purchased at the time that the licensee entered into the operation of these premises. Another factor has significance. Since the licensee had fifteen bottles of cognac among the alcoholic beverages in the basement, it would have been unrealistic that it would have ordered the three bottles of cognac during this period.

It is significant that neither Miss Grasso, Woltz nor DeSanctis were called as witnesses to testify on behalf of the licensee with respect to the said invoices, when it appears that both witnesses were available and could have testified.

The applicable principle of law appears to be where a party has a witness or witnesses available, and where they possess peculiar knowledge concerning the facts essential to a party's case, the failure to call said witness or witnesses gives rise to an inference that, if called, the testimony elicited therefrom would be unfavorable to said party, i.e., he could not contradict the testimony of the Division's witnesses. Re Lesniewski, Bulletin 1581, Item 5; Hickman v. Pace, 82 N.J. Super. 483 (1964); Re Cork 'N Bottle, Bulletin 1232, Item 3; Re Soto Pruna, Bulletin 1713, Item 1.

It is logical to infer from the totality of the evidence and the circumstances herein that this merchandise was obtained from an unauthorized source. I am convinced and find that the Division has proved its charge that the licensee has failed to retain and produce for inspection a copy of the delivery slips, invoices, manifest, waybill or other similar document truly dated and signed by the licensee or its agent on the date of the actual delivery of the said alcoholic beverages, in violation of Rule 6 of State Regulation No. 39. The said charge has been proved by a fair preponderance of the believable evidence, and indeed by substantial evidence, and I recommend that the licensee be found guilty of the said charge.

Licensee has no prior adjudicated record. I further recommend that an order be entered suspending the license on the said charge for thirty days. Cf. Hall-Will, Inc., Bulletin 2001, Item 11.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Investigation by ABC agents on August 14, 1973, discloses that the licensed premises are presently closed and a sign on the interior of the front door reads "Closed - open in 4 weeks." Thus, no effective penalty can presently be imposed. Hence, the effective dates for the suspension will be fixed by the entry of a further order herein when the licensed business has been fully resumed on a substantial full-time basis by the licensee.

Accordingly, it is, on this 21st day of August 1973,

ORDERED that Plenary Retail Distribution License D-4, issued by the Mayor and Council of the Borough of Wood Ridge for premises 263 Valley Boulevard, Wood Ridge, be and the saem is hereby suspended for thirty (30) days, the effective dates of which said suspension to be fixed by further order aforesaid.

Robert E. Bower
Director

4. DISCIPLINARY PROCEEDINGS - IMMORAL ACTIVITY (LEWD DANCE) ON LICENSED PREMISES - PRIOR DISSIMILAR RECORD - SUSPENSION FOR 55 DAYS.

In the Matter of Disciplinary Proceedings against

Empire Bar, Inc.
268 Washington Street
Newark, New Jersey,

Holder of Plenary Retail Consumption License C-148, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS and ORDER

Sanford R. Gudger, Esq., Attorney for Licensee
Carl A.Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on February 19, 1973 it permitted lewdness within the licensed premises in that a female entertainer was allowed to perform in an indecent manner, in violation of Rule 5 of State Regulation No. 20.

Pursuant to a specific assignment to conduct an investigation, ABC agents B and I visited the licensed premises.

Agent B testified that on February 19, 1973, shortly after noontime, he was in the licensed premises and observed a female entertainer begin a "go-go" performance. She was clad in gold and silver panties and had what is identified as "pasties" over her breasts. So clothed she danced conventionally but, at one point, she turned her back to the audience of patrons, lowered her head and upper part of her body and began stroking and rubbing the interior of her thighs. Thereafter she lay on the stage upon which she was performing and made body motions in simulation of a sex act. The dancer (later identified as Eunice Merrill) surrendered the pasties to the agent thereafter and those articles were offered into evidence. The licensee's employees were advised of the alleged violation.

On cross examination agent B admitted that, were it not for an exterior sign indicating that "topless dancing" would take place, an interior investigation of the premises would not have been made. He further admitted that, while the pasties did not cover the full breast of the dancer and were thus suggestive, there was a substantial covering of her breasts.

ABC agent I testified in substantial corroboration of the testimony of Agent B. On cross examination he admitted that the general dance of the performer was not in itself suggestive, even with the pasties, until the woman acted out what he described as simulated intercourse.

The licensee introduced the testimony of the dancer Eunice Merrill who stated that she always dances with pasties whenever she dances and has done so in various taverns throughout the State. She denied that her dance had ever been considered immoral. She admitted that her dance was suggestive but not vulgarly so. It was not a "nasty" dance. She admitted that dancing itself has a sexual connotation and that she did not consider herself as a "go-go" dancer but, rather, an interpretive dancer. She believed that the response to her dancing was in the mind of the individual who observed it.

The corporate owner, John H. Troxler, testified that, while he was not present during the dance, he characterized her prior dancing as typical "go-go"dancing. It does not vary much from other "go-go" performances.

In evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and therefore require proof by a preponderance of the believable evidence only. Butler Oak Tavern, Inc. v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); 36 N.J. Super. 512, 519 (App.Div.1955).

Testimony, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself. It must be such as common experience and observations of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). The finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

Based upon the foregoing principles, I find that the believable evidence preponderates in support of the charge preferred herein. I find it impossible to believe that the acts described by the agents could have been contrived. The testimony of Agent B was in no way adversely affected on cross examination. It was thereafter corroborated by Agent I whose testimony emerged unshaken despite vigorous cross examination. The sole issue in this particular matter is one of credibility.

Licensee raised several contentions in defense to the charge. It was urged that the sign "topless dancing" alluded to the quality of the dance, not the mode of dancing. That is, the quality was such that it could not be "topped" in other establishments. However, the public reacted to such sign and it is apparent that the use of the word "topless" gave open implication to the

presence of dancing prohibited in liquor-licensed premises in this State and, in consequence, gave rise to the inquiry of the agents. Such inquiry is part of their anticipated duties and has no relevancy to the charge herein.

An argument was advanced that, as the dancer's breasts were small, the pasties adequately covered them, hence the use of such pasties was not in itself violative of the regulation. There may be some basis for this argument as the agent admitted that the use of the pasties alone may not have carried that degree of suggestion to give rise to the charge. Nevertheless, their use in the company of the dancer's actions was sufficient to generate the charge herein.

A challenge was directed to the agents' qualifications to be "censors"of the actions of others. This argument presumed that the agents determine what is and what is not violative of the regulation. Such is not the case. The agents report only what they observe. The charges are thus instituted by the Division and must be proven by a fair preponderance of the credible evidence. Hence the agents are not censors, but merely observers.

An unusual contention was advanced that, as the dancer was a black person, her dance would be different from that of a white girl and should not be judged by the same standards. Such argument is patently spurious. While one of the agents admitted a difference when a question relative to this contention was posed to him, his response was candid and spontaneous -- black dancers were different in that they were usually better dancers and enjoyed a better sense of rhythm. Such tests are not applied to the area of immorality.

A final contention was raised that the dance did not appeal to the prurient interests of the average person when applying contemporary community standards. We are not here concerned with the censorship of a book or of a theatrical performance. Cf. McFadden's Lounge, Inc. v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 61 (App.Div. 1968).

The object manifestly inherent in the rule (5 of Regulation No. 20) 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. "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, inconsistant 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.). In re Schneider, 12 N.J. Super. 449, 458 (App.Div. 1951).

I conclude, after evaluation of the evidence and the applicable law, that the charge has been established by a fair preponderance of the credible evidence and recommend that the licensee be found guilty as charged.

Licensee has a prior record of suspension for a dissimilar violation occurring more than five years ago which will not be considered for penalty recommendation. However, license was suspended for five days effective February 21, 1972, by the municipal issuing authority on a charge of failing to keep a list of employees on premises.

It is recommended that the license be suspended on the charge herein for fifty days (Re Starshock, Inc., Bulletin 2101, Item 2), to which should be added five days by reason of the dissimilar offense occurring within the past five years, making a total of fifty-five days.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 21st day of August 1973,

ORDERED that Plenary Retail Consumption License C-148, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Empire Bar, Inc., for premises 268 Washington Street, Newark, be and the same is hereby suspended for fifty-five (55) days, commencing 2:00 a.m. on Thursday, August 30, 1973 and terminating 2:00 a.m. on Wednesday, October 24, 1973.

Robert E. Bower
Director