

STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
RICHARD J. HUGHES JUSTICE COMPLEX - CN-087  
TRENTON, NEW JERSEY 08625-0087

BULLETIN 2449

April 30, 1987

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1. NOTICE REGARDING REVISIONS IN TRADE SHOW PERMITS FOR SUPPLIERS AND WHOLESALERS - CRITERIA FOR TRADE SHOW, MERCHANDISING AND SAMPLING PERMITS ISSUED PURSUANT TO N.J.A.C. 13:2-24.7

N.J.A.C. 13:2-24.7 provides that "...samples may be provided to retailers, and donations of alcoholic beverages made to qualified industry trade organizations, only within the terms and conditions of a special permit first obtained from the Director, issued upon a petition establishing and defining its need and use and verifying that all taxes have been paid thereon." In furtherance of this, the Division issues five different permits. This notice is provided to define the criteria, fees and terms for those five permits.

SAMPLE OR DISPLAY PERMIT

Revised criteria for the Sample or Display Permit were promulgated in Bulletin 2441, Item 5 (April 26, 1985). This permit allows a solicitor for a wholesale licensee to carry samples of alcoholic beverages and either display such products to retail licensees or offer tastings in quantities not exceeding 50 ml. for distilled spirits, 12 oz. for beer, or 4 oz. for wine to any one individual licensee and/or his bona fide employee (provided such person is of legal drinking age, i.e. 21). The display or sampling may occur on the retail licensee's premises or at the retail licensed location from a vehicle, such as a beer truck, maintained or utilized by the wholesaler for such purpose, even though the area on which it is parked is not strictly part of the retail licensed premises.

The Sample or Display Permit is issued for a 1-year period commencing on the date of issuance at a fee of \$25.00 per registered brand. Copies of the permit may be reproduced by the permittee wholesaler to be given to each solicitor carrying the samples, and no additional copies of the permit need be purchased from the Division. The solicitor must sign his name and solicitor's permit number on the copy of the permit carried by him and he must carry this copy with him when displaying, sampling or transporting the product.

Each solicitor utilizing the Sample or Display Permit must maintain a log listing the name, license number and address of each retail licensee to whom or to which samples are provided, as well as the names of any bona fide employees of the retail licensee to whom samples are given, and the date on which given. The log must be produced by the solicitor upon reasonable demand by anyone authorized to enforce the alcoholic beverage control laws or regulations and must be retained by the wholesaler-employer of the solicitor for a period of 3 years following the expiration date of the permit. A

recent random review of such logs has indicated to the Director that they are either not being maintained or are being maintained in a superficial and non-complying manner. Notice is hereby given that failure to maintain the required log and information will result in denial of future sampling permits to such non-complying wholesaler, and may also result in disciplinary proceedings for failure to comply with the terms of the issued permit.

Each product covered by a Sample or Display permit must be clearly marked "SAMPLE - NOT FOR SALE", or "FOR DISPLAY PURPOSES ONLY - NOT FOR SALE" in ink across the label of the container in letters not less than one-half inch in height and of proportionate width (except on miniatures, on which the size of the lettering may be reduced as necessary). An original sealed container in a size no greater than the allowable sample quantity may be left with the retail licensee or employee for later tasting and evaluation. Such container, however, must have the required sampling notation affixed to the container in a manner that will prevent its removal so that the retailer cannot offer the product for resale to consumers.

The application or Petition for Sample or Display Permit may be obtained from the Licensing Bureau of the Division. A reduced size facsimile of the petition appeared in Bulletin 2441, Item 5, and may be reproduced therefrom. The wholesaler is responsible for paying all taxes to the State of New Jersey on the product sampled.

#### PERMIT TO DISPENSE SAMPLES IN CONJUNCTION WITH TRAINING OR INSTRUCTIONAL SEMINARS

This permit is issued to a Class A or Class B licensee (supplier or wholesaler) to permit the utilizing and dispensing of samples of the permittee's alcoholic beverages to retail licensees for purposes of training or demonstrating product management, equipment use and maintenance, or dispensing techniques; or for informational business conferences (but not for selling or promoting sales). The sampling under this permit is restricted to open containers for immediate consumption on the premises of the supplier or wholesaler permittee and only during or as part of instructional seminars or conferences.

The fee for this permit is \$25.00 and it is issued for a period expiring on June 30th following the issuance date. The fee is not prorated for less than a year's period. Application for this permit may be made on letterhead of the supplier or wholesaler. The wholesaler is responsible for paying all taxes to the State of New Jersey on any products sampled under this permit.

#### DONATION PERMIT

The Donation Permit is issued to a supplier or wholesale licensee on an annual basis to authorize the permittee to donate alcoholic beverages to licensee associations for dispensing at social affairs conducted by and for the members of the association and alcoholic beverage industry.

The permit provides that alcoholic beverages may be furnished for any industry social affair being held during the effective period of the permit, provided that the Director first approves the quantity of alcoholic beverages to be donated. The supplier or wholesaler must submit a proposed approval letter, in duplicate, at least seven days prior to the date of the affair, and must indicate that a prior written request has been made to the supplier or wholesaler by the association. The approval request must include the date, time and place of the affair; the approximate number of guests; and the quantity, size and kind of alcoholic beverages to be furnished.

Except for malt alcoholic beverages and coolers, all bottles being donated must be clearly marked "DONATION - NOT FOR SALE" in indelible ink across the label, in letters not less than one-half inch in height and of proportionate width. In lieu of ink, gummed labels, that are not removable, may be used.

The Donation Permit provides that alcoholic beverages being transported to the affair must be accompanied by a copy of the permit and, when delivered, must be receipted for by a responsible officer of the association. The receipts must be retained by the permittee, and be attached to the original request from the association, for a period of at least one year from the expiration of the permit.

The fee for the annual permit is \$100.00 and will be issued to expire on December 31st following issuance. The fee is not-prorated for less than a year's period. Application for this permit may be made on letterhead of the supplier or wholesaler. The permittee is responsible for paying all taxes to the State of New Jersey on any products donated under this permit.

#### MERCHANDISING SHOW PERMIT

A Merchandising Show Permit may be issued to a supplier or wholesaler to authorize the dispensing of samples of alcoholic beverages in open containers for immediate consumption on the premises to New Jersey retailers (including their bona fide employees), members of the alcoholic beverage industry, or authorized guests, who are of legal drinking age, i.e., 21, at a trade show sponsored by recognized alcoholic beverage or related industry associations or groups. When issued, the permit, or a copy of it, must accompany the beverages en route to and at the trade show, and the original must be conspicuously displayed during the trade show. The permit will also authorize the transportation and temporary storage of the alcoholic beverages at the trade show site.

The fee for the Merchandising Show Permit is \$50.00 per calendar day if issued to the holder of a New Jersey Class A or Class B license (supplier or wholesaler). If issued to a non-New Jersey licensed industry member (which may be done on petition establishing that such industry member is seeking to introduce a product into the New Jersey market or where a trade show is held on a regional or multi-state basis), the fee is \$75.00 per calendar day. Application forms are obtainable from the Licensing Bureau of the Division. The

permittee is responsible for paying all taxes to the State of New Jersey on any products sampled under this permit.

A Merchandising Show Permit may also be issued to a group of licensees or to a trade group representing more than one licensee if the display and tasting is to be conducted in common for the promotion of the related products. Such qualifying entities include, but are not limited to, the New Jersey Wine Industry Advisory Council, Rums of Puerto Rico, or national trade councils promoting the alcoholic beverage products of a particular country. The fee for the permit is \$50.00 per calendar day if the majority of those represented by the entity are New Jersey licensees, or \$75.00 per calendar day if the majority are not licensed in New Jersey.

#### PERMIT FOR INDIVIDUAL LICENSEE PRODUCT INTRODUCTION/PROMOTION EVENT

This permit may be issued to a Class A or Class B licensee (supplier or wholesaler) to authorize the gratuitous dispensing of samples of alcoholic beverages in open containers for immediate consumption on the premises to licensed New Jersey retailers or their bona fide employees who are of legal drinking age, i.e., 21, at a function held by the permittee, either on or off its licensed premises, in order to introduce or promote a product or products that such permittee is authorized to sell and offers for sale in the regular course of its business.

The permit will only be issued if the event is non-discriminatorily open to all retailers within a defined general classification (such as a defined area, county, etc.) or in a certain defined class (such as licensees having at least 50% of sales in package goods, etc.). The permit will not be issued for a private affair. The permittee will also be required by the terms of the permit to maintain a log in which is recorded the date, location of event, name and business affiliation of attendees.

This permit will authorize the permittee to utilize products from its own inventories, but licensees are cautioned that, if the event is scheduled off the permittee's premises and on a retail licensed premises (including Atlantic City casino-hotels), the permittee must obtain the retailer's consent to bring in alcoholic beverage products pursuant to this permit.

When issued, the permit, or a copy of it, must accompany the beverages en route to and at the site of the event, and the original must be conspicuously displayed during the show. The permit will also authorize the transportation and temporary storage of the alcoholic beverages at the site of the event if off the permittee's licensed premises.

The fee for this permit is \$50.00 per calendar day. Application forms are obtainable from the Licensing Bureau of the Division. The permittee is responsible for paying all taxes to the State of New Jersey on any products sampled under this permit.

2. OPINION LETTER: EMPLOYMENT OF POLICE OFFICERS FOR CROWD/TRAFFIC CONTROL OR TO PROVIDE SECURITY FOR LARGE SUMS OF MONEY

The following opinion letter was sent by the Director to a Police Chief who had written a letter dated April 24, 1987, requesting authorization for members of his department to be employed on the premises of licensees within his municipality for crowd/traffic control or security for money:

Dear Chief:

This letter is written in response to your letter dated April 24, 1987, in which you requested authorization, pursuant to N.J.S.A. 33:1-26.1 and N.J.A.C. 13:2-23.31 to allow police officers from your department to be employed by liquor licensed establishments in your municipality for crowd/traffic control or security for large sums of money. You represent in your letter that all such police officers are hired directly through the Police Department's Record Bureau and payment for services are made to the officer, apparently by the licensee. You assure us that you wish to strictly conform with the regulation and not deviate from same.

Although, generally, licensees may not employ a police officer whose jurisdiction is in the same municipality in which the licensee's premises is located, our regulations do provide for a relaxation of such employment by certain licensees where the use of trained police officers may be required to provide crowd control, traffic control or security for large sums of money. In the past, by regulation, this exception has been limited to licenses owned by racetracks, stadiums, auditoriums, theatres and other such establishments whose primary business does not consist of the sale or service of alcoholic beverages. N.J.A.C. 13:2-23.31(b)3.

Recognizing that the usage of such West Orange officers for specifically limited instances of crowd control and to provide security is a proper police related purpose which needed not to be restricted exclusively to race tracks, stadiums, auditoriums, theatres or other such establishments whose primary business does not consist of the sale or service of alcoholic beverages (absent any evidence or suggestion of potential and probable abuse), I indicated in our ABC Handbook that such employment could be authorized without delimiting same to the restricted class of license holders. Accordingly, I shall herein grant the authorization you request. In doing so, I believe it is both necessary as well as helpful to add some clarifying information which was left out of the Handbook in consideration of the limited space available.

The Handbook states that "[t]he municipality may either bill the licensee for such cost or may require the licensee to pay such officers directly. In no event, however, may the licensee directly hire these police officers without the assignment by the local police superiors." (emphasis supplied.) Therefore, my author-

ization herein is subject to the occurrence of three conditions precedent to the hiring of your police officers.

1. The employment of such officers must legitimately be limited to instances of:
  - a. crowd control;
  - b. traffic control; and/or
  - c. providing security for large sums of money collected or otherwise utilized by such licensees.

Officers cannot be hired under this exception utilizing one or more of the above noted instances as a sham and thereafter be employed for non-related purposes.

2. The officers must be assigned by their police superiors for carrying out such specific above listed exempt duties; and

3. The municipality must establish a written policy which either requires the licensees to pay the municipality for the noted police services or requires the licensees to pay the police officers directly. The allowance provided herein for licensees to pay the officers directly is based upon our recognition that some municipal budgets may be unable to provide for employment by licensees as herein authorized, especially should same contain a requirement that overtime be paid such officers. Nevertheless, the municipality's requirement that the licensees pay the officers directly establishes a clear municipal policy and authorization for such employment practices and establishes additional safeguards against this authorization being improperly utilized to circumvent appropriate regulations and statutory provisions.

Given the accomplishment of the above three conditions, thereafter, employing licensees should file, with your office, a written statement listing the names of the police officers employed, and the amount of lump sum payment made to such officer(s) for the period employed. Since your office assigns such police officers upon request, these statements can be filed after the fact and on a yearly basis.

The authorization granted herein is based upon the representations contained in your letter and your assurances that such employment will conform to the specifics indicated in the regulations. Additionally, I am sure you will caution your officers that should they determine that any violations of the alcoholic beverage control laws or regulations are taking place, they must properly take appropriate action even in recognition that same may be detrimental to the licensee who is paying for their off-duty employment. Police officers are under an affirmative duty to enforce the alcoholic beverage control laws utilizing due diligence to detect violations and apprehend offenders pursuant to the provisions of N.J.S.A. 33:1-71.

Very truly yours,  
s/John F. Vassallo, Jr.

## 3. STATE LICENSE TRANSACTIONS - JANUARY 1, 1987 TO DATE.

| LICENSE TYPE:  | LICENSE #:      | STATUS:  |
|--|-----------------|--|
| State Beverage Distributors<br>Frank Grillo<br>1590 South Olden Avenue<br>Trenton, NJ 08610  | 3401-19-465-001 | New license<br>iss. eff:<br>1/6/87   |
| Annual State Permit<br>Railhead Inc.<br>One Hudson Place<br>Hoboken, NJ 07030  | 3401-14-464-001 | New license<br>iss. eff:<br>1/6/87   |
| Additional Warehouse<br>Shorepoint Distributing, Co. Inc.<br>6 Industrial Way W Bay 7-B<br>Eatontown, NJ 07724   | 3401-24-121-002 | Place to<br>Place Transfer<br>eff: 1/7/87                                    |
| Limited Wholesale License<br>Adolph Coors Company<br>Golden, Colorado 80401  | 3401-25-466-001 | New license<br>iss. eff:<br>1/8/87   |
| Transportation License<br>Independent Liquors of NJ, Inc.<br>301 South Salem Street<br>Dover, NJ 07801   | 3401-20-467-001 | New license<br>iss. eff:<br>1/15/87  |
| Plenary Retail Transit<br>Night Hawk, Inc.<br>1602 Doris Street<br>Neptune, NJ 07753   | 3401-13-468-001 | New license<br>iss. eff:<br>1/27/87  |
| Additional Warehouse<br>Shore Point Distributing Co.<br>Rt #35 and Laurel Avenue<br>Holmdel, NJ 07733<br>From: 6 Industrial Way<br>West Bay 7 & 8<br>Eatontown, NJ | 3401-24-121-003 | Place to<br>Place Transfer<br>eff: 1/27/87                                   |
| Transportation License<br>Martini, Inc.<br>Route 309<br>Drums, PA 18222  | 3401-20-469-001 | New License<br>iss. eff:<br>2/2/87   |
| Additional Warehouse<br>Peerless Beverage Company<br>1064 Springfield Road<br>Union, NJ 07083  | 3401-24-470-001 | New license<br>iss. eff:<br>2/5/87   |
| Transportation license<br>Warren Trucking Company, Inc.<br>P.O. Box 5224<br>State Rt 782<br>Martinsville, VA 24115   | 3401-20-471-001 | New license<br>iss. eff:<br>2/10/87  |
| Transportation License<br>Oval Cargo Distribution Systems, Inc.<br>1201 Corbin Street<br>Elizabeth, NJ 07201   | 3401-20-472-001 | New license<br>iss. eff:<br>2/25/87  |
| State Beverage Distributors<br>RKL INC.<br>Berkshire Valley Road #5523<br>Oak Ridge, NJ 07438<br>From: Berkshire Valley Road<br>Oak Ridge NJ 07438                 | 3400-19-216-005 | Place to<br>Place Transfer.<br>Corporate<br>Structure Change<br>eff: 2/25/87 |



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| Transportation license<br>Atlantic Steamers Supply Co. Inc.<br>1110 Adams Street<br>Hoboken, NJ 07030                                    | 3401-20-473-001 | New license<br>iss. eff:<br>2/27/87        |
| Limited Wholesale license<br>Batavia Wine Cellars Inc.<br>School Street<br>Batavia, NY 14020   | 3401-25-475-001 | New license<br>iss. eff:<br>3/17/87        |
| Transportation license<br>Cardinal Transport Inc.<br>1230 Northern Illinois Drive<br>Channahon, IL 60410                                 | 3401-20-476-001 | New license<br>iss. eff:<br>3/20/87        |
| Transportation License<br>BFT Transport Inc<br>31 Fargo Street<br>South Boston, MA   | 3401-20-477-001 | New license<br>iss. eff:<br>3/20/87        |
| Plenary Wholesale license<br>Wine Imports, Inc.<br>80 River Street<br>Hoboken, N J 07030<br>From 1 Loretto Avenue<br>Hawthorne, NJ 07506 | 3400-23-957-003 | Place to<br>Place Transfer<br>eff: 3/20/87 |
| Public Warehouse license<br>Network Transportation Systems<br>35 Brown Street<br>Washington, NJ 07882                                    | 3401-28-474-001 | New license<br>iss. eff:<br>3/26/87        |
| Public Warehouse license<br>Tyler Distribution Centers Inc.<br>283 Dayton Jamesburg Rd<br>Dayton, NJ 08810                               | 3401-28-478-001 | New license<br>iss. eff:<br>3/25/87        |
| Annual State Permit<br>Casino in the Park, Inc.<br>Lodge Lincoln Park<br>Jersey City, NJ 07306   | 3401-14-479-002 | New license<br>iss. eff:<br>3/25/87        |
| Limited Wholesale license<br>Aries Importers Corporation<br>5 Parkside Drive<br>North Brunswick, NJ 08902                                | 3401-25-482-001 | New license<br>iss. eff:<br>3/25/87        |
| Transportation license<br>Network Transportation Systems, Inc.<br>35 Brown Street<br>Washington, NJ 07882                                | 3401-20-483-001 | New license<br>iss. eff:<br>3/26/87        |
| Transportation license<br>Liz Transport Inc.<br>15 Augusta Avenue<br>Edison, NJ 08820  | 3401-20-484-001 | New license<br>iss. eff:<br>3/25/87        |
| Limited Wholesale license<br>Universal Fine Wines Ltd Inc.<br>801 Washington Avenue<br>Carlstadt, NJ 07072                               | 3401-25-480-001 | New license<br>iss. eff:<br>3/31/87        |
| Wine Wholesale license<br>Universal Fine Wines Ltd Inc.<br>801 Washington Avenue<br>Carlstadt, NJ 07072                                  | 3401-26-481-001 | New license<br>iss. eff:<br>3/31/87        |
| Transportation license<br>Gross & Hecht Trucking Co., Inc.<br>35 Brunswick Avenue<br>Edison, NJ 08817                                    | 3401-20-485-001 | New license<br>iss. eff:<br>3/31/87        |

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|---|-----------------|--|
| Plenary Retail Transit<br>Ocean Beach Enterprises, Inc.<br>"Golden Eagle" #906010<br>906 Ocean Avenue<br>Belmar, NJ 07719                                 | 3401-13-486-001 | New license<br>iss. eff:<br>4/3/87   |
| Annual State Permit<br>Catering by Kevin, Inc.<br>83 Dewolf Road<br>Old Tappan, NJ 07675  | 3401-14-487-001 | New license<br>iss. eff:<br>4/3/87   |
| Annual State Permit<br>N.H.M. Enterprises Inc.<br>Knoll Country Club<br>Knoll Rd & Greenbank Rd<br>Parsippany, NJ 07054                                   | 3401-14-488-001 | New license<br>iss. eff:<br>4/6/87   |
| Wine Wholesale license<br>Lago Imports, Inc.<br>61 Howe Lane<br>Freehold, NJ 07728  | 3401-26-489-001 | New license<br>iss. eff:<br>4/13/87  |
| Transportation license<br>Silver Eagle Transport Inc.<br>9523 Florida Mining Blvd<br>Jacksonville, FL 32223<br>From: Md Goldston Inc.                     | 3400-20-994-002 | Person to<br>Person Transfer<br>eff: 4/15/87   |
| Additional Sales Premise<br>Tomasello Winery<br>Union Sqare<br>500 Route 35<br>Red Bank, NJ 07701   | 3400-21-174-002 | New Premises<br>iss. eff:<br>4/21/87   |
| Annual State Permit<br>Allaboard Foodservices, Inc.<br>Pennsylvania RR Station<br>Newark, NJ 07101  | 3401-14-462-001 | New license<br>iss. eff:<br>4/21/87  |
| Plenary Wholesale license<br>Allo-Best Inc.<br>24-30 Mileed Way<br>Avenel, NJ 07001<br>From: Allo-Best Inc.<br>500 Milik Street<br>Carteret, NJ 07008     | 3401-23-046-005 | Place to Place,<br>Corporate Structure<br>Change, & Corporate<br>Name Change eff:<br>4/21/87 |
| Transportation license<br>Alrich Trucking Inc.<br>24-30 Mileed Way<br>Avenel, NJ 07001<br>From: 500 Milik Street<br>Carteret, NJ 07008                    | 3400-20-799-003 | Place to Place<br>Transfer eff:<br>4/21/87   |
| Limited Wholesale license:<br>Kramer Beverage Co., Inc.<br>Fire Road at Delilah Road<br>Pleasantville, NJ 08232   | 3401-25-111-002 | Place to Place<br>Transfer eff:<br>4/21/87<br>(expansion)                                    |
| State Beverage Distributor<br>Rocco & Michael Cardillo<br>14 Jacklin Ct<br>Clifton, NJ 07012<br>From: Robert Toledo<br>114 Essex Street<br>Lodi, NJ 07644 | 3400-19-711-005 | Person to Person<br>Place to Place<br>Transfers eff:<br>4/29/87                              |

**4. DISCIPLINARY PROCEEDINGS (TOWNSHIP OF WEST ORANGE) - SALE TO ACTUALLY OR APPARENTLY INTOXICATED PATRONS - 21 DAYS LICENSE SUSPENSION - DISCUSSION OF CONSEQUENCES OF REFUSAL OF PREHEARING SETTLEMENT OFFER TO ACCEPT A MONETARY PENALTY IN LIEU OF SUSPENSION.**

|                                 |                             |
|---------------------------------|-----------------------------|
| IN THE MATTER OF DISCIPLINARY ) | FINAL CONCLUSIONS FINDING   |
| PROCEEDINGS AGAINST:            | GUILT TO CHARGED VIOLATIONS |
| )                               | AND FINAL ORDER IMPOSING    |
| LILLY'S LANGTREE'S, INC.        | SUSPENSION OF LICENSE FOR   |
| t/a SPANKY'S )                  | TWENTY-ONE (21) DAYS        |
| 290 WATCHUNG AVENUE             |                             |
| WEST ORANGE, NEW JERSEY 07052 ) |                             |
| HOLDER OF PLENARY RETAIL )      | OAL DKT. NO. ABC 4365-86    |
| CONSUMPTION LICENSE NO.         |                             |
| 0722-33-066-006 ISSUED BY )     | AGENCY DKT. NOS. S-15,852   |
| THE MUNICIPAL BOARD OF          | H-07186-028V                |
| ALCOHOLIC BEVERAGE CONTROL OF ) |                             |
| THE TOWNSHIP OF WEST ORANGE     |                             |
| )                               |                             |

Lee Barry, Deputy Attorney General, Representing the Division

Robert C. Williams, Esq., Representing the Licensee

INITIAL DECISION BELOW

HONORABLE R. JACKSON DWYER, ADMINISTRATIVE LAW JUDGE

Decided: February 19, 1987

Received: February 24, 1987

BY THE DIRECTOR:

I. FILED EXCEPTIONS AND REPLIES:

Written Exceptions to the Initial Decision were filed on behalf of the Licensee and written Replies thereto were filed by the Deputy Attorney General representing the Division, as is permitted pursuant to N.J.A.C. 1:1-16.4(a). Thereafter, the attorney representing the Licensee filed Replies to the Deputy Attorney General's Replies, entitling same "Replies to Exceptions." I can find no provision within the rules of procedure to permit Replies to filed Replies. Moreover, I note that those "secondary" Replies basically reiterated its prior request for oral argument, as was contained in the Licensee's attorney's initial Exceptions, and those Replies also transmitted a copy of the Licensee's attorney's submission made to the Administrative Law Judge initially hearing this matter. Same is already contained in the file presented to me. Therefore, I find nothing of substance new or unique submitted in such "Replies to Replies."

I have also determined not to grant the Licensee's request to make oral argument to me in this case. I find that the Licensee

and his attorney were afforded a full and complete opportunity to present their positions, both at the hearing below and in their Exceptions. I find no warrant for further oral argument. The request is, therefore, denied. Additionally, I have determined to reject the filed Exceptions and accept the Initial Decision rendered in this matter. My reasons follow.

## II. PROCEEDINGS BEFORE ADMINISTRATIVE LAW JUDGE:

The Licensee was charged by the Division on June 12, 1986, with the following two charges:

- (1) On March 1, 1986, you sold, served or delivered or allowed, permitted or suffered the sale, service or delivery of an alcoholic beverage, directly or indirectly to a person or persons, actually or apparently intoxicated or allowed, permitted or suffered the consumption of an alcoholic beverage by such person in and upon your licensed premises; in violation of N.J.A.C. 13:2-23.1(b).
- (2) On March 1, 1986, you conducted your licensed business without keeping on your licensed premises a list containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises; in violation of N.J.A.C. 13:2-23.13(a)(3).

Upon entry and receipt of the Licensee's plea of not guilty, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

The Administrative Law Judge, in a very thorough opinion, discussed the testimony and the evidence received at such hearing. Thereafter, he found, and listed, numerous instances of indicia of actual or apparent intoxication. As a result he found the Licensee guilty of such charge. He also concluded that the Licensee was guilty of the second charge, i.e., that it conducted its licensed business without keeping on its premises a list containing the names and addresses and other required information with respect to all persons then currently employed, in violation of N.J.A.C. 13: 2-23.13(a)(3). Accordingly, he recommended that this license be suspended for a period of twenty-one (21) days.

### III. RESOLUTION OF EXCEPTIONS:

#### A. Effect of the Stipulation:

The Licensee in its Exceptions initially argues with the Judge's characterization concerning the stipulation entered into by and between the parties at the hearing below. Such stipulation indicated that each of the patrons charged as being actually or apparently intoxicated consumed mixed drinks called "Kamikazes." The stipulation, according to the Initial Decision, was that such mixed cocktail had an alcoholic content of 42.1% by volume.

The Licensee argues this is a misleading characterization of the facts since the contents of alcohol tested came not from the patrons' drinks, but rather from a sample prepared upon direction of the ABC inspectors. As, however, the Deputy Attorney General points out in his Replies, the Division had no need to present evidence in support of the specific alcoholic contents of the drinks actually served. The Deputy Attorney General notes that the specific alcoholic contents of the drinks was not a basis for the Judge's finding and thus same is irrelevant to the ultimate determination. Indeed, I note that the Judge did not make reference in his findings of fact as to the alcoholic content of such drinks. Furthermore, pursuant to N.J.S.A. 33:1-1.1, in proceedings such as these, a presumption exists that any alcohol, or beer, shall be presumed fit and intended for use for beverage purposes and that same contains more than one half of one percent alcohol by volume. Therefore, there was sufficient evidence before the Administrative Law Judge, through merely considering the testimony of the ABC inspectors, even without this stipulation, that alcohol was served and consumed by the four patrons who were accused of being actually or apparently intoxicated. Therefore, I find no substance to this Exception.

#### B. Exceptions to Facts and Conclusions of Law:

The other Exceptions filed on behalf of the Licensee dealt basically with factual findings, or with the conclusions of law resting upon same, as determined by the Administrative Law Judge. I find such Exceptions have generally been properly identified and resolved by the Judge in his Initial Decision. Additionally, I note that the Licensee made no attempt (nor did it request to have additional time) to have the transcript of the proceedings below compiled and submitted to me for my independent review of same. Without the benefit of such transcript, I must basically rely almost in toto upon the observations and determinations of the Administrative Law Judge. Rowley v. Bd. of Ed. of Manalapan-Englishtown, 205 N.J.Super. 65, 75 (App. Div. 1985); Regal Beagle,

Inc., v. Com. Coun. of South Amboy, Appeal # 4951, OAL Dkt. No. ABC 5659-84 & ABC 5818-85 (On Remand), (January 8, 1987).

Moreover, upon my total review of the Initial Decision, I am impressed with the thoroughness and the logical, internal consistency of the opinion rendered by the Administrative Law Judge. In contrast, I find that the Exceptions submitted lacked such credibility.

C. Review of West Orange Police Officers' Testimony:

As an example of such questionable Exceptions, I note that the Licensee argues that the Judge merely "parroted" the testimony of the inspectors and completely disregarded the testimony of the independent patrons, the West Orange police officers and the employees of the establishment.

In the first instance I note that the Judge's opinion fully discussed all of the testimony received and he listed cogent reasons for his determination to accept the inspectors' testimony as the more credible evidence adduced at the hearing. Also, discounting the testimony of the "independent" patrons and employees who the Judge found evinced an apparent bias in favor of the Licensee, and focusing on the testimony of the West Orange police officers, I note that such officers arrived as a consequence of being summoned by the ABC inspectors after the inspectors determined to charge the license with the noted violations. The officers, thus, were on the premises for a relatively short amount of time in contrast to the inspectors who were there for well over an hour. Thus, the officers had much less opportunity than the inspectors to observe the patrons. Furthermore, common knowledge of human behavior suggests that apparently intoxicated patrons are going to attempt to conceal any symptoms of intoxication in the presence of uniformed police officers after the premises has been cited for such a violation. Of course, therefore, one would expect such patrons to behave differently on and after the time that the West Orange police arrived. Even the Licensee's own expert witness admitted "... that the atmosphere in which a person drinks is a very important factor in his outward manifestations of intoxication." Thus I find no credibility in such Exception.

The Administrative Law Judge has thoroughly reviewed the appropriate law applicable in this case and his conclusions of law are fully supported by his factual findings. I shall therefore adopt such basic factual findings and conclusions of law as my own herein.

#### IV. PENALTY CONSIDERATIONS:

The presumptive penalty for the violation of a sale to an intoxicated patron is a fifteen (15) day suspension of license where same is a first offense and no egregious circumstances exist. In the instant case, the Administrative Law Judge has recommended a penalty of twenty (20) day suspension for this charge. I am mindful that there was not one but four patrons who were apparently intoxicated. Additionally, from my review of the Initial Decision the four patrons exhibited substantial signs of intoxication [staggering, shouting, headbutting, an admission by one patron that he was drunk, an admission by one of the bar maids that "your friend (Osborne) is wrecked"]. Even in this disturbing environment an additional round of alcohol was served to these patrons without intervention from an owner of the license who was present during this time. I consider the above mentioned factors to be "egregious circumstances" upon which the penalty should be enhanced.

It is well settled that in disciplinary proceedings such as these, the imposition of penalty is within the proper discretion of the Director. Certainly, a twenty (20) day suspension of license is the minimum to be imposed under this set of facts. IMO Disciplinary Proceedings Against Ken Lav Corporation, Bulletin 2394, Item #2, aff'd per curiam (App. Div., A-2986-79, March 17, 1981) (unreported). Cf., Butler Oak Tavern v. Div. of Alc. Bev. Cont., 20 N.J. 373 (1956).

#### V. OFFER IN COMPROMISE NOT APPROPRIATE:

The Licensee has not applied and petitioned that I exercise the discretion available to me and allow it to make an offer in compromise in lieu of all or part of the suspension herein. N.J.S.A. 33:1-31. Therefore, I need not consider this issue. Nevertheless, since the facts of this case are fresh in my mind, I have reviewed same to determine whether or not the payment of such an offer would be appropriate.

##### A. Pretrial Settlement Negotiations:

##### 1. Remission of Portion of Penalty Upon Entry of Non Vult Plea:

A review of the file indicates that, while the case was pending before the Administrative Law Judge but before the trial was held, there appears to have been settlement negotiations between both attorneys. The file contains a computation which indicates that, upon entry of a plea of non vult, the license would have been suspended for a 16 day period. Such 16 day closure would have represented the "net" suspension which would have to be served

by the Licensee. Such suspension period, therefore, contemplated the Licensee's receiving the benefit, in accordance with this Division's policy, of a five (5) day remission of penalty (of the 21 day total suspension) which remission would have been allowed in consideration of the entry of the required plea of non vult (or guilty) by the Licensee for such settlement to be effectuated.

## 2. Calculation of Approximate Amount of Offer In Compromise:

The file also includes Federal income tax information which the Licensee's attorney submitted to the Deputy Attorney General representing the Division in this case. That financial information apparently was utilized to obtain a preliminary calculation that an \$11,000.00 offer would be the approximate amount to be accepted in compromise in lieu of a suspension of license for 16 days.

The general practice of this Division is that in cases where a non vult (or guilty) plea is entered and the Licensee did not have a prior record of violations an offer will generally be accepted. [Certain specific violations, which are deemed to be of a per se extremely serious nature (e.g., where the licensee is involved with prostitution, commercialized gambling, or distribution of hard drugs, etc.), are excluded from this general policy and suspensions by such offending licensees must be served.]

The amount of the offer to be accepted is, by statute, left up to the Director's discretion, but a computational formula is utilized to calculate the approximate "net" profit the Licensee would amass based upon the utilization of its licensed privileges during the period for which it would otherwise be suspended. After preliminary negotiations between the licensee and the Deputy Attorney General assigned to the case (or, in instances prior to referral of the case to the Office of Administrative Law, by a member of the Prosecution Bureau) indicate that a settlement is reachable, and the general parameters of the settlement have been structured and largely agreed upon, the Deputy Attorney General (or an attorney from the Prosecution Bureau) reviews the case with me for my determination as to whether I will approve a settlement based upon the negotiated arrangements.

The file does not reveal any response was received either from the Licensee or its attorney to the Deputy Attorney General's proposed figure; neither is there any indication that a counter proposal was made. Obviously, the preliminary offer was rejected since the case went to trial.



## **B. Evidence of Egregious Circumstances**

I have independently reviewed the Initial Decision and the record presented to me and based upon same I have determined that, in light of the evidence of egregious circumstances concerning the major violation charged, the acceptance of an offer in compromise would not be appropriate. Now that I, personally, am fully apprized of the circumstances of this violation [as opposed to any prior review conducted by either members of the Prosecution Bureau or the Deputy Attorney General representing the Division, which review would have been based upon merely the representations contained in the Investigation Report], I believe that the presence of an owner of the licensed corporation, during the time when four patrons were allowed to become so very, at least apparently intoxicated and then were served an additional round of alcohol, warrants the imposition of the entire recommended suspension in this case. Hence, on the basis of such egregious circumstances alone, I find that the serious nature of such misconduct is most properly and effectively emphasized upon this Licensee by imposing the full suspension rather than allowing it to make of an offer in compromise of either the entire suspension or a portion thereof.

## **C. Effect of Rejection of Pretrial Settlement Offer Absent Establishing a Worthy Defense:**

### **1. Conflicting Testimony and Credibility Issue:**

Additionally, I find that the Division's case was very strong in this instance. The basic facts contained in the "Investigation Report" filed by the ABC Inspectors (which was made available to the Licensee through the discovery process), were corroborated and fully established by the testimony adduced at the trial. The Licensee's defense herein appears to have merely relied on testimony of its employees and its "independent" patrons whose probable bias in favor of the Licensee is apparent. [The recollection of events by the witnesses for the Licensee differed, in certain significant instances, markedly from that testified to by the ABC inspectors, who were able to refresh their recollection from their nearly-contemporaneous-with-the-events written reports. I agree with the Administrative Law Judge that much of the Licensee's witnesses' testimony appears to be less than forthright to say the least.] The Licensee attempted to bolster its defense by utilizing an expert witness, but his testimony had little relevance to the aspect of the "apparent" intoxication contained in this charge. [I have previously described why the testimony of the West Orange police officers can be discounted.]

## 2. Establishing a "Worthy" Defense:

The Licensee made an informed and voluntary choice and elected to present its case before an administrative law judge rather than settle the case before trial. In view of the overwhelming evidence of apparent, if not actual, intoxication, I am unable to conclude that the Licensee had a worthy defense to the most serious charge lodged against its license.

It is not sufficient, for purposes of establishing a "worthy" defense, that a licensee merely produce witnesses at trial who testify to some contrasting recollection of facts and circumstances. In many ABC cases licensees, at least initially, assert facts and circumstances which differ markedly from those reported by the ABC inspectors. The persons whose recollections so differ, generally, are the licensee's own employees and/or patrons.

A licensee, in determining to reject a pretrial settlement offer and proceed to trial on the merits, should carefully examine and weigh the probable testimony to be adduced, both in its behalf as well as against it, in such hearing. In this case, an even cursory review would have established that the testimony producible in the Licensee's favor not only was suspect from a point of bias on its behalf, but also that it corroborated the inspectors' testimony as well as contrasted sharply among the Licensee's witnesses' in several important aspects [the patrons admitted headbutting each other and that they were loud and boisterous while, significantly, the barmaids testified they did not see such "headbutting."]. Of substantial importance is that in this particular case, the owners of the license needed to carry out no independent investigation to discover the true facts as to what occurred on this premises in the night in question; the record clearly discloses that one of them was there when the violative conduct took place!

One final comment. If the West Orange police officers had had a complete opportunity to observe the actions and comportment of the patrons uninfluenced by such patron's awareness of the officers' presence, and the police officers thereafter testified that in their opinion the patrons "... did not appear to be intoxicated. . . ." and had such facts been established by a finding made by the administrative law judge (or, alternatively, through the submission of the hearing transcripts which supported such factor), I would have, at the least, considered that the Licensee had established a "worthy" defense. In the absence of same, I do not find that the Licensee's defense herein rises to such a level.

## 3. Effect of Rejecting Settlement Offer:

Based upon my observations as noted above, I can find no sound reason why the Licensee did not accept the Deputy Attorney General's preliminary offer to settle this matter (or at least make a reasonable counteroffer) prior to the trial. Now that this

Division, the State Police ABC Enforcement Bureau inspectors, and the Deputy Attorney General assigned by the Division of Law have had to go through the expense and effort of trying this case, I find no sensible basis exists which would sanction my accepting any monetary offer being proffered by the Licensee herein in compromise in lieu of this suspension.

**D. Director's Discretion to Accept Offers in Compromise:**

It is clear that whether or not such a compromise should be accepted is a matter left to the Director's discretion. IMO Disciplinary Proceedings Against Peggy's Lounge, et al., Agency Docket Number S-11,738; aff'd per curiam (App. Div., A-3633-78, November 26, 1980) (unreported); IMO Disciplinary Proceedings Against Emersons Ltd. of Wayne, Inc., Bulletin 2186, Item # 1, aff'd per curiam, (App. Div. A-3556-73, April 22, 1975) (unreported); IMO Disciplinary Proceedings Against Hillcrest, Inc., Bulletin 2105, Item # 3, aff'd per curiam (App. Div., A2475-72, January 8, 1974) (unreported); IMO Disciplinary Proceedings Against Terracina, Inc., Bulletin 2139, Item # 2, aff'd per curiam, (App. Div. A-506-73, February 23, 1974) (unreported).

Under the facts of this case, to now allow the Licensee the opportunity to make an offer in compromise would enable the Licensee to have, in a sense, two bites at the "settlement" apple. If I did allow the Licensee to now make an offer in compromise in lieu of the suspension, same would permit a licensee to test the "settlement waters," and if same was not to its liking, it could thereafter try the case with the knowledge that it could, if it lost at trial, always return to and accept the initial settlement offer. Such a practice would merely encourage needless trials and unnecessary efforts on behalf of the State by its employees.

**E. Previously Announced Policy Re: Effect of Rejecting Settlement Offers Absent Establishing a Worthy Defense at Trial:**

My determination herein is consistent with my previously announced presumptive policy concerning such matter. Such policy had been publicly announced over two (2) years ago in an ABC Bulletin Item. Those bulletins are available for a modest charge to anyone who wishes to subscribe to this service. Certainly, therefore, the Licensee and its attorney either knew or could have and should have known of this policy. In Re William Haas and Stephen Cappadona, Bulletin #2440, Item #6. (March 25, 1985); Frank and Don's Inc. v. Mayor and Council, Netcong, Appeal # 4932, OAL Dkt. No. ABC 4992-84 (decided December 6, 1984).

Accordingly, it is on this 10th day of April, 1987,

ORDERED that Plenary Retail Consumption License No. 0722-33-066-006 issued by the Municipal Board of Alcoholic Beverage Control of the Township of West Orange to Lilly Langtree's, Inc., t/a Spanky's, for premises at 290 Watchung Avenue, West Orange, New Jersey 07052 be and the same is hereby suspended for a period of twenty-one (21) days commencing at 2:00 a.m., Thursday, May 14, 1987 and continuing until 2:00 a.m., Thursday, June 4, 1987.



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JOHN F. VASSALLO, JR.  
DIRECTOR

APPENDIX: INITIAL DECISION BELOW



**State of New Jersey**  
**OFFICE OF ADMINISTRATIVE LAW**

**INITIAL DECISION**

**OAL DKT. NO. ABC 4365-86**

**AGENCY REF. NO. S-15,852 H-07186-028V**

**LICENSE NO. 0722-33-066-006**

**STATE DIVISION OF ALCOHOLIC BEVERAGE CONTROL,**

**Petitioner,**

**v.**

**LILLY LANGTREE'S, INC. t/a SPANKY'S**

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**Lee Barry, Deputy Attorney General, for petitioner**

**(W. Cary Edwards, Attorney General of New Jersey, attorney)**

**Robert C. Williams, Esq., for respondent**

**Record Closed: December 15, 1986**

**Decided: February 19, 1987**

**BEFORE R. JACKSON DWYER, ALJ:**

The licensee, Lilly Langtree's, Inc. t/a Spanky's (hereinafter Spanky's), holder of plenary retail consumption license No. 0722-33-066-006 pled not guilty to two charges preferred against the licensee by the Director of the Division of Alcoholic Beverage Control (hereinafter the Division). The Director charged that the licensee violated N.J.A.C. 13:2-23.1(b) by selling alcoholic beverages to four persons (hereinafter the patrons) who were actually or apparently intoxicated on the licensed premises. The

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Director also charged that the licensee violated N.J.A.C. 13:2-23.13(a)3 by conducting its business without keeping on its licensed premises a list containing the names, addresses and other required information with respect to all persons then currently employed on the licensed premises.

### PROCEDURAL HISTORY

On July 14, 1986, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on September 12, 1986 before Sybil R. Moses, ALJ. A hearing was held on November 12, 1986. The last memorandum was received by the administrative law judge (ALJ) on December 15, 1986, at which time the record closed. Because of a death in the ALJ's family, Ronald L. Parker, Acting Director and Chief ALJ, signed an order of extension in this matter until February 20, 1987.

### STIPULATIONS

It was stipulated by the parties that on March 1, 1986, four patrons identified as Michael F. Helmstetter, David J. Osborne, Stephen Komorowski and John Taurossi, were in Spanky's, 290 Watchung Avenue, West Orange, New Jersey. The number of drinks consumed by them cannot be stipulated; however, each of the four patrons consumed mugs of beer and a mixed drink called a Kamikaze, which mixed cocktail has an alcohol content of 42.1% by volume.

### MOTIONS

The parties jointly moved to sequester all fact witnesses prior to the commencement of the hearing. The licensee's expert witness, Richard Zylman, was permitted to remain in the hearing room during the entire testimony.

The licensee also moved to dismiss the Division's charges at the conclusion of its case. That motion was denied.

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The Division also moved to exclude the licensee's expert witness, Richard Zylman, from testifying, asserting that whether one is or is not actually or apparently intoxicated can be determined without expert testimony. The Division's motion to exclude was denied.

### UNDISPUTED TESTIMONY

The undisputed testimony of the two state police investigators established that the licensee's employee list was incomplete and that the name of the dancer, Irene Huesca, and the last names of three or four other employees, were omitted from the list.

### SUMMARY OF THE DISPUTED TESTIMONY

#### (a) The Division's Testimony

On Saturday, March 1, 1986, at approximately 9 p.m., two inspectors (J.V. and L.P.) of the Division of Alcoholic Beverage Control Enforcement Bureau, New Jersey Division of State Police, entered Spanky's to conduct an investigation to determine if sales were being made to minors, lewd shows were being performed, or if any narcotics were being sold inside the licensed premises. The inspectors, who entered from the front door, described in detail the interior of the licensed premises. There was an oval-shaped bar with bar stools in the middle of the main room, a sitting capacity for approximately 45 to 55 people, a raised go-go stage, and various video games near the bar area. A kitchen area and restrooms are to the right of the bar. The inspectors sat at the right end of the oval bar. They ordered a drink (probably a beer) but could not recall with any certitude whether they had consumed any of it. After the two inspectors took their seats, they began to focus their attention on four patrons, later identified as Michael F. Helmstetter, David J. Osborne, Stephen Komorowski and John Taurossi, directly to their right. A go-go dancer, Irene Heusca, was performing her dance routine at the time in an acceptable manner. During the next 45 minutes or so, the two inspectors testified that each of the four patrons appeared to be speaking in a slurred, boisterous and loud manner; each

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consumed two mugs of beer and three mixed drinks, stipulated as Kamikazes. The four patrons, who at different intervals sat and stood, staggered. One of the patrons, David J. Osborne, was also engaged in a practice of headbutting with the other three patrons, i.e., the top of one person's head was hitting the top of the other person's head. The inspectors testified that they could hear the sound of "craniums cracking," and they opined that the practice of headbutting was harmful.

According to the inspectors' testimony, Osborne was overhead to shout to the go-go dancer at about 9:15 p.m., "I am fucked up - how am I going to drive home." The inspectors observed that Osborne was consuming a draft beer and that about one-third of the beer spilled on the bar as he put the mug to his lips. The inspectors overheard one of the barmaids, Patricia Schieni, stating to Osborne's friend, John Taurossi, "This party might be for you, but your friend [Osborne] is wrecked." Ms. Schieni had previously served a round of beer to the four patrons and a second barmaid, Helen Kazaneas, proceeded to serve another round of mixed drinks (Kamikazes) in a pitcher.

During the 45-minute period from 9 to 9:45 p.m., the inspectors concluded that the condition of all four patrons had badly deteriorated and that they were all intoxicated. A final (fourth) round of mixed drinks (Kamikazes) was served to the four patrons at about 10:15 p.m. The inspectors felt that, based on their experience and the totality of the circumstances, it was better to let the four patrons consume that additional drink rather than try to stop them from consuming it and possibly causing "a riot" and/or endangering the welfare of others and their own safety.

Both barmaids, Patricia Schieni and Helen Kazaneas, sold alcohol to the four patrons at different times. The owner, Anthony Massa, and the manager, Frederick Cucola, periodically walked around the bar and looked at the four patrons while the two barmaids sold alcoholic beverages to the four patrons. The inspectors testified that both Massa and the barmaids had ample opportunity to observe the condition of the four patrons and that they did nothing to discourage the sale of alcoholic beverages to them. Inspector T. left the premises to get West Orange police officers for backup assistance. Inspector T. informed the West Orange police officers of their ongoing investigation, and



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he reentered the premises at approximately 10:30 p.m. with officers James Waldron and Peter Egan. The inspectors advised the owner, Anthony Massa, and the manager, Frederick Cucola, that they wanted the four patrons taken into the kitchen area of the premises.

It is undisputed that the two West Orange police officers, James Waldron and Peter Egan, called by the Division as its witnesses, acknowledged that the four patrons were calm, orderly and polite, and that they did not appear to be intoxicated. Both West Orange police officers observed the four patrons in the kitchen area for approximately ten minutes. They did not interview or speak to them because they did not participate actively in the investigation. Both patrolman Egan and patrolman Waldron testified that they were there "solely as backup." Patrolman Egan, Patrolman Waldron and Sergeant Buoy transported the four patrons to the West Orange police headquarters in their respective patrol cars. Although patrolmen Egan and Waldron did not detect the odor of alcoholic beverages on the breaths of the four patrons inside the kitchen area of the licensed premises, they stated that they could smell an odor of alcoholic beverages coming from the breaths of the patrons inside their patrol cars en route to police headquarters.

At police headquarters the inspectors concluded that the four patrons were not fit to drive their respective cars. The inspectors testified that the four patrons did not request permission to take a breath test. Had such a request been made, the inspector stated they would have spoken to the duty officer and acquiesced in that request. Thereafter, the inspectors agreed to drive the four patrons to John Taurossi's father's home.

**(b) The Licensee's Testimony**

Three of the four patrons who testified, Michael F. Helmstetter, David J. Osborne, and John Taurossi, gave basically cumulative and consistent testimony. They drew a diagram depicting the front door and interior of the licensed establishment (the bar area), their respective positions at the bar, and the kitchen and men's room (J-1 through J-3).

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According to their testimony, David Osborne initially went to Michael Helmstetter's house sometime between 5:30 and 6 p.m. They watched professional wrestling on television until approximately 8:30 p.m., when Stephen Komorowski and John Taurossi arrived. The four proceeded to Spanky's. They entered through the front door and then turned to the right to three empty bar stools, where they alternated standing and sitting.

They ordered a round of tap beer which was served in mugs. They also had a drink (a Kamikaze) in a shot glass. During the time period from 9 to 9:45 p.m., Osborne testified that he had three Kamikazes, one full mug of beer, and part of another mug of beer. He estimated that his total alcohol intake was about four or four and one-half drinks.

Michael Helmstetter and John Taurossi testified that, during this same interval of time, they had three mixed drinks (Kamikazes) and two mugs of beer. They were served by two barmaids. The rounds of drinks were ordered together.

Taurossi did not recall the barmaid stating to him, "This party might be for you but your friend [Osborne] is wrecked." None of the witnesses denied that they were "kidding around," that they were boisterous and that they were engaged in headbutting. They maintained that headbutting did not involve physical contact and was not detrimental to the other person. They demonstrated for the ALJ the mock headbutting. Osborne denied he told the dancer that "I am fucked up - how am I going to drive home."

The four patrons were approached by state investigators approximately 40 to 45 minutes after their arrival. Osborne testified that he was tapped on the shoulder and told to go into the kitchen area. Two West Orange police officers arrived at the bar. The four patrons produced their identification. Each of the witnesses denied they were intoxicated. Helmstetter and Taurossi testified that they were taken to the West Orange police department where they asked for permission to take a breath test. Either a state investigator or a West Orange police officer told them that a breath test was not necessary.

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The four patrons were then transported by the two state inspectors to John Taurossi's father's house. Thereafter, they picked up their respective cars two blocks from Spanky's and went to the Star Restaurant, where they continued to drink.

Helen Kazaneas and Patricia Schieni, the barmaids at Spanky's, testified that they served the four patrons that evening. Ms. Schieni testified that she served the four patrons two draft beers each, while Ms. Kazaneas testified that she was the last one to serve the four patrons drinks (Kamikazes). The contents of a Kamikaze are one and one-half ounces of Vodka, one-half ounce of Triple Sec, a dash of lime juice and sour mix.

The barmaids testified the four patrons were having fun. They were not drinking to excess and were not intoxicated. The barmaids did not observe the four patrons headbutting. Ms. Schieni denied that she told Taurossi, "This party might be for you, but your friend [Osborne] is wrecked."

Anthony Massa, the owner of Spanky's, testified that he made a practice of walking around the bar at periodic intervals to see if any of the patrons were actually or apparently intoxicated. Massa recalled that, at one point, he stopped by the kitchen door and noticed the four patrons. They were having a good time; they were not bothering anyone. Massa testified that he observed one of the investigators checking a patron for proof of age. Massa was subsequently approached by the two investigators and told that he wanted the four patrons taken into the kitchen area. According to Massa, the four patrons were "perfect gentlemen" and they exhibited no manifestations of actual or apparent intoxication.

Richard Zylman, an expert witness in breathalyzer and alcohol-related matters, testified that he was able to calculate the blood alcohol concentration in an individual's system at a particular time based upon body weight, time factors involved, the type and amount of alcohol consumed, whether the person had food in his stomach, the time of intake, and the gender of the person.

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Mr. Zylman testified that he was present at the hearing and heard the three patrons testify regarding their weight, their alcohol intake, the food they consumed and the time periods of their initial and last drinks. He also heard the testimony of the two barmaids about the contents of a Kamikaze and he heard the testimony of the two inspectors.

Assuming that the four patrons consumed two mugs of beer and four mixed drinks (Kamikazes) from their initial arrival at 9 p.m. until 9:45 or 10 p.m., Mr. Zylman opined that the blood alcohol in the system of John Taurossi, 190 pounds, whose weight was less than the other three patrons, would produce a blood alcohol factor of .03 or .04 percent. According to Mr. Zylman, the other three patrons would have a lower blood alcohol factor. Mr. Zylman further testified that "the worse case scenario" for Taurossi or the other three patrons would be a maximum of .058 percent. Mr. Zylman explained that each Kamikaze has an ethyl alcohol factor equivalent to two ounces of 12% wine.

On cross examination, Mr. Zylman conceded that the atmosphere in which a person drinks is a very important factor in his outward manifestations of intoxication. For example, a person at a bar can be loud and boisterous and exhibit other manifestations of intoxication, while that same person in another environment can be quiet and orderly with the same amount of drinks in his system. Mr. Zylman conceded that in the environment of Spanky's the four patrons could have appeared intoxicated to the two inspectors who observed them.

#### FINDINGS OF FACT

Having carefully considered the entire record and evaluated the demeanor and credibility of the witnesses, I FIND:

1. On March 1, 1986, from approximately 9 to 9:45 p.m., two inspectors of the Division of Alcoholic Beverage Control, Enforcement Bureau, New Jersey State Police, observed four patrons, Michael F. Helmstetter, David J. Osborne, Stephen Komorowski and John Taurossi, directly to their right, consume two mugs of beer and three mixed drinks known as Kamikazes.

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2. The four patrons, who at different intervals sat and stood, were observed by the two inspectors to stagger.
3. One of the four patrons, David J. Osborne, engaged in a practice of headbutting with the other three patrons. The top of one person's head was hitting the top of another person's head. The two inspectors could hear the sounds of the heads coming together, and they opined that the practice was harmful.
4. Osborne was overheard to shout to the go-go dancer, Irene Huesca, "I am fucked up - how am I going to drive home."
5. The inspectors observed Osborne consuming a draft beer, and about one-third of the beer spilled on the bar as he put the mug to his lips.
6. One of the barmaids, Patricia Schieni, was overheard stating to John Taurossi, "This party might be for you, but your friend [Osborne] is wrecked."
7. A fourth round of mixed drinks (Kamikazes) was served to the four patrons at about 10:15 p.m. The inspectors made a judgmental determination to allow the four patrons to consume this round of drinks rather than to step in and possibly cause a disturbance in the bar which they felt would pose a danger to other patrons or to themselves.
8. In response to a hypothetical question, the licensee's expert witness, Richard Zylman, testified that based upon the testimony at the hearing, the four persons could have appeared actually or apparently intoxicated to the two inspectors.

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9. The actual or apparent intoxication of the four patrons should have been readily apparent to the two barmaids, and to the owner of Spanky's Anthony Massa, at about 9:45 p.m. Neither the barmaids nor Mr. Massa did anything to discourage the four patrons from further drinking. In fact, one of the barmaids served a fourth round of mixed drinks to the patrons at about 10:15 p.m.

### CONCLUSIONS OF LAW

#### (a) Employees' List Charge

The licensee has been charged with a violation of N.J.A.C. 13:2-23.13(a)3. It is undisputed that the list of employees' was incomplete. The last names of three or four employees, including the go-go dancer, Irene Huesca, was omitted from the list.

N.J.A.C. 13:2-23.13(a)3 requires that licensees maintain a list containing, among other things, the names of all persons currently employed on the licensed premises. See A.B.C. Bulletin 2413, Item 5 (May 5, 1983). The word "name" is defined as:

The designation of an individual person, or of a firm or corporation.

A person's "name" consists of one or more Christian or given names and one surname or family name. It is the distinctive characterization in words by which one is known and distinguished from others, and description, or abbreviation, is not the equivalent of a "name." (Black's Law Dictionary, 922 (rev. 5th Ed. 1979). [Emphasis added.]

I CONCLUDE that the licensee, Lilly Langtree's, Inc., t/a Spanky's, has violated the regulation, N.J.A.C. 13:2-23.13(a)3, which mandates that the first and last names of employees must be recorded on the employees' list maintained by the licensed premises.

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(b) The actual or apparent intoxication charge

The more serious of the two charges preferred against the licensee is that the licensee sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage to four patrons, Michael F. Helmstetter, David J. Osborne, Stephen Komorowski and John Taurossi, who were actually or apparently intoxicated on March 1, 1986 in violation, of N.J.A.C. 13:2-23.1(b). This regulation was promulgated in furtherance of the objectives of N.J.S.A. 33:1-73 et seq., i.e., "to be remedial of abuses inherent in liquor traffic." Cf., Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). The charges need only be proved by a preponderance of the believable evidence. Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

N.J.A.C. 13:2-23.1(a) and (b) were not enacted solely for the benefit of intoxicated persons but for the protection of the general public as well. Cf., Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947).

When alcoholic beverages are sold by a tavern keeper to a minor or an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent. See, National Safety Council, Accident Facts, p. 49 (1959 ed.); cf., Resume of Annual Reports of the Chief Medical Examiner of the County of Middlesex, State of New Jersey (1933 - 1958), p.9 (1959); Study No. 885. A13, Minnesota Dept. of Highways, The Relationship of Drinking and Speeding to Accident Severity p. 5 (1959).

Randaport v. Nichols, 31 N.J. 188, 202 (1959).

In order to establish a violation of N.J.A.C. 13:2-23.1(b), the Division must show a sale, delivery or allowance of an alcoholic beverage to a person who is actually or apparently intoxicated. I CONCLUDE that the Division has proven all of the requisite elements of this charge by a preponderance of the believable evidence.

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It is undisputed, according to the testimony of the three patrons, that there was a sale of alcoholic beverages on the licensed premises. The patrons took turns paying for the rounds of drinks. The conflicting testimony is whether the four patrons were actually or apparently intoxicated. The two inspectors testified credibly, forthrightly, and concisely that each of the four patrons spoke in a slurred, boisterous and loud manner; that they each consumed two mugs of beer and three mixed drinks (kamikazes); that they staggered; that they engaged in a harmful practice of headbutting; that one of the four patrons, David J. Osborne, shouted to the go-go dancer, "I am fucked up - how am I going to drive home"; that the inspectors overheard one of the barmaids, Patricia Schieni, state to John Taurossi, "This party might be for you, but your friend [Osborne] is wrecked"; and that the inspectors detected an obvious odor of an alcoholic beverage on the four patrons' breath. The condition of the four patrons noticeably deteriorated during the first 45 minutes they were in the licensed establishment, and a barmaid served a fourth round of drinks to the four patrons at about 10:15 p.m.

The three patrons, the two barmaids, and the owner, who testified in behalf of the licensee, denied observing in the four patrons any of the manifestations of actual or apparent intoxication. The licensee further pointed out that the West Orange police officers corroborated their testimony that the four patrons were polite and orderly and did not appear to be intoxicated.

The ALJ perceives no question of credibility concerning the testimony of the two state inspectors and two West Orange police officers. The West Orange police officers, who were called as backup assistance by the inspectors, did not observe the four patrons at the bar area; they observed them for about 10 minutes in the kitchen. The inspectors, on the other hand, made observations over a fairly lengthy period, and those observations encompassed the full scope of this investigation. Therefore, the ALJ attaches greater weight to their testimony, which was positive, clear and credible.

To be believed, testimony must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and



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observation of mankind can approve as probable under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954) and Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). Using these principles as a guide, I am persuaded that the testimony of the two state inspectors was worthy and fully supportive of the two charges. I CONCLUDE that the testimony of the barmaids, Patricia Schieni and Helen Kazaneas, and the owner, Anthony Massa, was not entirely forthright and was tainted by the fact that they had a direct or indirect interest in these proceedings. The barmaids are employees of the licensee. They testified that they did not see the four patrons engaged in the practice of headbutting. Conversely, three of the four patrons called by the licensee admitted that they were engaged in this practice on at least three or four occasions. Ms. Schieni's denial that she stated to John Taurossi, "This party might be for you, but your friend [Osborne] is wrecked" strains credulity. The testimony of the three patrons also reinforced much of the two inspectors' testimony. They did not deny they were speaking in a loud and boisterous manner and that they were butting heads with each other. Further, the licensee's expert, Richard Zylman, conceded on cross-examination that, based upon their observations of the four patrons at the bar, the two inspectors could reasonably have concluded that the patrons were apparently intoxicated.

The seminal case exploring the phrase "apparently intoxicated" is Div. of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196 (App. Div. 1968). In it, the court mentioned several "indicia of intoxication" including, but not limited to, having glassy eyes, a flushed face, a disheveled appearance, messy hair, unzipped clothing; bumping into furniture while walking; stumbling; spilling drinks and slurred speech. Id. at 198-199. When the defendant in Zane challenged the rules in which the phrase "apparently intoxicated" appears, based on the ground of vagueness, the court said:

We find nothing ambiguous, vague or unfair in them. They are directed to the possessors of retail consumption licenses and those in their employ - persons who by reason of their occupation may fairly be deemed to possess a certain expertness in this field of endeavor. Indeed, whether a man is sober or intoxicated is a matter of common observation not requiring any special knowledge or skill. [citations omitted]. Id. at 200-201.

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The idea that whether or not a person is intoxicated is subject to common knowledge appeared one hundred years before Zane. "Whether a man is sober or intoxicated is [a] matter of common observation, not requiring any special knowledge or skill, and is habitually and properly asked of witnesses who have occasion to see him, and whose means of judging correctly must be submitted to the jury." Castner v. Sliker, 33 N.J.L. 95, 97 (Sup. Ct. 1868). E.g., Freud v. Davis, 64 N.J. Super. 242, 247 (App. Div. 1960).

The court in Zane established a standard for determining when a person is "apparently intoxicated." "The term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior." Zane, 99 N.J. Super. at 201.

It is the duty of the bar employee to determine when a patron is apparently intoxicated so that the patron will not be served any more alcoholic beverages. When writing about the court's standard for determining apparent intoxication, the court explained:

Nor does this language place the tavern keeper or his employees in any dilemma by being compelled to make a doubtful decision. They may always make suitable inquiries when a person appears to be intoxicated to verify either that he is intoxicated or has reached a point where he ought not to be served alcoholic beverages. Id. at 201.

A long line of opinions have followed the Zane case and have applied the standard for determining apparent intoxication established in Zane. In re Brown & Brown, A.B.C. Bulletin No. 2132, Item 5 (Nov. 28, 1973); In re Tisler Corp., A.B.C. Bulletin No. 2356, Item 1 (Nov. 1, 1979); Div. of Alcoholic Beverage Control v. Bill & Betty's Tavern, 2 N.J.A.R. 380 (1980); In re Notty Pyne Grill, Inc., A.B.C. Bulletin No. 2386, Item 1 (March 10, 1980); In re Stockhouse Corp., A.B.C. Bulletin No. 2392, Item 2 (March 31, 1980); In re Ken Lav Corp., A.B.C. Bulletin No. 2394, Item 2 (April 10, 1980); In re Regan & Regan, A.B.C. Bulletin No. 2394, Item 3 (April 22, 1980); In re Andolpho, A.B.C. Bulletin No.

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2395, Item 2 (April 17, 1980); In re L.D.M., A.B.C. Bulletin No. 2396, Item 2 (April 18, 1980); Div. of Alcoholic Beverage Control v. Harry M. Stevens, Inc., 5 N.J.A.R. 141, (1981).

I CONCLUDE that the four patrons, Michael Helmstetter, David J. Osborne, Stephen Komorowski and John Taurossi exhibited the well recognized indicia of intoxication and that they were actually or apparently intoxicated at Spanky's on the time and date in question.

I FURTHER CONCLUDE that the licensee knew or should have known from the circumstances that the four patrons were actually or apparently intoxicated but the four patrons were served alcoholic beverages. A licensee has a responsibility in regard to "observable manifestations of excessive indulgence in alcohol." The licensee or his employees have the duty to make suitable inquiries when a person appears to be intoxicated in order to verify that the patron is intoxicated or has reached a point where the patron might not be served further alcoholic beverages.

#### ORDER

Having found that the licensee, Lilly Langtree's, Inc., t/a Spanky's, is in violation of N.J.A.C. 13:2-23.13(a)3 and N.J.A.C. 13:2-23.1(b), it is hereby ORDERED that the plenary retail consumption license No. 0722-33-066-006, issued by the Municipal Board of Alcoholic Beverage Control, West Orange Township, be suspended for 21 days. This penalty is calculated as follows: 20 days for violation of N.J.A.C. 13:2-23.1(b) and one day for violation of N.J.A.C. 13:2-23.13(a)3. The suspensions are to be served consecutively.

It is FURTHER ORDERED that the suspension commence at 1 a.m. on April 21, 1987 and terminate at 1 a.m. on May 12, 1987.

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This recommended decision may be affirmed, modified or rejected by JOHN F. VASSALLO, JR., DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE my Initial Decision with JOHN F. VASSALLO, JR. for consideration.

Apr. 19, 1987  
DATE

R. Jackson Dwyer, ALJ  
R. JACKSON DWYER, ALJ

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PUBLICATION OF BULLETIN 2449 IS HEREBY DIRECTED THIS  
30TH DAY OF APRIL, 1987.

John F. Vassallo, Jr.  
JOHN F. VASSALLO, JR.  
DIRECTOR