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

BULLETIN 1947 January 14, 1971

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - LINCROFT INN, INC. v. MIDDLETOWN.

2. DISCIPLINARY PROCEEDINGS (NEWARK) - LEWDNESS AND IMMORAL ACTIVITY (INDECENT ENTERTAINMENT AND CONDUCT) - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 80 DAYS.

3. DISCIPLINARY PROCEEDINGS (JERSEY CITY) - PURCHASE FROM ANOTHER RETAILER - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

4. DISCIPLINARY PROCEEDINGS (HOBOKEN) - ALCOHOLIC BEVERAGES NOT TRULY LABELED - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

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(e) the suspension for 20 days was excessive, creating a hardship to both the LINCROFT INN and its employees;
(f) the proof of the respondent was insufficient as a matter of law to establish by a predominance of evidence that the appellant had violated Rule 7 of State Regulation No. 20;
(g) there has been no showing by the respondent of any credible evidence that the issuing authority could rely upon in deciding against the appellant."

Respondent in answer filed denies the aforesaid allegations of appellant and contends that the charge preferred had been sufficiently proven to warrant a finding of guilt thereon.

The appeal herein was heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before the Township Committee was received in evidence and, in addition thereto, testimony was presented by both appellant and respondent pursuant to Rules 6 and 8 of said regulation.

Police Detective Allen J. Ford testified that he was assigned to investigate appellant's premises and, as a result thereof, he visited said premises on June 9 and 10, 1969, and on each occasion observed one William Reardon (hereinafter Reardon) therein. Detective Ford stated that on June 11, 1969 he again visited the appellant's premises and saw Reardon at the time in conversation with two men at one end of the bar during which Reardon took a newspaper from his jacket and a piece of paper fell to the floor; that, after the men left, he (Detective Ford) said he retrieved the piece of paper and, upon examination thereof, found that bets were written thereon pertaining to various races scheduled at the Monmouth track; that he (Detective Ford) left the appellant's premises, met Sergeant Halliday in the parking area of a supermarket, and gave the piece of paper to him.

Detective Ford further testified that on June 13, 1969 he visited appellant's establishment and saw Reardon in conversation with a man referred to as "Jack;" that Robert Daverio (president of appellant, hereinafter Daverio) joined in the conversation and "they talked at first about sports in general." After Daverio left, Detective Ford said he listened to a conversation between Reardon and Jack, at which time he saw Reardon take a scratch sheet from his pocket, look at it and say "'Yeah, Blum's a good rider, Jack.' There was a pause sort of between the two, a hesitation-type thing, and Jack said, 'I'll give the money to Bobby.'" On June 27 he entered appellant's licensed premises with a search warrant.

On cross examination Detective Ford testified that on two occasions he saw Daverio in Reardon's company but Daverio was not there when the slip of paper testified to by him (Detective Ford) fell out of Reardon's pocket; that Daverio was not with Jack and Reardon when the bet was allegedly made.

On redirect examination Detective Ford stated Reardon had conversations from time to time with different patrons. Detective Ford further stated that on two occasions Reardon received telephone calls, "one at the hostess' desk, or where the hostess receives the people, and one occasion at the bar."

On further cross examination of Detective Ford, the attorney for appellant read the affidavit made by Detective Ford which was used to procure the search warrant wherein was stated

that the name of the horse on which Jack placed a bet with Reardon was "By the Numbers" but that at the hearing before the respondent Detective Ford said the name of the horse in question was "Happy Irish."

Sergeant William J. Halliday testified that on June 27, 1969 he went to appellant's premises and saw Reardon at the bar; that he confiscated bookmaking and gambling paraphernalia found on Reardon's person; that Daverio was there and, prior to his arrest, Daverio was advised of his constitutional rights and at police headquarters Daverio made a statement "similar to the other statement stating that he knew Reardon was bookmaking, and that he told Reardon to stop bookmaking, and that he was using a television set to gamble on, and that he took the television set out;" that Chief McCarthy, Captain Letts and Reardon, as well as other persons, were present.

On cross examination Sergeant Halliday testified that he never saw anyone making a bet either in or outside of appellant's premises.

Captain Robert Letts testified that he is in charge of the detective bureau and was in charge of the investigation made at appellant's premises; that on June 27, 1969 he and other officers conducted a raid at the appellant's establishment and he was present when the search of Reardon uncovered bookmaking paraphernalia on his person; that he and Sergeant Halliday had a conversation with Daverio who stated that he was aware Reardon was actually taking bets and that "he had told him to knock it off." Captain Letts also said that Daverio told him that he had the television set removed from the bar area in hopes that the betting would cease.

On cross examination Captain Letts testified that no gambling devices were found in appellant's premises other than bookmaking paraphernalia found on Reardon.

Police Chief Joseph M. McCarthy testified that, although on June 27, 1969 he did not participate in the raid at appellant's premises, at headquarters Daverio engaged in conversation with him, also Captain Letts and Sergeant Halliday, at which time he admitted that he was aware of Reardon's gambling activities.

John Loew testified that he had been employed by appellant as a bartender for approximately a year before his employment was terminated in May 1969. Loew stated that Reardon was in appellant's "quite often" and Reardon spent practically all day in the place speaking with patrons, taking bets on horse races and other sporting events. Moreover, Loew stated that Reardon received incoming calls on the house telephone and used the pay telephone for making outgoing calls.

Loew further testified that on a Saturday afternoon in April 1969 Daverio called him upstairs to his quarters and explained that he had received numerous telephone calls; that the "heat was on, and asked him his advice as to what he should do." Loew told him "to get rid of the television and get rid of Reardon."

On cross examination Loew testified that, after leaving appellant's employment, he became a special police officer and worked for the "State Conservation" and was under the supervision and control of the Middletown police.

Ethel P. Kanov (an attorney) testified that, as a result of a telephone call from Mrs. Daverio (wife of Daverio who was in

custody of the police), she (Ethel Kanov) went to police headquarters and asked Chief McCarthy if Daverio had made any statements and received assurance from the Chief that he had not.

On cross examination Attorney Kanov stated that she did not know if she had the conversation with Chief McCarthy before or after the alleged statement was made by Daverio and, although she was with Daverio for ten or fifteen minutes and left with him, she made no inquiry of him as to whether he had made the statement. Attorney Kanov also spoke to Sergeant Halliday but did not speak to him about any statement that may have been made by Daverio.

Harold R. Eastwick (employed as a bartender by appellant) testified that he knew Reardon who visited appellant's establishment quite frequently between April and June 1969; that when he (Eastwick) was on duty he never saw Reardon or anyone else accept bets. Eastwick further stated that he had seen Reardon take out a little book from his pocket and "sometimes he might have written in it to refresh his memory. I don't know what he was doing." Eastwick also testified that Daverio told him that he (Daverio) had removed the television set and he later heard that this was done to prevent any possibility of patrons wanting to bet on horse races.

Irene Eldershaw and Catherine Erving (hostesses employed by appellant) and Eleanor Chakalos (a waitress) testified that they had never observed Reardon or any other person engage in bookmaking on appellant's licensed premises.

Robert Daverio (president of appellant) testified that he had known Reardon who was a patron in appellant's establishment for approximately a year; that Reardon had given him (Daverio) a card indicating that he was president of a crane rental company and that prior thereto had given him a card which disclosed that he was affiliated with a labor union. Daverio said he told Chief McCarthy and Sergeant Halliday at the time they were taking him to police headquarters that if he "knew Bill Reardon was bookmaking in my place I would throw him the hell out."

Daverio denied that at any time he had stated to Loew that he (Daverio) had received information that it was "hot" and wanted Reardon to cut out gambling.

There is no denial that, after the raid by the police and a search of Reardon, gambling paraphernalia was found on his person. It is inconceivable that Daverio had known and seen Reardon coming into his establishment very frequently but neither he nor anyone else, with the exception of Loew, suspected that he was engaged in gambling activities. From the testimony of Detective Ford it appears that Reardon made no attempt to conceal his activities in and about the premises while conversing with various persons. Even in the absence of actual knowledge, a licensee cannot escape the consequences of the occurrence of the incidents as related herein which took place in the licensed premises. It is no defense that the licensee or anyone employed in the licensed premises had ever seen any gambling activities on the part of Reardon. Licensees or others who may be in charge may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees or employees must use their eyes and ears and use them effectively to prevent the improper use of their premises. Bilowith v. Passaic, Bulletin 527, Item 3; Re One-Thirty-Five Mulberry St. Corp., Bulletin 892, Item 2. It is quite apparent under the circumstances herein that the licensee suffered gambling activities in the nature of horse race bets to be taken on the licensed premises.

As the Supreme Court said in Essex Holding Corp. v. Hock, 136 N.J.L. 28, at p. 31:

> "Although the word 'suffer' may require a different interpretation in the case of a trespasser, it imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority. Guastamachio v. Brennan, 128 Conn. 356; 23 Atl. Rep. (2d) 140."

I have weighed the testimony presented in this matter and, after careful examination of all the evidence, am satisfied and find as a fact that appellant is guilty of the charge herein in that it suffered the gambling activities to occur on the licensed premises. I conclude that appellant has failed to sustain the burden that respondent's action was erroneous and against the weight of the evidence as required by Rule 6 of State Regulation No. 15. Cf. Collins v. Clifton, Bulletin 1750, Item 1.

I might add that the penalty of twenty days suspension imposed by respondent was far from excessive in view of the fact that it is the Director's policy in unaggravated first-offense cases to impose a minimum suspension of license for sixty days. Re Englund, Bulletin 1717, Item 4.

It is therefore recommended that an order be entered affirming the action of respondent, dismissing the appeal, and fixing the effective dates for the suspension imposed by the respondent and stayed pending the entry of the order herein.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, appellant has filed exceptions to the Hearer's report and written argument in support thereof. Appellant excepts to the admission into evidence of the entire transcript of the hearing below before respondent, questions the Hearer's recommended factual findings upon the basis of lack of credibility of the respondent's witnesses, and contends that the rule of law of the Essex Holding Corp. case cited by the Hearer is inapplicable herein and that, as a matter of law, knowledge by the licensee of the occurrence of the gambling on its licensed premises must be established to sustain a finding of guilt.

Initially, it should be noted that respondent, by notice of intention dated February 13, 1970, stated it would offer into evidence "the complete transcript of testimony taken before the issuing authority", including the testimony of its five witnesses who testified below. The notice was not limited, nor need it be limited, to include only respondent's witnesses, as appellant argues. Consequently, the entire transcript was properly received in evidence, in accordance with Rule 8 of State Regulation No. 15. In any event, the admission of the portion of the transcript containing the testimony of appellant's witnesses was not prejudicial to the appellant.

As to the finding of law by the Hearer that it is the licensee's responsibility to prevent the prohibited conduct on the licensed premises and that proof of knowledge thereof is not required, appellant argues that this may apply to minors being served alcoholic beverages, but should not apply to gambling activity by a patron. However, the Essex Holding Corp. is still controlling and applies to the alleged gambling activity herein. If appellant,

through its employees or agents, either knew or should have known of gambling activity, but failed to prevent it, the applicable standard of guilt is met. Re Tube Bar, Inc., Bulletin 1852, Item 2, affirmed on appeal to the Superior Court, Appellate Division, in an unreported decision recorded in Bulletin 1898, Item 2. Nothing in appellant's written argument is to the contrary, although the issue is academic here in view of my other findings herein.

As to the basic factual question, I have carefully reviewed the entire record herein and make the following findings: the evidence is insufficient to establish that Reardon engaged in any proscribed gambling on the licensed premises on either June 11, 13 or 27, 1969. On June 11 and 27, the evidence shows that he possessed gambling betting slips, but there is no proof that he accepted the bets at the licensed premises or that he engaged in any other activity there with respect to the bets. On June 13 the evidence gives rise to the suspicion that he may have accepted a horse racing bet from "Jack" at appellant's bar but, in fairness to the licensee, the evidence is equally consistent with "Jack" having engaged in prefatory conversation with Reardon prior to his proceeding elsewhere to place his bet with "Bobby." Furthermore, there is a paucity of evidence to establish that this conversation could reasonably have been heard by appellant's bartender or any other agent of appellant.

However, as to the period of time prior to June 11, 1969, I find that on each Monday in March and April 1969, and on the first two Mondays in May 1969, Reardon accepted horse race and sporting event bets from patrons at appellant's licensed premises and that appellant's bartender John Loew took no steps to prevent this activity although, as testified by him, he was fully aware that such activity was taking place on each of these days when he worked the day-shift instead of his normal night-shift. This testimony is indirectly corroborated by the evidence, hereinabove delineated, establishing that during the month of June 1969 Reardon was engaging in this very type of activity (horse race and football pool betting). On June 11 and 27, dates not too remote from said preceding months, he was found to possess on the licensed premises slips containing horse race and football pool bets and a tally sheet showing amounts owed to him on gambling bets. Furthermore, I find that appellant's principal, Daverio, admitted to the several police officers on June 27, 1969, that Reardon had been bookmaking at his premises, and that his statement to the police officers was not "if I knew he was a bookmaker I would have thrown him out", as testified by him.

The attack on Loew's credibility is based principally on the allegation that he was fired in the middle of May 1969 from his employment with appellant and his admitted employment thereafter from June 12 to August 11, 1969, as a special police officer in Middletown Township subject to the overall supervision of the Middlesex Township Police Department. These are alleged to be motivation for his fabricating perjured testimony to implicate the licensee.

A reading of the transcript convinces me, as it is apparent the Hearer was convinced, that Loew's testimony has the ring of truth. I accept his version of the termination of his employment, namely, that he refused a reassignment of duties with appellant, rather than Daverio's version that Loew was fired because of complaints he first received in January of 1969. It seems doubtful that Daverio would have waited five months to act on the complaints. Also, the employment of Loew as a special police officer is not of itself sufficient motivation to impugn his veracity. That he would perjure himself to obtain this employment, which he terminated on his own volition after two months, is not readily acceptable.

While it is true that Loew testified at the Division

hearing that he observed Reardon taking bets "on one or two occasions", as contrasted with the entire duration of his employment as he testified below, the context of such testimony, which was cut short when it reached the April 1969 period, indicates that Loew was referring only to his initial observation of Reardon, not the entire period of his employment. This conclusion is buttressed by Loew's testimony that "on a few occasions" he also saw Reardon record bets in a pad.

Appellant also argues that the testimony of its six female employees to the effect that they did not observe Reardon engage in any gambling activity should adversely affect the credibility of Loew. But this testimony, negative in character, does not have the weight of the positive testimony of Loew. The fact that an employee does not become aware of prohibited activity on the licensed premises does not mean that it is not taking place. And once the fact of its occurrence is established, the knowledge thereof by any agent of the licensee is deemed knowledge by the licensee. Rule 33 of State Regulation No. 20.

In sum, I conclude that appellant's guilt of the charge has been established as to the hereinabove mentioned dates by more than a fair preponderance of the believable evidence adduced herein. I will therefore accept the Hearer's recommended findings affirming the suspension action of respondent and dismissing the within appeal.

Accordingly, it is, on this 10th day of November, 1970,

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

ORDERED that Plenary Retail Consumption License C-11, issued by the Township Committee of the Township of Middletown to Lincroft Inn, Inc., t/a Lincroft Inn, for premises 700 Newman Spring Road, Middletown, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Wednesday, November 25, 1970 and terminating at 2:00 a.m. Tuesday, December 15, 1970.

RICHARD C. McDONOUGH
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - LEWDNESS AND IMMORAL ACTIVITY (INDECENT ENTERTAINMENT AND CONDUCT) - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 80 DAYS.

In the Matter of Disciplinary Proceedings against

Polo Chez, Inc.
t/a Gary's Bar
488 Broad Street
Newark, New Jersey

Holder of Plenary Retail Consumption License C-220, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS and ORDER

Friedman & D'Alessandro, Esqs., by Edward G. D'Alessandro, Esq., Attorneys for Licensee
Edward F. Ambrose, 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, August 8, 1969, you allowed, permitted and suffered in and upon your licensed premises, lewdness, immoral activity and foul, filthy, indecent and obscene conduct viz., in that you allowed, permitted and suffered female dancers, commonly known as 'Go Go Girls' to perform, commit and engage in by themselves and in association with persons employed on your licensed premises as bartenders and with male patrons and customers, for ostensible entertainment of the customers and patrons on your licensed premises, in obscene, indecent, filthy, lewd, lascivious, disgusting and immoral manner and engage in acts, gestures and movements of and with their hands, legs and other parts of their bodies in association with such acts, gestures and movements, in manner and form having obscene, indecent, filthy, lewd, lascivious, disgusting, immoral and suggestive import and meaning; in violation of Rule 5 of State Regulation No. 20."

Pursuant to a specific assignment to conduct an undercover investigation of an alleged lewd show by "go-go" girls, ABC Agents C and N investigated the licensed premises.

Agent C testified that on August 8, 1969, he and Agent N entered the premises at 12:15 p.m. The premises are located on the first floor of a three-story building; the licensed premises is equipped with a juke box, several booths and a cigarette machine along the front wall. Along the left wall there is a bowling machine, kitchen and a ladies' rest room; and in the rear are located a storage room, public telephone and men's rest room. In the center of the premises there is a large oval-shaped bar with a

raised dancing platform in the center approximately the same height as the bar. On this visit, he observed that there were approximately one hundred fifty patrons, mostly male, on the premises; it was very crowded. John Polo (owner of 98% of the shares of stock in the corporation), James Pisapia, Robert Alexander and James Di Gioacchino were tending bar.

Agent C testified that at the time of his entrance three female "go-go" dancers were entertaining, namely, Eileen Sauers (a/k/a Dawn), Marie Yantorn (a/k/a Cindy) and Catherine Nobuko Mita (a/k/a Kay). They were attired in typical two-piece "go-go", bikini-type outfits. During the two-hour period of their performance, they danced on the platform, the bar, behind the bar and outside the bar among the patrons.

Agent C observed Cindy doing bumps and grinds, rubbing her private parts with her hands, squatting on top of the bar and placing the heads of patrons into her private parts. She was further observed circulating among the patrons outside the bar, grabbing them about the waist, rubbing her private parts against theirs in simulation of sexual intercourse. She shook salt and pepper down into her bra and tights and sat on the heads of male patrons at the bar. On occasions she was observed lying on the bar in front of the seated patrons, thereafter pouring beer on her stomach and letting the male patrons lick it off, after which she pushed their heads down into her private parts.

She was further observed on the dance platform along with the other two dancers, dancing with a male patron, rubbing her private parts against him, simulating sexual intercourse. The three dancers behind the bar simulated sexual intercourse with the bartenders and tried to undress some of them. She was seen on one occasion to place the bottom end of an empty beer bottle in her tights with the open end protruding, after which she placed the open end into the mouth of one of the patrons.

Dawn was observed on top of the bar rubbing her breasts and private parts in a sensual manner, putting salt and pepper into her bra and tights, squatting on the bar and pulling the heads of patrons into her private parts. She then danced among the patrons outside the bar, pulling them into her private parts, simulating sexual intercourse. She was also seen cavorting similarly with the bartenders behind the bar. At that time Polo was positioned within two or three feet of where the young ladies were engaged in the above described activities with the bartenders.

Kay was observed doing bumps and grinds, rubbing her private parts and exposing her breasts. She lay on her back on the platform simulating having sexual intercourse, during which she grabbed bartenders with her legs and attempted to pull them into her private parts. This was done with Polo (an officer of the licensee), among others. She pulled at her bra and permitted patrons to throw change into it. She then stepped out onto the bar, squatted in front of one of the patrons, pulled his head into her private parts and permitted him to put money into her tights. Also she called a male patron up to the platform and simulated sexual intercourse by rubbing her private part up and down his leg.

Agent C also noted that the crowd was quite loud and patrons shouted "take it off".

At 2:15 p.m. Agents C and N identified themselves to Polo and advised him that they had witnessed a lewd and indecent performance; that it was not permissible for the "go-go" girls to conduct themselves in this manner. Polo replied that he knew they were going a little too far and he had told them to hold it down.

Under intensive cross examination, Agent C reiterated the alleged acts of lewdness and indecency; that Dawn "also went among the patrons standing about the bar and was observed dry humping several of these males by rubbing her private part against theirs, simulating sexual intercourse" and that he did not get the name of any of the male patrons involved; that Cindy was seen simulating sexual intercourse with patrons around the bar. Additionally, Agent C testified that he had not known Mr. Polo before this incident; that he had gone to the premises on a specific assignment; that he had purchased four drinks and consumed three of them during the three-hour period.

Agent N substantially corroborated Agent C's testimony. He added that he and Agent C had observed these acts from directly opposite the "go-go" stage; that Dawn leaped on a support pole and wrapped her legs around it and simulated sexual intercourse.

Under extensive and vigorous cross examination, Agent N averred that he and Agent C had witnessed the performances from a position standing directly behind the seated patrons; that neither C nor N had had anything alcoholic to drink on August 8, 1969, prior to entering the premises; that he had consumed three drinks during the two-hour period; that the only egress from inside the bar was at the rear of the bar; that the girls had to leave from behind the bar and walk on the outside of the bar to the juke box in front; that, upon doing so, they would grab patrons and pull the patrons into them and simulate sexual intercourse; that he made these observations from approximately three or four feet from the platform; that he viewed the incident wherein the patrons licked the beer from Cindy's stomach from approximately twenty feet; that Polo was in the immediate area and witnessed the "licking" incident; that "the patrons had the drinks in their hands so they weren't on the bar, and the bar area was cleaned in this spot where Marie Yantorn laid down on the bar."

Witnesses appearing on behalf of the licensee were Craig Kleinknecht (a patron and IBM operator), Robert A. Hunter (an employee of the licensee at the time of the alleged violation), Leroy E. Greuter (a patron), James N. Pisapia (an employee of the licensee), Charles J. Catalano (a patron and data processing operator), Douglas P. Krautheim (a patron), William Dean (a patron), Eileen Sauers (Dawn), one of the dancers, Jerome T. Pillien (a patron), Harry Feifer (a patron) and John Polo (owner of 98% of the stock of the corporate licensee).

Mr. Kleinknecht testified that he entered the premises with Charles Catalano; that he was present from 1 p.m. until 1:50 p.m.; that he usually goes to the premises for lunch on Friday; that he stayed near the front of the premises next to the juke box; that he saw two or three girls dancing; that he saw nothing of a lewd nature; that the girls would have to walk from behind the bar to put money in the juke box; and that he witnessed none of the alleged lewd acts described by the agents. On cross examination he admitted that he was not on the premises from 12:15 to 1 p.m. or from 1:50 to 2:45 p.m.; and he described the performance as ordinary "go-go" dancing.

Robert Hunter testified that he is presently an unemployed machinist; on August 8, 1969 he was employed by the licensee as a bartender; that, on the date in question he served forty to fifty sandwiches; there is a set-up of salt, pepper and ketchup every eight or ten feet around the bar; there were definitely three dancers; each bartender has his own station; the bar measures thirty feet by twenty feet by thirty feet by twenty feet; he saw none of the alleged lewd acts described by the agents, and the dancer could

not have lain on the bar because it was too cluttered.

On cross examination, he testified that he had not worked as a machinist for over a year; that he was very busy on the day in question; and that he only occasionally glanced at the girls.

Leroy Greuter testified that he is an office worker in the area; he was in the licensed premises on the date in question from 1 to 2 p.m. and saw nothing that he would consider to be a lewd or indecent performance.

On cross examination he testified that he had been going to the licensed premises for six months because of the entertainment and that he had dated Cindy Yantorn.

James Pisapia testified that he is the daytime manager of the licensed premises; there are salt and pepper, ketchup and mustard set-ups six or eight feet apart on the bar; each bartender has a station assigned to him; he served eight drinks to the agents; and he was quite busy and did not have time to stand around watching the girls perform.

Continuing, he testified, as follows:

"Q Did they touch you in any way?
A I was grabbed approximately twice if you want to call it being grabbed.
Q How were you grabbed?
A Once when I was in the register with my back toward the stage, one girl did grab my top button and unbutton it, and with that I had walked away.

* * * * *

Q Did anybody else grab you?
A No.
Q Did any of the girls dry-hump you?
A No.
Q Did you see any men on the stage dry-humping with any of the girls?
A Not on the stage.
Q Did you see them dry-humping anywhere?
A As I said, I was quite busy. I haven't got that much time to stand around and really watch them, but I didn't see it. I glanced here and there. That's about all.
Q Did you see the girls dancing?
A Yes.
Q Did they simulate the sex act in any way?
A As much as any dancer could.
Q How did they dance?
A Just danced.
Q You know what dry-humping is, don't you?
A Yes.
Q Were they dry-humping on the stage?
A Gyrating, yes. Dry-humping, I can't buy that. Not altogether.
Q Would you say they gyrated like any other 'go-go' dancers?
A Yes. I fail to see how they can dance without it."

Finally, he denied generally observing any of the alleged lewd acts.

On cross examination, he testified that he was quite busy; he would look at the performers for split seconds; that one of the dancers did step onto the bar for a few seconds.

Jerome Pallien testified that he was a regular customer, almost daily; that he was on the premises from 1 to 2 p.m. on the date in question; that he took his wife there for lunch on the date in question; that he saw nothing of an obscene nature done by any of the girls in his presence.

On cross examination he testified that his wife stayed only about a half-hour; that he did not go to the premises for lunch but, rather, for the entertainment.

Harry Feifer testified that he works in the Newark area on Mondays and Fridays and has lunch at the licensed premises when he is in Newark; he entered the licensed premises at about 11:30 a.m. August 8, 1969; he was in the premises two-and-one half hours; and he denied that any of the alleged lewd acts occurred.

Charles Catalano testified that he had entered the licensed premises in the company of Craig Kleinknecht; he had been a patron for three years; he had been on the premises for forty-five minutes on August 8, 1969; and that nothing obscene occurred while he was on the premises.

Douglas Krautheim testified that he was on the licensed premises August 8, 1969, from 11:30 a.m. to 12:15 p.m. and saw none of the alleged acts of lewdness.

Eileen Sauers (Dawn) testified she has worked for John Polo for three years at the present location and at another bar; that neither she nor the other dancers committed any of the lewd acts; and she is no longer employed at the licensed premises.

John Polo denied that any of the alleged acts of lewdness took place in the licensed premises. He asserted that the agents had eight or ten drinks; and denied that he stated that he knew the girls were going too far.

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 v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956) (36 N.J. Super. 512, 519 (App. Div. 1955)).

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as 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. "...Every fact or circumstance tending to show ... the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence." State v. Spruill, 16 N.J. 73, 78 (1954). It is fundamental that the interest or bias of a witness is relevant in evaluating his testimony. In re Hamilton State Bank, 106 N.J. Super. 285, 291 (App. Div. 1969).

Based upon the foregoing principles, I find that the believable evidence preponderates in favor of the Division. I find

it impossible to believe that the numerous acts described by the agents could all have been contrived. The testimony of Agent C was in no way adversely affected on cross examination. It was thereafter corroborated by Agent N whose testimony emerged unshaken despite a vigorous cross examination.

Assuming for the moment that one or two of the acts alleged were the product of exaggeration, it taxes the mind too greatly to believe that all of the incidents described by the Division witnesses could have been imaginary. It is clear that any one of the numerous acts alleged would, if proven, justify a finding adverse to the licensee. Since the descriptions of the alleged incidents as presented first by the Division agents and then by the licensee are so diametrically opposed, the credibility of the evidence presented became the critical issue. Indeed, the able counsel for the licensee pointed out in argument during cross examination of Agent N, "... the issues of credibility should be looked at rather carefully because we are going to produce a number of people that are going to say a lot of different things than what these people say...." And again, "... the sole issue in this particular matter is one of credibility...."

The entertainment as described by the ABC agents, if believed, constitutes lewd and indecent performances of the vilest nature, and is repugnant to the prevailing moral standard of society. In fact, any one act described would constitute a performance of such nature as would support the charge made by the Division.

Witnesses for the defense, however, denied each and every alleged act of indecency, and they did so in concert. It is this blanket denial which leads the Hearer to question the veracity of the witnesses for the licensee.

The profusion of witnesses which paraded to the witness stand in behalf of the licensee, eager to testify that no indecent act was seen, only serves to underscore the rule that the testimony of many witnesses does not necessarily outweigh the testimony of a few.

The rules cited in <u>State v. Spruill</u>, <u>supra</u>, and <u>In re Hamilton State Bank</u>, <u>supra</u>, are pertinent here. Five of the eleven witnesses who testified were present or past employees. Indeed, one was the majority stockholder. Another was one of the young ladies alleged to have performed indecently. While it does not necessarily follow that persons in such a position would designedly color or exaggerate their testimony, there is nonetheless the personal interest which serves as the basis for the above cited rules. A sixth witness was socially acquainted with one of the entertainers. Thus one can understand his reluctance to be party to a finding that she has entertained indecently in public.

It should be noted that only two of the remaining disinterested witnesses were on the premises for more than one hour of the two-hours period during which the agents made their observations.

Finally, I am convinced that the complete denial of any lewd acts by all of the licensee's witnesses is incredible and unbelievable.

After carefully considering and evaluating the testimony of the witnesses herein, I accept as factual the agents' version of the performances given by the female entertainers. I find

that their graphic, detailed and explicit portrayal of the performances was wholly credible. Re The Garden House, Inc., Bulletin 1920, Item 3.

Accordingly, after considering the entire record and the various precedents cited, I am persuaded by the proofs in this case that the charge has been sustained by a fair preponderance of the evidence. I therefore recommend that this licensee be found guilty of the charge.

Although the licensee corporation has no prior record of suspension of license, the license held by Gary's Bar, Inc., for premises 17 Centre Street, Newark, in which Gloria Polo, an officer, director and stockholder thereof and who is also a 1% stockholder of the within licensee corporation was suspended by the Director for ten days effective July 18, 1966 for gambling (pool game and "liar's poker") on the licensed premises (Re Gary's Bar, Inc., Bulletin 1691, Item 6). In view of the seriousness of the offense, I recommend that the license be suspended for seventy-five days (Re Canterbury Caterers, Bulletin 1863, Item 3) to which should be added five days by reason of the prior record for dissimilar violation within the past five years, or a total of eighty days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the attorney for the licensee pursuant to Rule 6 of State Regulation No. 16.

I have analyzed the matters contained in the said exceptions and find that they have either been considered in the Hearer's report or are lacking in merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the Hearer's report and the exceptions thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 10th day of November 1970,

ORDERED that Plenary Retail Consumption License C-220, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark, to Polo Chez, Inc., t/a Gary's Bar, for premises 488 Broad Street, Newark, be and the same is hereby suspended for eighty (80) days, commencing at 2:00 a.m. Tuesday, November 24, 1970, and terminating at 2:00 a.m. Friday, February 12, 1971.

RICHARD C. McDONOUGH
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - PURCHASE FROM ANOTHER RETAILER - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against EDWARD R. PFEIFER t/a Liberty Tavern 282 St. Paul's Ave. Jersey City, N. J., Holder of Plenary Retail Consumption License C-454, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	CONCLUSIONS AND ORDER

Licensee, Pro se.
Walter H. Cleaver, Esq., Appearing for the Division.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging (1) that on divers dates between December 8, 1969 and September 5, 1970 he purchased alcoholic beverages from other retail licensees, in violation of Rule 15 of State Regulation No. 20, and (2) that on September 5, 1970 he permitted a mislabeled beer tap on the licensed premises, in violation of Rule 26 of State Regulation No. 20.

Licensee has a previous record of suspension of license by the municipal issuing authority for five days effective February 25, 1952 for sale of alcoholic beverages during prohibited hours in violation of Rule 1 of State Regulation No. 38.

The prior record of suspension for dissimilar violation occurring more than five years ago disregarded, the license will be suspended on the first charge for fifteen days (Re Rio Porto, Inc., Bulletin 1913, Item 6), and on the second charge for ten days (Re Old Holland House, A Corporation, Bulletin 1742, Item 9), or a total of twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days.

Accordingly, it is, on this 12th day of November, 1970,

ORDERED that Plenary Retail Consumption License C-454, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Edward R. Pfeifer, t/a Liberty Tavern, for premises 282 St. Paul's Ave., Jersey City, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Tuesday, November 24, 1970, and terminating at 2:00 a.m. Monday, December 14, 1970.

RICHARD C. McDONOUGH
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against Leonard Luizzi 614 Second St. Hoboken, N. J., Holder of Plenary Retail Consumption License C-71, issued by the Municipal Board of Alcoholic Beverage Control of the City of Hoboken.	CONCLUSIONS and ORDER

Licensee, Pro se.
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on September 17, 1970, he possessed alcoholic beverages in two bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Licensee has a previous record of suspension of license by the Director for fifteen days, effective November 24, 1969, for similar violation. Re Luizzi, Bulletin 1892, Item 7.

The prior record of suspension of license for similar violation within the past five years considered, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Re Zaktansky, Bulletin 1737, Item 3.

Accordingly, it is, on this 10th day of November 1970,

ORDERED that Plenary Retail Consumption License C-71, issued by the Municipal Board of Alcoholic Beverage Control of the City of Hoboken to Leonard Luizzi, for premises 614 Second St., Hoboken, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Tuesday, November 24, 1970, and terminating at 2:00 a.m. Monday, December 14, 1970.

Richard C. McDonough
Director

New Jersey State Library