

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 2356

June 10, 1980

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1. DISCIPLINARY PROCEEDINGS (Orange) - SALE TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - ALLOWED, PERMITTED OR SUFFERED AN ACTUALLY OR APPARENTLY INTOXICATED PERSON TO WORK IN LICENSED PREMISES - LICENSE SUSPENDED FOR 25 DAYS UPON FINDING OF GUILTY TO CHARGE NO. 1 - LICENSEE FOUND NOT GUILTY TO CHARGE NO. 2.

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1. DISCIPLINARY PROCEEDINGS - SALE TO A PERSON ACTUALLY OR APPARENTLY
INTOXICATED - ALLOWED, PERMITTED OR SUFFERED AN ACTUALLY OR APPARENTLY
INTOXICATED PERSON TO WORK IN LICENSED PREMISES - LICENSE SUSPENDED FOR
25 DAYS UPON FINDING OF GUILTY TO CHARGE NO. 1 - LICENSEE FOUND NOT GUILTY
TO CHARGE NO. 2.

In the Matter of Disciplinary
Proceedings against

Tisler Corp.
t/a The Orange Pub
465 Main Street
Orange, N. J.

CONCLUSIONS
AND ORDER

Subsequently transferred to

AET CORP.
465 Main Street
Orange, N. J.

Holder of Plenary Retail Consumption
License No. 0717-33-071-002 issued by
the Municipal Board of Alcoholic
Beverage Control of the City of Orange.

Joseph G. Dooley, Jr., Esq., Attorney for Licensee.
Ronald S. Blumstein, Esq., Deputy Attorney General, Appearing for Division.

Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

Dated: September 17, 1979

Received: September 18, 1979

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by the licensee and written Answers were submitted thereto on behalf of the Division, pursuant to N.J.A.C. 13:2-19.6.

The majority of the licensee's Exceptions constitute references to alleged inconsistencies and inadequacies in the testimony of ABC Agent K as to observations made of the alleged "actually or apparently" intoxicated individual, Edna O'Connor. I am satisfied that this agent's testimony was not speculative or vague, but was forthright and credible. The use of the term "apparent", or its derivatives, does not indicate, in the context of the charge, an uncertainty. The agent testified to what she observed, and to some extent, since subjective evaluations were made therein, the testimony had to be couched in somewhat less than absolute certainty.

The physical manifestations of the individual "actually or apparently" intoxicated were directly and unequivocally testified to by ABC Agent K, and corroborated by then ABC Agent De F. The Administrative Law Judge had the opportunity to evaluate said testimony, as well as the testimony of the defense witnesses. I am satisfied and find, from my review and analysis that the record, in its totality, supports a finding of guilty as to Charge No. 1, and I reject licensee's Exceptions related thereto.

With regard to the penalty recommended as to Charge No. 1, to wit, a fourteen days license suspension, I also reject the Exception that the local issuing would not impose such term of suspension. The standards applied are not what the local issuing authority might impose, but rather, this Division's policies as to penalty. In that regard the precedent penalty for this offense is a twenty-five days license suspension. Consistent therewith, I shall reject the Administrative Law Judge's penalty findings and impose a suspension of twenty-five (25) days.

While not a part of the Exceptions filed, in regard to the finding that the second Charge has not been established by a preponderance of the credible evidence, I do concur, based upon my review of the entire record. However, I specifically reject the concepts expounded by the Administrative Law Judge in attempting to explain or distinguish the regulatory terms "actually or apparently" intoxicated. This Division has considered such issue properly decided in Division of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196 (App. Div. 1968) and the various Division Bulletins decisions therefrom. See also, Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960) and Grant Lunch Corp. v. Newark, etc., Alcoh. Bev. Cont., 64 N.J. Super. 553 (App. Div. 1960).

I find the licensee guilty as to Charge No. 1 and shall dismiss Charge No. 2.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Initial Decision, the written Exceptions filed thereto by the licensee and the written Answers submitted on behalf of the Division, I concur in the findings and recommendations of the Administrative Law Judge, except as to the penalty and otherwise heretofore noted, and adopt them as my conclusions herein.

Accordingly, it is, on this 1st day of November, 1979,

ORDERED that, upon the within finding of guilt to Charge No. 1, Plenary Retail Consumption License No. 0717-33-071-002 issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange to Tisler Corp., t/a The Orange Pub, subsequently transferred to AET Corp., for premises 465 Main Street, Orange, be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. Monday, November 19, 1979 and terminating 2:00 a.m. Friday, December 14, 1979, and it is further

ORDERED that I find the licensee "not guilty" as to Charge No. 2 and said Charge be and is hereby dismissed.

Joseph H. Lerner
Director

IN RE: TISLER CORPORATION, T/A)
THE ORANGE PUB)
)
)

INITIAL DECISION
OAL DKT.NO. A.B.C. 1159-79

APPEARANCES:

Joseph G. Dooley, Jr., Esq.
Attorney for Tisler Corporation

John J. Degnan, Esq.,
Attorney General
By: Ronald S. Blumstein, Esq.,
Deputy Attorney General
Attorney for the Division of Alcoholic
Beverage Control

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On July 25, 1979 and August 14, 1979 hearings were held on amended charges which the Division of Alcoholic Beverage Control preferred against Tisler Corporation, t/a The Orange Pub, by notice dated April 16, 1979. These charges were that:

1. On January 9, 1979, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages to a person actually or apparently intoxicated, and allowed, permitted and suffered the consumption of alcoholic beverages by said person in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.1(b) .
2. On November 18, 1978, you allowed, permitted, or suffered an actually or apparently intoxicated person to work in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.20.

Tisler Corporation entered a plea of not guilty to both charges on April 25, 1979.

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The matter was filed with the Office of Administrative Law as a contested case on May 3, 1979 and was assigned the above docket number. It was originally scheduled for hearing on June 5, 1979 but was adjourned.

Prior to the taking of testimony on July 25, 1979, it was agreed that the Division would proceed first with its case with respect to the January 9, 1979 charge.

Mr. Blumstein was granted permission to present, out of order, a witness who, he represented, had been subpoenaed but who had not appeared.

Ms. K was the Division's first witness concerning the January 9, 1979 charge. She testified that she is currently employed by the Division of State Police, Bureau of Alcoholic Beverage Control. Prior to that she was employed exclusively by the Division of Alcoholic Beverage Control for about 4½ years.

On January 9, 1979 she and her undercover investigating partner, DiF, entered The Orange Pub at 11:00 P.M.

She described The Orange Pub as a three story building. When one enters there is an L shaped bar to the right, to the left, a stage with an organ, to the rear, a stairway leading down and restrooms were to the rear left as well as a telephone.

When she arrived there were about 12 people in the bar. The bartender on duty was Arthur Schultz, known to her as Billy.

She seated herself toward the middle of the bar with DiF on her right. She observed a female to her left named Edna O'Connor who appeared to her to be intoxicated.

She observed a glass of beer in front of Edna at the bar. Edna was very unsteady on the bar stool, she weaved back and forth, her eyes were rolling around. When she picked up her glass, her hand was very unsteady. She would squint her eyes and then open them wide again. She had trouble focusing her eyes and she made gestures with them as though she were having trouble seeing.

Edna had difficulty handling her cigarette and she dropped it on the bar, rather than putting it in her ashtray. It remained on the bar.

Edna was seated approximately four bar stools from Ms. K. Another female was between Edna and the witness.

At times, it appeared Edna was sleeping at the bar. Once she left the bar to go to the ladies' room, in the rear. Her movements were very slow and unsteady and she staggered. She braced herself against the ladies' room door prior to entering. Prior to going to the ladies' room, Edna again took another drink from her beer.

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When Edna returned to the bar she staggered and, it seemed, she did not return to her original seat. Her brother helped her with her coat and she had difficulty trying to find the sleeves.

Prior to putting on her coat, Edna asked the bartender for another draft in a very slurred voice. She received another beer from the bartender after rejecting an effort of her female companion to give her some of her beer.

As the result of what they observed, Agent DiF. telephoned the Orange police. The beer that Edna was drinking was seized and, after the police arrived, the two identified themselves to the bartender, the licensee, and advised him of the violation.

The witness stated that alcohol that is seized is poured into an evidence bottle, it is sealed and submitted to the Division chemist for analysis. A small bottle containing a liquid was marked S-1 for identification. The witness identified the bottle as the one into which the beer from Edna's glass was poured. The contents were analyzed and Mr. Dooley stipulated to a report and to its contents which was marked S-2 for identification.

S-2 consists of two pages and is the Director's certification concerning the chemist and the actual report identifying the draft beer seized as containing 3.5% alcohol by volume. S-2 was marked into evidence.

The witness was asked, based on her observations on January 9, 1979 and her experience as an ABC investigator, whether Edna at the time she was served her last drink, was exhibiting obvious manifestations of excessive indulgence in alcoholic beverages. The question was objected to and ultimately allowed because I opined the observation whether one is sober or drunk requires no particular knowledge or skill. See Division of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196, 201 (App.Div. 1968). She answered "yes".

Additionally, based on her observations of Edna she was of the opinion that her conduct departed from the normal. This, too, was objected to.

Ms. K. left with DiF. at midnight.

The Division ended its questioning of Ms. K. with respect to the January 9, 1979 incident, reserving the right to call her concerning the events of November 18, 1978.

On cross examination, Ms. K. admitted preparing a report which she periodically referred to on direct examination. Mr. Dooley reviewed the report and was allowed to retain a copy for cross examination. The witness stated that her report indicated Mrs. O'Connor was two stools away from her. She said both her report and her testimony are "about" accurate. She had said Edna was about four stools over.

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One person was between Ms. K. and Edna. There were no seats between her and this other person.

She stated she believed she said Edna was slumped over at the bar on direct examination..

Ms. K. described the difference between appearing to be slumped over and being slumped over. One is appearing, one is actual.

The bar was 3 or 4 feet high. She could not say how tall Edna was but she was of medium build. The seats were barstools but she could not recall backs on them.

She was in the pub on three occasions. She had been there in November, 1978 also. On January 9, 1979, the tables had been moved over.

The witness was asked when she recalled seeing an L shaped bar. She answered it was approximately L shaped, rounded corners as distinguished from a sharp end,

She was asked if it were a straight bar. She said there were patrons seated at the end of the bar, that her report said L shaped. She recalled people being at the end of the bar facing her.

The witness said Edna appeared to be slumped over. At the hearing Ms. K. leaned over so that her head was about 6 inches from her knees. Edna's head was closer to the bar than to her knees. She appeared to be slumped over. She gave the appearance of being slumped over.

Ms. K. was asked if she knew Edna had a beer in front of her. She stated it gave the visual appearance of beer. Edna was weaving, swaying. The witness sat upright and moved the upper portion of her body in a circular manner and not with her head down.

She was asked how she could observe Edna's eyes rolling around if she were slumped over. She answered that Edna was not slumped over all the time, a portion of the time she was slumped over, a portion of the time she was weaving back and forth and a portion of the time she was in different positions at the bar looking in different directions. Then she was able to see her eyes rolling back and forth.

She admitted that the Pub was not extremely well lighted and that there was one person between herself and Edna. Edna was two stools away.

Ms. K. was in the Pub for an hour. The bar was approximately 18 feet long.

She stated that no one got up from a seat to make room for her when she arrived.

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The closest she got to Mrs. O'Connor that night was about one foot. She noticed nothing about Edna's physical characteristics other than she previously described. She did not recall speaking to Edna. She first observed Edna by her actions about five minutes after she entered the bar. Precisely, her peculiar mannerisms, not acting normally.

Ms. K was asked, if one were partially blind from an accident and had an inner ear or balance problem, would the person act normally. She said it would depend on each individual person with that affliction.

The witness concluded Edna had difficulty focusing because her eyes would close and open and squint and roll around. This was from her complete observation. She did not know if this was the result of Edna drinking one beer or a physical impediment.

She had been in the bar for about thirty-three minutes before Edna went to the ladies' room. She actually had twenty-eight minutes to observe Edna.

When Edna came back to the bar, Ms. K believed she sat to DiF. 's immediate right. She was about a foot from Edna when the police arrived. She noticed nothing unusual about Edna other than what she had testified to.

Ms. K stated that her training on the detection of one who might be drunk stemmed from Division guidelines and on the job training.

She admitted that her report made no mention of Edna having blood-shot and watery eyes. There was no mention of a strong odor of alcohol on her breath. Edna did not appear boisterous.

The witness referred to her report and stated that it contained a reference to Edna's speech being slurred when she asked the bartender for another draft. She did not recall whether she had testified on direct that Edna's speech was slurred. She recalled, after looking at her report, that Edna's speech was slurred. She stated that she did not constantly refer to the report while on direct.

Ms. K defined appearance as indications by gestures. This was with respect to Edna focusing her eyes. She did not know if the appearance of something was the fact of it.

The witness admitted using appearance extensively in her report with respect to Edna's actions and admitted there was a difference between actually doing something and appearing to do it. To her observations it appeared to her that Edna was doing these things. She admitted that perhaps "appearance" was the wrong choice of word. She said it was Division policy to use the word "appearance".

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Edna had difficulty in responding to her female companion when she spoke to her. The witness admitted that this was not in her report.

On re-direct examination Ms. K stated that she did not seek for more indicia of Edna's intoxication when she was about a foot away from her after the police arrived because she felt she already had sufficient evidence to enable her to write a report on one who was under the influence of alcohol.

She stated that the man could not get Edna's arms into the sleeves of her coat because she was moving about and was not being helpful.

Ms. Keller said that when Edna was slumped over she was not swaying. They were two different instances.

Directing her attention to her report, there were people seated in an L shaped fashion at the end of the bar.

On re-cross, Ms. K said DiF was the senior agent on the job but was no longer with the ABC. She had known DiF for 5 years, did not know about his formal training and had worked with him for about a year. In her on the job training, she was told that bloodshot eyes were one of the considerations in determining intoxication. Two others were the odor of alcohol and flushed appearance. Her report made no mention of the latter. She said she was not seated that closely to Edna although she was at one time in the evening only a foot away from Edna.

The local police did not wish to bring Edna to headquarters for further tests. It was not ABC jurisdiction to take the person into custody. They never asked the Orange police to test the woman further. It was left to the local police to proceed further.

In answer to a question from Mr. Blumstein, the witness stated she was aware of cases where the local police chose not to pursue the investigation of the one supposedly intoxicated. ABC has no jurisdiction over the patron.

Ms. K's report on the January 9, 1979 events was moved into evidence as S-3. It contained her markings which she made on the hearing date.

The defense proceeded at this point with the testimony of Frederick W. Liebhauser. He testified he is the brother of Edna O'Connor and that Arthur W. Schultz was his school chum. On January 9, 1979 he, his sister and a Mrs. Jacqueline Craig went to The Orange Pub after they had had dinner at the Beef and Ale Restaurant in West Orange. Mr. Liebhauser picked up his sister and Mrs. Craig at about 5:30 P.M. and drove them to the restaurant where his sister had, during the course of a two hour dinner, two Dewars and water, a prime rib dinner, coffee and salad. Additionally, she drank water. To his knowledge, she had nothing to drink prior to his arrival at her residence.

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They left the Beef and Ale at about 9:20 P.M. His sister asked him if he wanted to go have a drink or something and they proceeded to The Orange Pub. They arrived at about 9:30 or 9:35 P.M.

They went to the rear end of the bar, just past the middle where there were three seats. He ordered a round of drinks, his sister having a tap beer. He did not order another round.

The witness stated that he left his seat to go talk to Mr. Schultz's mother and that a very attractive blond lady took his seat. He therefore stood to the rear, behind his sister and Mrs. Craig. He identified the blond as Ms. K and stated she sat to Mrs. Craig's right. His sister sat immediately to Mrs. Craig's left.

The witness testified that his sister had a tragic accident on Halloween in 1977 when she fell into a hot water pipe manhole and sustained very severe injuries. Her hearing was impaired in both ears. She developed a static twitch in her left eye. She has a scar above her eyebrow. Her eye is damaged and every 18 to 20 seconds, it twitches. Her sight is impaired and she does not hear on her left side. She has a habit of leaning over. In talking to Mrs. Schultz that evening, Edna had to lean down to hear Mrs. Schultz. The latter speaks in a low, modified tone. Edna was leaning toward Mrs. Schultz. She cocked her head to hear, moving her head forward but not in a slump. Edna also was speaking to the witness and Mrs. Craig and her speech was not slurred.

Mr. Liebhauser testified that his sister never left her chair to go to the rest room. Mrs. Craig went to the bathroom.

He stated that neither his sister nor anyone on her behalf ordered a second glass of beer. He was buying and nobody else was buying for his party. His sister was normal, no unsteadiness of hands. She might have been tired. He assisted Edna with her coat and she had difficulty with the left side because of her injury.

On cross-examination, Mr. Liebhauser, in addition to recounting his sister's injuries and condition, stated that she has a minor balance problem. He testified that the Beef and Ale in South Orange is about four miles from his sister's West Orange residence. They left for dinner at about 5:45 P.M. and arrived at about 6:00 P.M. The Beef and Ale is about 5½ miles from The Orange Pub, about 15 minutes by car.

They were seated immediately at the Beef and Ale and left at about 9:20 P.M. after having a leisurely meal.

He drank a lot of coffee and enjoyed talking to his sister during the 3½ hour dinner. His sister had two Dewars and water. He was unaware of his sister having anything to drink prior to his picking her up at 5:30 or 5:35 P.M.

Edna and Mrs. Craig went to the restroom at the Beef and Ale after 8:00 P.M.

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They arrived at The Orange Pub at about 9:35 P.M., took off their coats and had a round of drinks. Edna had a six ounce glass of beer.

Mrs. K entered after 10:45 P.M. He had gotten up from his seat about five minutes before Ms. K and her companion arrived. He was about three feet to the rear of his sister and he did not observe her order another drink. He emphasized he bought his sister one beer and that she was a normal, social drinker.

Two uniformed police officers arrived after 11:30 P.M. His sister became annoyed after the two State employees identified themselves.

I asked Mr. Liebhauser where his sister and Mrs. Craig were on the day of the hearing. He believed his sister to be at home in West Orange. Mrs. Craig was either in Boonton or Roxbury.

The next witness for the defense was Arthur Schultz. He was the only bartender at The Orange Pub on January 9, 1979. He said that Mr. Liebhauser's party came into the Orange Pub and that Edna sat next to his mother, Mrs. Craig next to Edna and Mr. Liebhauser next to Mrs. Craig. The round of drinks included a glass of Schaefer beer which he gave to Edna.

They indicated to him that they had been to dinner and that they were full. He did not gratuitously give Edna a second drink. Mr. Schultz did not observe Edna go to the bathroom. The woman sitting to Edna's right went to the bathroom. Edna was talking to his mother, leaning to her left but she had to go forward to hold her weight with her foot on the foot rest. He recalled nothing unusual about Edna's speech. It definitely was not slurred and her eyes were not bloodshot. Mr. Liebhauser fairly described the condition of Edna's left eye. Mr. Schultz indicated that when Edna talks, the left side of her face appears partially paralyzed.

He recalled the arrival of Ms. K and Mr. DiF

Mr. Schultz testified that Edna sipped her beer and that she acted as though she did not want it. Her hands did not shake nor did her arms twitch.

He stated he bought The Orange Pub on December 1, 1978. Prior to that he had worked elsewhere as a waiter-bartender part time for 7½ years. He felt he could judge whether one has the appearance of having too much to drink. Edna definitely did not have too much to drink nor did she ever appear to be sleeping.

On cross-examination, Mr. Schultz stated that he was the owner of The Orange Pub on January 9, 1979, the sole shareholder of Tisler Corporation. There were ten patrons at the Pub between 9:30 and 11:30 P.M. Mr. Schultz was able to recall and put in the back of his mind exactly who was present because of what he described as the unpleasant incident that happened.

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He was asked if he normally drank while he worked as a bartender. The question was objected to and the objection was sustained. He stated he was not drinking on the night of January 9, 1979.

Mr. Schultz stated he memorized what everyone drank that evening.

The bar is U shaped with two seats at each end.

At the end of the night he did not memorize whether every patron went to the bathroom but Edna definitely did not go. Mrs. Craig went to the bathroom.

Edna drank only one beer. He poured her a second one. Mr. Schultz indicated that the second beer was in the bottle which had been marked S-1 for identification. He initialed the bottle and it contained beer from the glass that was in front of Edna. Mr. Schultz's step-father wanted Edna to have another beer but she did not drink any of it. Edna did not ask for the second glass of beer.

On redirect, Mr. Dooley showed Mr. Schultz two business cards and a piece of paper with some writing on it. The witness said he telephoned Mr. Dooley on January 10, 1979 and that he informed him who was at the bar the previous evening. One piece of paper contained the names of three customers and there were also business cards for Mr. Liebhauser and an Edward Rehling.

On recross, Mr. Schultz stated that the bar was sold on May 10, 1979.

The final witness for the defense on the January 9, 1979 charge was Sharon Ford. She arrived at The Orange Pub at almost 9:45 P.M. Edna arrived and they talked. Her speech was not slurred and she did not look to be intoxicated. On cross-examination, the witness stated that she did not talk with Edna after 9:45 P.M. She knew Edna's party ordered only one drink. She observed a glass of beer in front of Edna but she was not watching Edna the whole evening.

R K. was recalled by Mr. Blumstein. She was asked whether she investigated The Orange Pub on November 18, 1978. At this point, defense counsel moved that I disqualify myself from hearing the November 18, 1978 charge. His reason was that Mr. Blumstein, on cross, had asked Mr. Schultz if he normally drank while working as a bartender. The objection had been sustained. Mr. Dooley continued that the next question to which Mr. Schultz answered, "No, I wasn't", was "were you drinking--". Defense counsel indicated that the next charge went to the crux of that question. He argued that in fairness to Mr. Schultz another judge should hear the entire case. The motion was denied.

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Ms. K. stated that she and Mr. DiF arrived at The Orange Pub at 12:40 A.M. on November 18, 1978. Mr. Schultz was the bartender on duty. She and Mr. DiF sat toward the middle of the bar from where they were able to observe Mr. Schultz. He seemed to be intoxicated and he walked about sluggishly. His face was starting to sag, seeming to lose muscle tone and his facial expressions seemed to be of an intoxicated manner. She saw him consume three shots of liquor. There was a mixed drink on the bar in front of her and she saw him drink this also. These observations were made in a time period of an hour and ten minutes.

She stated that Mr. Schultz was unable to pour scotch into her shot glass. Rather, he missed the glass and poured the scotch on the bar.

The witness testified Mr. Schultz spoke in an irate manner, stating that he was going to kill his tenant, hit her with a board and kick her in the cunt. He said he was going to kick her 70 year old boyfriend in the balls.

She did not identify herself as an ABC agent and she and Mr. DiF left at 1:34 A.M.

On cross, Ms. K. said that she prepared a report of the incident and that she referred to it on direct.

She admitted that Mr. Schultz gave correct change not only to her and DiF but also to the other patrons.

She concluded that on November 18, 1978 that Mr. Schultz was on the verge of intoxication. She admitted that there was a difference between apparently and on the verge and that her report speaks in terms of on the verge and not apparently. She admitted that there was a difference between actual intoxication, apparent intoxication and the verge of intoxication.

Mr. Schultz was sluggish, very slow in movement.

The witness did not know what was contained in the three shots she saw him take. She did not examine the contents of the bottle but it appeared to be a liquor bottle. She could not see the label. She did not know if the mixed drink Mr. Schultz drank contained alcohol.

The witness did not have anything analyzed and thus did not know as a fact that what Mr. Schultz drank was liquor.

She admitted there was nothing about Mr. Schultz's muscle tone in her report.

The patrons in the bar did nothing that would indicate misconduct. The bar was run orderly.

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Her report was silent as to whether there was an odor of alcohol from Mr. Schultz's breath. He was about five feet away from her across the bar.

She admitted her report did not indicate Mr. Schultz spoke in a loud voice or with slurred speech. Ms. K observed him 90% of the time she was in the bar and she did not see him missing the glasses of others while pouring or giving them wrong change.

Her report did not mention that Mr. Schultz's eyes were bloodshot or that he was swaying.

Prior to redirect, Mr. Blumstein moved Ms. K's report for identification and into evidence as S-4. It was determined that Ms. K. marked the report in some respects and added the words "irate" and "loud" on the day of the hearing.

Ms. K testified that her report was intended to be exhaustive of her recollection of events on November 18, 1978. She recalled Mr. Schultz's tone to be irate. She, from her vantage point, was not able to see in which way he poured drinks for every patron. The bottle which he used to pour his shots was located in the back of the bar with other liquor bottles. She was familiar with what alcoholic beverage labels looked like and the bottles that she could observe the labels on were alcoholic beverages. The bottle Mr. Schultz used had a free pouring spout.

He used shot glasses. She saw him drink the shots of liquor and the mixed drink but she did not see him prepare the latter.

On recross, Ms. K stated she did not know what was on the label of the bottle Mr. Schultz used. She admitted covering more at the hearing than what was in her report. She did not know what was in the bottle or whether it was a mixed drink. She only knew Mr. Schultz was sluggish. She did not see him have a problem pouring other drinks or giving other people their change. She said that she would like to think her testimony and her report were all accurate, but that it did not appear that way.

No sample was taken because it was a continuing investigation.

Ms. K said that the licensee was on the verge of intoxication. It was stipulated that the corporate licensee, Tisler Corporation, was not intoxicated. There was no general misconduct.

At this juncture, Ms. K was excused and Mr. Blumstein indicated that Mr. DiF had not appeared and that he was unable to locate him, he having not responded to the subpoena. His request for an adjournment, objected to by Mr. Dooley, who rested his case, was granted.

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I recalled Mr. Schultz to the stand and determined that he was the sole owner of Tisler Corporation on November 18, 1978. I entered into evidence as my exhibit (J-1) the two business cards and piece of paper containing three names to which Mr. Schultz testified.

On August 14, 1979 a second hearing was held over the objection of Mr. Dooley.

S DiF testified. I elicited from him that he had not communicated with Ms. K. concerning her testimony of July 25, 1979.

Mr. DiF indicated that he was employed as a police officer in West Orange. Prior to that, he had been employed for about five years with the Division of Alcoholic Beverage Control.

He testified that he investigated The Orange Pub on November 18, 1978. He arrived at about 12:40 P.M. with Inspector K. and that Mr. Schultz was the bartender on duty. He recalled that Mr. Schultz consumed three shots of liquor and a mixed drink. The witness did not know exactly what kind of liquor Mr. Schultz drank. He assumed it was liquor because it came out of a bottle. Mr. Schultz seemed like he was slightly intoxicated. He concluded this because of Mr. Schultz's gait, facial expressions and speech.

The witness had a report that had been prepared by Ms. K. and which he signed on November 20, 1978.

He said Mr. Schultz told him he was going to hit a tenant in the head with a board, kick her in the cunt and kick her 70 year old boyfriend in the balls. The witness stated that this seemed to be a little out of context and that Mr. Schultz appeared possibly being intoxicated.

The two agents did not identify themselves on November 18, 1978. They left the bar at about 1:34 A.M.

Mr. Dooley was permitted to cross-examine on the November 18, 1978 incident. Mr. DiF said that he did not know what Mr. Schultz consumed.

He testified he attended a State Police Academy in Union County from September 1974 to November 1974.

He admitted that the only experience he had concerning the indicia of intoxication was his field experience.

Mr. Schultz was in his view 100% of the time that he was in The Orange Pub although he did not watch him directly all the time.

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The witness could not recall if Mr. Schultz had difficulty giving people their correct change. Although a foot away from the bartender, he could not recall if his eyes were bloodshot, whether an odor of alcohol emanated from his breath or whether his speech was slurred.

On redirect, Mr. D F could not recall how Mr. Schultz poured drinks for him and Ms. K . He said that, based on his experience, he could differentiate between a liquor bottle and a soda bottle. He recalled that Mr. Schultz drank alcohol that evening.

On recross, the witness stated that Mr. Schultz had alcohol because he poured it out of a liquor bottle but he did not know what was in the bottle, nor what the label was. He admitted he did not know what Mr. Schultz consumed.

Concerning January 9, 1979, he said he and Ms. K entered The Orange Pub at 11:00 P.M. Mr. Schultz was the bartender. The two sat approximately in the middle of the bar. He focused his attention on a woman seated to his and Ms. K 's left who appeared to be intoxicated. The woman was seated to the left of Ms. K on the next stool or the one after it. The woman was with, he believed, her brother and possibly someone else. He did not recall the woman being more than two stools away. He was speaking about Edna. He stated her speech was slurred, she spoke out of context, dropped her cigarette on the bar, was unsteady and, kind of, started falling asleep.

He observed Edna drinking. He did not recall what it was. He said Edna walked unsteadily to the ladies' room. She returned in an unsteady manner and sat to his right, not in her proper seat. After she found her original seat, she wanted another drink. She received a draft beer from Mr. Schultz.

Mr. DiF called The Orange Police and, upon their arrival, informed Mr. Schultz and those involved of the violation. He testified he was familiar with the ABC standard of apparently intoxicated and, in his opinion, based on the observations he made, Edna O'Connor appeared to be intoxicated.

On cross, he stated that Edna was not arrested for being under the influence of an alcoholic beverage or for being a disorderly person. He remembered Edna drinking some beer. He did not know what was contained in Edna's glass at the time he arrived at The Orange Pub.

He said that Ms. K sat to his left and that Edna sat either on the stool next to Ms. K or on the one after that. He did not recall anyone between Ms. K and Edna. He believed, to the best of his recollection, that Edna's friend, not her brother, was to Edna's left.

He knew Edna went to the bathroom because she later identified herself. He remembered her going to the bathroom.

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Mr. Schultz's mother was seated to Edna's left.

The witness stated that his report indicated that Edna was with a friend but he did not recall if the friend was seated between Ms. K. and Edna. On the diagram he made at the hearing, the witness indicated that Edna was next to Ms. K., on Ms. K.'s left. He did not recall to whom Edna spoke in a slurred manner. He was not familiar with Edna's normal speech.

Mr. DiFuria was no more than a foot from Edna when he asked her her name and other information. His report is silent as to whether Edna had bloodshot eyes or a flushed face or whether her breath had a strong odor of alcohol on it. The witness said it was possible these three criteria for the appearance of alcohol existed but he did not make a note of them in his report. He had no independent recollection of them.

The woman friend of Edna went to the bathroom after Edna. He recalled that Edna went first.

S-5, the joint report of Ms. K. and Mr. DiFuria concerning the November 18, 1978 incident and S-6, Mr. DiFuria's report of the events of January 9, 1979 were admitted into evidence.

The Division rested on both charges.

Mr. Dooley indicated that he had previously rested.

A discussion then ensued concerning a letter which I wrote to both counsel on July 26, 1979 concerning the production of Edna O'Connor and her medical records at the August 14, 1979 hearing. I read the letter into the record (T68-21 to 71-4). The entire discussion will be found (T61-13 to 75-19). Mrs. O'Connor and her medical records were not produced and, after my determination that there would be no third hearing date and the summations, the hearing was closed.

Disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence, Freud v. Davis, 64 N.J. Super. 242, 248 (App. Div. 1960).

I have studied the transcripts of the July 25, 1979 and August 14, 1979 hearings and have set forth the facts in detail. I have also listened to the tapes of the July 25, 1979 hearing, have observed and listened to the witnesses as they testified and have given this matter careful thought and consideration.

In my judgment the record contains substantial evidence for me to conclude that the Division has proven, by a preponderance of the believable evidence, the guilt of Tisler Corporation, trading as The Orange Pub, with respect to the January 9, 1979 charge.

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I also conclude, based on my review of the whole record, that the Division has not sustained its burden of proving Tisler's guilt on the November 18, 1978 charge by a preponderance of the believable evidence.

First, as to the latter charge, November 18, 1978. The Division charged Tisler as follows:

"On November 18, 1978, you allowed, permitted, or suffered an actually or apparently intoxicated person to work in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.20."

R. K. testified that, Mr. Schultz was the bartender on duty on November 18, 1978. He seemed to be intoxicated. He was sluggish, his face sagged, he seemed to lose muscle tone and he missed her glass when he poured her a drink, hitting the bar instead. He was slow in movement. Mr. Schultz was irate in tone and he used foul language with respect to his tenant and her boyfriend.

Mr. Schultz gave all patrons their correct change and had no trouble pouring drinks for others. The bar was orderly.

Ms. K. concluded on November 18, 1978 that Mr. Schultz was on the verge of intoxication. She admitted that there was a difference between one being apparently intoxicated and one being on the verge of intoxication. Her report spoke in terms of on the verge of intoxication.

Ms. K. did not mention that an odor of alcohol emanated from Mr. Schultz's breath, or that his speech was slurred, or that his eyes were bloodshot or that he swayed. It did not appear that both her testimony and report were all accurate.

To me, the key fact in Ms. K.'s testimony was that she concluded on November 18, 1978 that Mr. Schultz was on the verge of intoxication.

In my judgment, one is either actually or apparently intoxicated or he is not. If one is merely on the verge of intoxication, he is not actually or apparently intoxicated.

The noun "verge" is defined in the Second College Edition of Webster's New World Dictionary (1972) at page 1577 as "The edge, brink or margin (of something) (the verge of the forest): also used figuratively (on the verge of hysteria)". The World Book Dictionary, Volume Two, L to Z, page 2323 defines the noun "verge" as "the point at which something begins or happens; edge; rim; brink: The country is on the verge of civil war." As an intransitive verb it is defined as "to be on the verge; be on the border; border (on): Fifth Avenue verges on Central Park".

Ms. K.'s testimony was therefore insufficient to prove that Mr. Schultz on November 18, 1978 was, as was charged, actually or apparently intoxicated.

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I reach the same conclusion after reviewing Mr. DiF. 's testimony with respect to November 18, 1978. He testified that Mr. Schultz seemed like he was slightly intoxicated because of his gait, facial expressions and speech. He stated that Mr. Schultz appeared possibly being intoxicated.

Again, this testimony was not enough to prove by a preponderance of the believable evidence that Mr. Schultz was actually or apparently intoxicated as he worked as a bartender on November 18, 1978. One who seems to be slightly intoxicated or who appears possibly being intoxicated is not, in my judgment, actually or apparently intoxicated. There must be something more definite.

The Division therefore failed to prove by a preponderance of the believable evidence that Mr. Schultz was actually or apparently intoxicated on November 18, 1978 and I recommend that the charge be dismissed.

With respect to the January 9, 1979 charge I have found substantial competent evidence in the whole record to enable me to conclude that the Division has successfully shouldered its burden of proving by a preponderance of the believable evidence the guilt of Tisler. The choice of accepting or rejecting the testimony of witnesses is mine, Freud v. Davis, 64 N.J. Super. 242,246 (App.Div.1960). I have the duty of making a reasonable choice, Freud v. Davis supra, page 246.

It has also been held that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a person is sober or intoxicated, Freud v. Davis, supra, page 247.

The charge which the Division preferred against Tisler was that "On January 9, 1979, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages to a person actually or apparently intoxicated, and allowed, permitted and suffered the consumption of alcoholic beverages by said person in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.1(b)."

Ms. K testified that Edna O'Connor, the patron in question, was apparently intoxicated. Edna had a glass of beer in front of her and was very unsteady on the barstool. She weaved back and forth, her hand was very unsteady, her eyes rolled around, she squinted them and had trouble focusing and seeing. Additionally, Edna would open and close her eyes and she had difficulty handling her cigarette, dropping it on the bar where it remained rather than putting it in her ashtray. Ms. K stated that Edna appeared to be sleeping at the bar and that when she walked, her movements were very slow and unsteady and she staggered, bracing herself against the ladies' room door for support. When she returned from the ladies' room she did not return to her seat and she was not helpful to her brother as he assisted her in putting on her coat. She had difficulty finding the sleeves.

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Ms. K said that Edna received another beer from the bartender, Mr. Schultz, and that it had the visual appearance of beer. Edna appeared to be slumped over, she swayed and her speech was slurred.

I am aware that the record contains some inconsistencies in Ms. K's testimony such as how many stools separated Edna and Ms. K and the shape of the bar. I am also aware of the fact that Ms. K at one time in the evening was about a foot away from Edna and that her report did not mention bloodshot or watery eyes, an odor of alcohol on Edna's breath or a flushed appearance. However, it is a rare trial or hearing where some inconsistencies are not brought out by cross-examination.

Mr. DiF stated that Edna appeared to be intoxicated, her speech was slurred, she dropped her cigarette on the bar, was unsteady and started falling asleep.

When she returned from the ladies' room she sat next to him, not in her proper seat. She received a draft beer from Mr. Schultz. She was apparently intoxicated.

There was no mention in his report of Edna having bloodshot eyes, a flushed appearance or an odor of alcohol on her breath.

I am aware that Edna sustained severe personal injuries as the result of a fall on Halloween, 1977. This accident left her with an appearance and mannerisms that one would normally not have. However, one could have the unfortunate physical conditions that Edna had and still exhibit the signs of apparent intoxication which the two agents observed and to which they testified. The two states, if you will, could readily co-exist and, in this case, did in fact co-exist. In my judgment, the testimony of Ms. K and Mr. DiF, with respect to Edna's state of apparent intoxication went well beyond her appearance and mannerisms as the result of her accident. The two observed manifestations or symptoms of Edna's excessive indulgence in alcoholic beverages and they saw that she was under the influence of alcohol to such a degree that her conduct and demeanor departed from the normal.

I therefore hold that the Division has proven by a preponderance of the believable evidence the guilt of Tisler to the charge of January 9, 1979.

Accordingly, I find the following facts with respect to the January 9, 1979 charge:

1. That Arthur Schultz was the sole shareholder in Tisler Corporation, the owner of The Orange Pub.
2. That Arthur Schultz was the bartender on duty.
3. That Tisler Corporation, through Arthur Schultz, sold, served and delivered beer, an alcoholic beverage, to Edna O'Connor.

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4. That the sale, service and delivery of beer to Edna O'Connor was allowed, permitted and suffered by Tisler Corporation, through Arthur Schultz.
5. That Edna O'Connor was actually or apparently intoxicated for the reasons I set forth in concluding that the Division had proven this charge by a preponderance of the believable evidence.
6. That Edna O'Connor consumed the beer in the licensed premises, The Orange Pub.
7. That this consumption was allowed, permitted and suffered by Tisler Corporation, through Arthur Schultz.
8. That therefore Tisler Corporation violated the provisions of N.J.A.C. 13:2-23.1 (b).

Concerning the November 18, 1978 charge I find the following facts:

1. That the relationship between Arthur Schultz and Tisler Corporation was the same as that on January 9, 1979.
2. That Arthur Schultz was the bartender on duty.
3. That Arthur Schultz was not actually or apparently intoxicated for the reasons I expressed in finding that the Division had not established this charge by a preponderance of the believable evidence.

I therefore recommend that a resolution be adopted finding that the November 18, 1978 charge has not been established and dismissing the proceedings on that ground.

As previously indicated, the charge of January 9, 1979 has been established. In my judgment, although the violation is a fact, it was not an egregious violation. It involved one patron and there were no aggravating circumstances. I therefore recommend that a resolution and order be adopted finding that the charge has been established and ordering that the license of Tisler Corporation, trading as The Orange Pub, be suspended for fourteen days.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of 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(c).

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.

DATE

Gerald T. Foley, Jr., A.L.J.

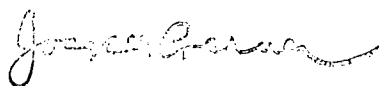
Receipt Acknowledged:

DATE

AGENCY HEAD

Mailed to Parties:

FOR OFFICE OF ADMINISTRATIVE LAW



Joseph H. Lerner
Director