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

BULLETIN 2122 November 8, 1973

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STATE OF NEW JERSEY
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1. DISCIPLINARY PROCEEDINGS - LEWDNESS ON LICENSED PREMISES - IMMORAL DANCE - LICENSE SUSPENDED FOR 50 DAYS.

In the Matter of Disciplinary Proceedings against

Iodice Corporation
t/a Iodice's Bar & Grill
4404 Dell Avenue
North Bergen, N. J.,

Holder of Plenary Retail Consumption License C-7, issued by the Municipal Board of Alcoholic Beverage Control of the Township of North Bergen.

CONCLUSIONS and ORDER

Mocco and Mocco, Esqs., by Joseph Mocco, Esq., Attorneys for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to a charge alleging that on May 3, 1973 it permitted lewdness and immoral activity in the licensed premises, viz., a female to perform a lewd and indecent dance for the entertainment of patrons, in violation of Rule 5 of State Regulation No. 20.

In support of the charge the Division offered the testimony of two ABC agents. Agent B testified that, accompanied by agent C, he entered the licensed premises, characterized as a neighborhood barroom, on May 3, 1973, at approximately 11:50 a.m. and positioned themselves at the bar. The patronage of approximately forty persons upon entry increased to approximately fifty patrons during their stay. A male and female were tending bar, one of whom was identified as Richard Engels, an officer and holder of one-third of the stock of the corporate licensee.

The agent observed a female (identified as Myra Marlowe) approach a juke box after receiving coins from Engels and mount a stage to commence go-go dancing. She was attired in a "G-string" and a poncho covering her shoulders to her waist. After dancing about ten minutes Myra removed the poncho and it appeared to the agent that her ample bosom was fully uncovered. At one point in the dance Myra turned her back to the audience and bent over, exposing her uncovered buttocks to the applause of the audience. Shortly thereafter she procured a towel and wiped her body, using movements that were suggestive in character. After the dancing was completed, she returned to the bar for a short time. Returning to the stage, she repeated her actions of the initial dance, removing the poncho, exposing her breasts which she fondled, and wiped herself in the same manner. At this point the agents identified themselves and spoke to the dancer and to the manager Engels and, while in conversation, the agent first observed that the nipples of Myra's breasts were covered with a small circular band-aid. Both Myra and Engels advised the agent that the band-aid covering constituted that degree of covering necessary to avoid a charge of topless dancing.

Agent C testified in substantial corroboration of the testimony of agent B. He added that, as he had seen what he described as normal go-go dancing on many occasions, Myra's dance was in his opinion not a "normal" dance. He differentiated the free unsupported swinging of her ample breasts from the covered supported costume used by the typical go-go dancer as a marked dissimilarity.

Raymond Engels testified that he is an officer of the corporate licensee and, on the date of the charge, was working in the capacity of manager. Earlier that morning, upon the arrival of Myra Marlowe who had been sent to perform in the premises for the first time, he learned that she intended to do a usual go-go dance. When she emerged clothed for that purpose, he noticed that the top of her body was covered by the poncho and, after she danced for a short time, he observed her remove the poncho. At that point he approached the stage and discussed with her the matter of her dance constituting a possible violation. She reassured him that she had danced in several establishments in this State on many occasions and, so long as the nipples on her breasts were covered, there would be no violation. He added that he became one of the owners of the licensed premises a few months before and that the former owner was then assisting him. He inquired of that former owner if, in his judgment, the girl's costume or lack of it would give rise to censure and was advised that such costume was proper.

Three patrons of the establishment who were present concurrently with the agents testified that they observed Myra's dance and that her actions were proper, were not lewd nor indecent. Martin Simpson denied that the dancer caressed her breasts; Christine Young described the dance as a normal go-go dance, as did George Ritter. These three patrons denied that the dancer's movements or costume attracted abnormal or excessive interest of the patrons.

It is apparent that a purely factual question has been presented for determination. In matters of this nature we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 36 N.J. Super. 512, aff'd 20 N.J. 373 (1956).

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App.Div. 1961).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

After carefully considering and evaluating the testimony of the witnesses herein, I accept as factual and credible the agents' version of the performance given by the female entertainer. I find that their graphic, detailed and explicit portrayal of the performance was wholly believable.

Accepting the version of manager Engels as credible, that he had never previously seen the performance of the dancer and relied upon her explanation that her bodily covering was sufficient, his candid admission that he interrupted her dance to question its propriety is sufficient to indicate that her lack of covering was enough to signal his alarm. That he relied upon her misimpression in lieu of insisting that she be attired properly until further inquiry of official nature could be made eroded his defense of innocence.

In adjudicating this matter I note the logic used by Judge Jayne speaking for the court in McFadden's Lounge v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 61 (App.Div. 1954), wherein he stated at p. 62:

> "Experience has firmly established that taverns where wine, men, women, and song centralize should be conducted with circumspect respectability. Such is a reasonable and justifiable demand of our social and moral welfare intelligently to be recognized by our licensed tavern proprietors in the maintenance and continuation of their individualized privilege and concession."

Furthermore, in a business as highly sensitive as the traffic of liquor, the Director is charged with the exercise of constant vigilance in the enforcement of the various statutes and the rules and regulations pertaining thereto. A relaxation from the requirements of the provisions contained in the Alcoholic Beverage Law and the rules and regulations of this Division would be contrary to their intendment and against the dictates of sound public policy. A public convenience should not be allowed to degenerate into a social evil. See Jeanne's Enterprises, Inc. v. Division of Alcoholic Beverage Control, 93 N.J. Super. 230 (App. Div. 1966), aff'd 48 N.J. 359 (1966); cf. Paterson Tavern & Bar v. Hawthorne, 108 N.J. Super. 433 (App.Div. 1970), rev'd on other grounds, 57 N.J. 180 (1970).

The Division's unrelenting policy of prohibiting "topless" female employees whether entertainers or otherwise has been affirmed by the courts. See In re Club "D" Lane, Inc., 112 N.J. Super. 577 (App.Div. 1971).

Therefore, after examining the various precedents cited, I am persuaded by the clear and convincing proof in this case that the charge has been sustained by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the charge.

Absent prior record, it is accordingly recommended that the license be suspended for fifty days. Re Starshock, Inc., Bulletin 2101, Item 2.

## Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions filed with respect thereto which I find either to have been satisfactorily resolved by the Hearer in his report or are lacking in merit, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 18th day of September 1973,

ORDERED that Plenary Retail Consumption License C-7, issued by the Municipal Board of Alcoholic Beverage Control of the Township of North Bergen to Iodice Corporation, t/a Iodice's Bar & Grill for premises 4404 Dell Avenue, North Bergen, be and the same is hereby suspended for fifty (50) days, commencing at 3:00 a.m. Thursday, September 27, 1973 and terminating 3:00 a.m. Friday, November 16, 1973.

Robert E. Bower
Director

2. APPELLATE DECISIONS - OCEAN CLUB CORPORATION v. JERSEY CITY.

| | | |
|---|---|---|
| Ocean Club Corporation, Appellant, | ) | On Appeal |
| v. | ) | CONCLUSIONS and ORDER |
| Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent. | ) | |

Leon Sachs, Esq., Attorney for Appellant
Raymond Chasan, Esq., by Bernard Abrams, Esq., Attorney for Respondent Board
Friedman, Grundman & Friedman, Esqs., by Meyer Friedman, Esq., Attorneys for Objectors

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which, by resolution dated June 29, 1973 denied renewal of appellant's Plenary Retail Consumption License C-127, for the 1973-74 licensing period.

Appellant contends that the action of the Board was erroneous for the following stated reasons:

> "(a) The conclusions were against the weight of the evidence.
>
> (b) The findings were the result of hearsay testimony.
>
> (c) (Its determination was) arbitrary, capricious, and an abuse of discretion.
>
> (d) The action was beyond the scope of the authority of the Board..."

The Board, in its answer, denied the substantive allegations of the petition of appeal and averred that its action was predicated upon the "testimony of many objectors produced at the hearing on June 26, 1973, and

June 26, 1973, was overwhelming in showing that the tavern of the appellant represents a nuisance and is objectionable to the neighbors in the vicinity thereof."

Upon the filing of the appeal, by order dated July 1, 1973, the Director extended appellant's 1972-73 license until further order herein.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded counsel to introduce testimony and cross-examine witnesses.

Reverend Anthony I. Cataudo testified that he was assigned to Sacred Heart Roman Catholic Church in the year 1960 and became its pastor in 1969. The church is located on the corner of Bidwell and Jackson Avenues, one block distant from the subject licensed premises. The tavern is located on the corner of Bidwell and Ocean Avenues. Many parishioners have occasion to pass the tavern going to and from church.

In the year 1969, Reverend Cataudo was dissuaded from prosecuting an appeal to deny the renewal of appellant's license due to the representation of the appellant's manager that he would try to protect passersby. Since that time, conditions have worsened.

He has observed people milling around in front and near these premises. People "hang around" all the time. Driving by is difficult due to the double parking. He has observed garbage and waste in the back yard. He has complained concerning these matters to the Board of Health and to the police department. The department of public works has cleaned out the yard. However, the yard reverted to the same condition. These conditions have existed from 1969 to the present.

It appears that, at each license renewal time, conditions are ameliorated. However, upon renewal of the license, conditions would worsen. Parishioners passing by have been accosted and threatened. Many residents of Bidwell Avenue moved out of that block because they "just could not stand the conditions that exist on that corner."

On cross examination, Reverend Cataudo asserted that the conditions which he described outside the appellant's tavern are solely due to the appellant's tavern. Parishioners have complained to him that they have been harrassed, threatened and insulted on their way to church and have requested him to speak in their behalf.

Additional questioning revealed the following:

"Q Father, you stated on occasion you saw people outside the bar drinking?

A Holding their cans of beer or glasses, yes, many times.

Q You saw that yourself?

A Oh, yes, many times. Not only one or two people, crowds hanging out there."

He has made verbal complaints to the police department concerning these observations. The police have gone to the tavern in response to his calls.

Reverend Bruce A. Williams, who is in residence at Sacred Heart Church, testified that he is a full time professor in the philosophy department of St. John's University, New York and returns to the church at dinner time, and on occasions as late as between 9:00 and 11:30 p.m. In driving past the licensed premises, the witness testified:

> "I see crowds of people, many of them quite obviously in intoxicated condition, pouring out of and into the tavern, and standing around the intersection completely ... they are oblivious to or uncaring about the flow of traffic, so it is often quite dangerous to pass."

He passes the tavern almost daily and the condition he described is the rule rather than the exception. He conceded that he is not expert at estimating the size of the crowds and described the congregation as "a sea of humanity in that section." He has observed cars double-parked and jutting into the intersection, thus making it impossible to pass. He has become more aware of this situation during the past three years. He is more fearful of passing that corner than certain other areas in Jersey City and New York.

Reverend William V. Albert, who is rector of Grace Church-Van Vorst and president of its rehabilitation foundation, which is located several blocks distant from the licensed premises, testified that the Foundation has spent considerable sums of money in purchasing and rehabilitating a number of homes in various parts of the City, including some in the area of the licensed premises.

Upon hearing complaints levelled against the operation of the appellant's tavern by members of his office staff, he made a personal inspection. His observations made on several nights substantiated the testimony of the preceding witnesses. He has observed large groups of people "in front of the tavern, on the corner, and around the corner" milling around and drinking. These observations were made as recently as the month of May 1973. A passerby would have much difficulty walking past the tavern. He, personally, would be fearful of walking past the premises.

Elisabeth Lewis, deputy director of the Grace Church Rehabilitation Foundation testified that, in travelling between her home and her work she frequently drives past the licensed premises. She has seen a "congregation" of people in front thereof. Further questioning revealed the following:

"Q What are these people doing, if anything, in front of the tavern?

A They are having a good time.

Q By 'having a good time' what do you mean?

A They appear to be very happy, very jovial. They have bags and bottles. I can't say what is in the bags. Occasionally I see somebody take a drink from a bottle. Usually I am more concerned getting a round. You have to stop; you can't get by. In trying to get around you will see occasionally somebody do something.

Q Has anything happened to you?

A Except for a few people getting nasty once in a while because I want to get by."

She added that the crowd is noisy and uses language that she wouldn't want her children to hear.

A conference was held with the police department and she is aware that a building in the area was used by the police in order to conduct a surveillance of appellant's tavern.

William Rowan, tenant specialist for the Grace-Van Vorst Model Cities Housing Information Center, testified that, in the pursuit of his duties, he visits every section of the City. During the past year, he has observed crowds in front of the licensed premises. Upon being questioned concerning the number of persons, Rowan replied, "They have been many. You have a group of 5 here, you have a group of 4 here, maybe 3 here." He has also observed beer drinking outside the premises by patrons, of these premises.

Rodney Thomaier, a captain of the local police department testified concerning numerous arrests made of persons on the corner of Ocean Avenue and Bidwell Avenue during the years 1972 and 1973. He could not attribute the arrests to the operation of the tavern. He has observed crowds on the corner and double-parking.

William Fitzgerald, a local detective assigned to the narcotics squad, testified that he conducted a surveillance of the area by use of binoculars. During a three-day period in February 1973, he has witnessed, on occasions:

> "An individual approach the tavern, enter the tavern, come back outside with another individual, and I would see an exchange being made, money for heroin, and I would see the one individual return to the tavern, and the individual that bought the narcotic leave the area."

He communicated descriptions of the individuals involved to fellow police officers by radio. This has resulted in arrests being made. Narcotics have been found on individuals that he was sent to apprehend in the licensed premises.

Inside the tavern he has observed:

> "An individual enter the tavern to speak with another individual, apparently to buy narcotics. They were brought back outside and sale was made, and the individual returned to the tavern, and the other individual left the area."

He saw no sales of narcotics made inside the premises.

In behalf of the corporate appellant, George F. Goodman testified that he manages the tavern business for his wife who is the sole stockholder thereof. He asserted that the crowds in front of the tavern are caused by the residents of the buildings in the area, and other stores in the area. Whenever he has seen people drinking in front of the tavern he has ordered them to stop. He does not sell liquor for consumption on the sidewalk. He attributed the loose garbage to a nearby laundry.

It is firmly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of the Board in the first instance and, in order to prevail on this appeal, the appellant must show unreasonable action on the part of the Board, constituting a clear abuse of such discretion. Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Magnolia, 38 N.J. 484 (1962).

The dispositive issue in this appeal is whether the evidence herein justifies the action of the Board in refusing to renew appellant's license. Nordco Inc. v. Newark, Bulletin 1148, Item 2. In analyzing the testimony, it would be helpful to state the applicable legal principles pertinent to a determination hereof. The burden of proof in all these cases which involve discretionary matters where the applicant seeks a renewal of the license, falls upon appellant to show manifest error or abuse of discretion by the issuing authority. Downie v. Somerdale, 44 N.J. Super. 84 (App. Div. 1957). As was stated in Zicherman v. Driscoll, 133 N.J.L. 586, 587 (1946):

> "The question of a forfeiture of any property right is not involved. R.S. 33:1-26. A liquor license is a privilege. A renewal license is in the same category as an original license. There is no

> inherent right in a citizen to sell intoxicating liquor by retail. Crowley v. Christensen, 137 U.S. 86, and no person is entitled as a matter of law to a liquor license. Bumball v. Burnett, 115 N.J.L. 254; Paul v. Gloucester, 50 Id. 585; Voight v. Board of Excise, 59 Id. 358; Meehan v. Excise Commissioners 73 Id. 382; affirmed 75 Id. 557. No licensee has a vested right to the renewal of a license. Whether an original license should issue or a license be renewed rests in the sound discretion of the issuing authority. Unless there has been a clear abuse of discretion this court should not interfere with the actions of the constituted authorities. Allen v. City of Paterson, 98 Id. 661; Fornarotto v. Public Utility Commissioners, 105 Id. 28. We find no such absue. The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuing and renewing of licenses."

As early as in Conte v. Princeton, Bulletin 139, Item 8, the well established principle was cited to the effect that a licensee is responsible for conditions both in and outside his licensed premises which are caused by patrons thereof. Cf. Garcia v. Fair Haven, Bulletin 1149, Item 1.

The principles set forth in Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, 303 (1970) are particularly applicable here:

> "Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record..."

It is abundantly clear that the licensee was unable to control its patronage, to the detriment of the public. It is apparent that the repeated gathering by patrons in front of the licensed premises constituted the "nuisance"condition which served as the basis for the denial of the renewal herein.

I find from the credible evidence presented that these crowds regularly disrupted the free flow of traffic, both vehicular and pedestrian, and that the improper control and operation

of the licensed premises herein was the primary cause of the conditions.

A licensee must keep his place and his patronage under control and is responsible for conditions both outside and inside his premises. Galasso v. Bloomfield, Bulletin 1387, Item 1. In the area of licensing, as distinguished from disciplinary proceedings, the determinative consideration is the public interest in the creation or continuance of the licensed operation, not the fault or merit of the licensee. Blanck v. Magnolia, supra. In the matter of licensing, the responsibility of a local issuing authority is "high", its discretion is "wide" and its guide is "the public interest." Lubliner v. Paterson, 33 N.J. 428 (1960) at 446. Thus, entirely apart from the consideration as to the appellant's culpability for the above-described conditions existing at this establishment, the broad question posed before the Board on appellant's application for renewal was whether, in the light of the surrounding circumstances and conditions it was in the public interest for this tavern to continue to operate. The objective judgment of the Board was that its continuance would be inimical to the public interest. R.O.P.E. Inc. v. Fort Lee, Bulletin 1966, Item 1.

While it may well have been a more satisfactory procedure for the Board to initiate disciplinary proceedings on specific charges, and to base its refusal to renew on an adjudicated record, it is understandable that local iss uing authorities may decide to withhold the institution of disciplinary proceedings with the ex pectation that the licensee will correct the unlawful activities. See R.B. & W. Corp. v. North Caldwell, Bulletin 1921, Item 1.

"Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue...Did the decision of the local board represent a reasonable exercise of discretion on the basis of the evidence presented? If it did, that ends the matter of review both by the Director and by the courts..." Lyons Farms Tavern, Inc. v. Newark, supra.

Reviewing this matter in the ambience of the times in which it is common knowledge that crime and violence in the streets of most major cities have increased considerably in recent years, it is fair to say that the fears expressed by the objectors influenced the Board's action. It is my view that the Board, in honoring those objections, acted reasonably and in the lawful exercise of its discretion.

I find, from my careful examination of the evidence herein, that the Board's determination was supported by substantial evidence and that it acted in the public interest when, in the exercise of its lawful discretion, it denied the renewal of appellant's license. I, therefore, conclude that the appellant has not established that the action of the municipal board was erroneous and should be reversed. Rule 6 of State Regulation No. 15.

It is, therefore, recommended that the action of the Board be affirmed and that the appeal herein be dismissed.

## Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record, including the transcripts of the testimony, the exhibits and the Hearer's report, I concur in the findings of the Hearer and adopt his recommendations.

Accordingly, it is, on this 2nd day of October 1973,

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

ORDERED that the order dated July 1, 1973, extending the term of appellant's 1972-73 license pending determination of the appeal be and the same is hereby vacated, effective immediately.

Robert E. Bower
Director

3. APPELLATE DECISIONS - A's INN, INC. v. DEAL - ORDER.

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|---|---|---|
| A's Inn, Inc., t/a A's Inn, Inc. | ) | |
| | ) | On Appeal |
| Appellant, | ) | O R D E R |
| v. | ) | |
| Board of Commissioners of the Borough of Deal, | ) | |
| Respondent. | ) | |

Christiansen, Jube & Keegan, Esqs., by John P. Keegan, Esq.,
Attorneys for Appellant
Lautman & Rapson, Esqs., by C. Keith Henderson, Esq.,
Attorneys for Respondent

BY THE DIRECTOR:

This matter coming on to be heard on the return date of an Order to Show Cause why appellant's Plenary Retail Consumption License C-2, issued by respondent Board of Commissioners of the Borough of Deal should not be renewed without special conditions attached thereto pending the determination of this appeal;

And it appearing that the conditions imposed were specified as (a) that no more than seventy-nine (79) patrons be permitted in the premises at any one time; (b) that no live music or entertainment be permitted in the premises; and (c) that the entire interior portion of the premises be so lighted that the degree of illumination therein is always equal to the illumination that would be cast over an area with a diameter of ten (10) feet by a 60-watt (120 volt) clear electric light bulb located ten (10) feet above the center of such area;

And it further appearing that the respondent offered no proof that the existence of live music or entertainment disturbed the residents in the area by reason of loud volume of noise or sounds; and it further appearing that the inclusion of this condition was merely a further means to discourage attendance and as a supplement to the first condition which now limits attendance in these premises; and good cause appearing, it is

On this 2nd day of October 1973,

ORDERED that the special condition imposed on the renewal of Plenary Retail Consumption License C-2, issued by

respondent to appellant which prohibited live music or entertainment on the premises be and is hereby vacated, pending the determination of this appeal and further order of the Director.

Robert E. Bower
Director