

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

BULLETIN 2435

APRIL 19, 1984

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1. RECENT LEGISLATION--AMENDMENT TO STATUTE PROHIBITING SALE TO PERSON UNDER LEGAL AGE AND MODIFICATION OF DEFENSES THEREUNDER. (N.J.S.A. 33:1-77)--TEXT OF AMENDED STATUTE.

Chapter 565 of the Laws of 1983 (approved January 17, 1984) amended N.J.S.A. 33:1-77 to permit reliance upon the ABC Identification Card issued to persons of a legal drinking age by the county clerks pursuant to N.J.S.A. 33:1-81.2. The statute had previously been amended July 9, 1982 to permit reliance upon a driver's license bearing a photograph of the person holding such license. With this most recent amendment, an alcoholic beverage licensee may rely upon either a photo driver's license or the ABC card issued by the county clerk. A licensee should be very careful that the photograph appearing on such license or ABC card resembles the person making use of it.

This most recent amendment to N.J.S.A. 33:1-77 also eliminates the writing or signed statement that had been previously permitted as the other defense to a disorderly person's charge for sale of an alcoholic beverage to a person under the legal age.

With this amendment, it now appears that the only defense to the disorderly person's charge that is available to a licensee is reliance upon a photo driver's license or the ABC card (or an equivalent governmentally issued alcoholic beverage control card issued by another state), together with the other two requirements set forth in the statute, that the appearance of the person was such as to make an ordinary prudent person believe the person to be of legal age to make the purchase, and that the sale was made in good faith relying upon either the photo driver's license or the ABC card.

With this latest amendment to N.J.S.A. 33:1-77, it would appear that there is a conflict with N.J.S.A. 33:1-81.9, which has not been explicitly repealed. It appears to the Division, however, that there is an implicit repeal of this section since that section said that the ABC card would not be deemed to constitute a "writing" as used in N.J.S.A. 33:1-77. Since the latest amendment to that statute has eliminated the "writing," N.J.S.A. 33:1-81.9 can no longer have any meaning.

The amendment to N.J.S.A. 33:1-77 has not addressed the situation where a person has neither a photo driver's license nor an ABC card, yet the licensee is compelled to request identification because of a questionable appearance or other circumstances which would lead a prudent licensee to believe a person may not be of legal age to purchase alcoholic beverages. The Division can only suggest that if there is such question, a licensee refuse the sale, since there is no provision for reliance upon anything other than the photo driver's license or ABC card as a defense to a disorderly person's charge.

The identification cards referred to in the recent amendment to N.J.S.A. 33:1-77 are issued pursuant to the authority in N.J.S.A. 33:1-81.2, et seq., and N.J.A.C. 13:2-40.1 through 40.5. As soon as feasible, N.J.A.C. 13:2-40.5 will be amended to eliminate the last paragraph on the reverse side of the identification card, which paragraph is rendered meaningless by the amendment to the statute.

At the same time, the appropriate modification will be made to the "special note" set forth in the appendix to N.J.A.C. 13:2 on page 2-185 of the New Jersey Administrative Code, and the representation and statement found in that appendix on page 2-186 will be eliminated.

The full text of the statute, N.J.A.C. 33:1-77, as amended, now reads as follows:

33:1-77. Sale to person under legal age; penalty; defenses

Anyone who sells any alcoholic beverage to a person under the legal age for purchasing alcoholic beverages is a disorderly person; provided, however, that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the purchaser falsely represented by producing a driver's license bearing a photograph of the licensee or by producing a photographic identification card issued pursuant to section 1 of P.L. 1968, c. 313 (C. 33:1-81.2) or a similar card issued pursuant to the laws of another state or the federal government that he or she was of legal age to make the purchase, (b) that the appearance of the purchaser was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase, and (c) that the sale was made in good faith relying upon such production of a driver's license bearing a photograph of the licensee or production of a photographic identification card issued pursuant to section 1 of P.L. 1968, c. 313 (C. 33:1-81.2) or a similar card issued pursuant to the laws of another state or the federal government and appearance and in the reasonable belief that the purchaser was actually of legal age to make the purchase. (As amended, L.1983, c. 565, effective January 17, 1984.)

2. NEW REGULATION-DISPLAY SERVICES-REGISTRATION REQUIRED (N.J.A.C. 13:2-24.12-TEXT OF NEW REGULATION.

The Division has adopted N.J.A.C. 13:2-24.12, which became effective upon its promulgation in the New Jersey Register on April 16, 1984, and which prohibits any licensee, permittee, or registrant from utilizing in any manner whatsoever any display service unless it has registered with the Division. In accordance with the regulation, the Division has prepared a registration form, a facsimile of which is set forth below. Every display service must file this registration form, and renew its registration, by May 1 of each year, beginning this year, and must furnish the information set forth in N.J.A.C. 13:2-24.12(a)1 through 4, as well as the additional information requested on the form.

Since the new regulation is now effective, every retail licensee on whose premises any display is placed should request a written slip or other proof regarding the display placed on its premises and setting forth the value of the display materials furnished, as well as the identity of the display company placing them, and the supplier or wholesaler providing them.

Additionally, every display company or display service shall immediately begin a system whereby it can maintain, in such manner as to be able to furnish to the Division, the information required in N.J.A.C. 13:2-24.12(b).

Any specific questions regarding the new regulation or the information to be furnished can be addressed, in writing, to the Regulatory Bureau of the Division.

The full text of N.J.A.C. 13:2-24.12 is as follows:

13:2-24.12 Display services

(a) No licensee, permittee, or registrant privileged to engage in the commerce of alcoholic beverages in this State shall, directly or indirectly, furnish to, provide payment for, receive or advertise except anything of value from, or otherwise utilize in any manner whatsoever, any display service unless such service has registered with the Division in a form prescribed by the Director. Such registration shall include:

1. The name and address of the display service and all officers, directors, partners, stockholders and/or employees thereof unless a publicly traded corporation, in which case only officers, directors and stockholders having at least one percent interest need be furnished;

2. An affidavit or certification that no person listed in N.J.A.C. 13:2-24.12(a)1 would be disqualified from having an interest in an alcoholic beverage license in this State;

3. Copies of all existing display service agreements with licensees, permittees, registrants, suppliers, importers, manufacturers or cooperatives doing business in the State of New Jersey; and

4. The issuance of a registration acknowledgment, which shall be renewable on May 1 of each year.

(b) Every display service shall file with the Director quarterly reports on or before the 15th of January, April, July and October for the preceding calendar quarter, which reports shall identify the amounts and sources of all monies received from any licensee, permittee, registrant, supplier, importer or manufacturer of alcoholic beverages, indicate the name, address, and license number of all licensees to which services were furnished; and set forth, the value of the display materials furnished to or on behalf of each such licensee. Such reports shall be confidential pursuant to N.J.A.C. 13:2-29.2(a)3.

(c) Every licensee, permittee or registrant privileged to engage in the commerce of alcoholic beverages in this State shall maintain on its licensed premises all written agreements and detailed records of all transactions with any display service for a period of three years.

As adopted R.1984, d. 140, eff. April 16, 1984.
See 15 N.J.R. 1921(a), 16 N.J.R. 916(b).

A facsimile of the registration form appears on the next page (copies of the registration form in full size and for actual use may be obtained from the Regulatory Bureau of the Division).

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CM-887
TRENTON, NJ 08625

REGISTRATION FORM - DISPLAY SERVICE
PURSUANT TO N.J.A.C. 13:2-24.12(a)

1. NAME OF DISPLAY SERVICE ENTITY:

STREET ADDRESS _____
MUNICIPALITY _____
COUNTY _____ STATE _____ ZIP CODE _____
TELEPHONE NO. () _____

2. (a) ATTACH LIST OF NAME AND ADDRESS OF ALL OWNERS AND EMPLOYEES OF REGISTRANT. IF A CORPORATION ALSO LIST ALL STOCKHOLDERS' PERCENTAGE OF INTEREST, AND ALL OFFICERS AND DIRECTORS.

(b) FOR PUBLICLY TRADED CORPORATIONS, ATTACH LIST OFFICERS, DIRECTORS, AND ONLY THOSE STOCKHOLDERS HAVING AT LEAST A 1% INTEREST.

3. ATTACH COPIES OF ALL EXISTING PROMOTION OR SERVICE AGREEMENTS WITH LICENSEES, PERMITTEES, REGISTRANTS, SUPPLIERS, IMPORTERS, MANUFACTURERS, OR COOPERATIVES DOING BUSINESS IN NEW JERSEY.

(a) INDICATE HERE NUMBER OF AGREEMENTS ATTACHED _____

4. DOES ANY PERSON IDENTIFIED IN THIS REGISTRATION HAVE AN INTEREST AS AN OWNER OR EMPLOYEE OF ANY RETAIL, WHOLESALE OR MANUFACTURE CLASS LICENSE WITHIN OR WITHOUT THIS STATE? YES ___ NO ___

IF YES, IDENTIFY SPECIFICALLY THE PERSON(S), THE LICENSE AND THE NATURE OF INTEREST OR EMPLOYMENT IN THAT LICENSE.

5. IS ANY PERSON IDENTIFIED IN THIS REGISTRATION RELATED TO ANY PERSON WHO HAS AN INTEREST IN ANY RETAIL, WHOLESALE OR MANUFACTURE CLASS LICENSE WITHIN THIS STATE? YES ___ NO ___

IF YES, SPECIFICALLY IDENTIFY THE PERSON(S), THE RELATIONSHIP, THE LICENSE AND RELATIVE'S INTEREST IN THE LICENSEE.

6. IS ANY PERSON IDENTIFIED IN THIS REGISTRATION UNDER THE AGE OF EIGHTEEN YEARS OR HAS ANY SUCH PERSON EVER BEEN CONVICTED OF A CRIME INVOLVING MORAL TURPITUDE? YES ___ NO ___

IF YES, IDENTIFY THE PERSON(S), THAT PERSON'S AGE OR THE SPECIFICS OF THE CRIMINAL CONVICTION (CRIME, COURT, DATE AND SENTENCE).

7. HAS THE REGISTRANT AGREED TO PERMIT ANYONE TO RECEIVE OR AGREED TO PAY (BY WAY OF SALARY, RENT OR OTHERWISE) ANYONE, OTHER THAN THE OWNERS OF THE REGISTRANT, ALL OR ANY PART OR PERCENTAGE OF THE GROSS RECEIPTS OR NET PROFIT OR INCOME DERIVED FROM OR IN THE BUSINESS TO BE REGISTERED. YES ___ NO ___

IF YES, PROVIDE THE NAME AND ADDRESS OF THAT PERSON(S) AND DESCRIBE THE DETAILS OF PAYMENTS.

(ATTACH ADDITIONAL PAGE IF MORE SPACE NEEDED)

STATE OF NEW JERSEY
COUNTY OF _____

_____, BEING DULY SWORN ACCORDING TO LAW, UPON HIS/HER OATH, DEPOSES AND SAYS:

1. I AM THE _____ OF THE APPLICANT FOR DISPLAY SERVICE AND I AM AUTHORIZED TO MAKE THIS AFFIDAVIT ON BEHALF OF SUCH DISPLAY SERVICE.

2. THE INFORMATION AND ANSWERS SET FORTH IN THE FOREGOING REGISTRATION FORM AND IN THE ATTACHMENTS ARE TRUE AND COMPLETE.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS _____ DAY
OF _____

FOR DIVISION USE
(DATE FILED _____)
(REGISTRATION NO. _____)
(SIGNATURE _____)

3. RECONSIDERATION OF OPINION LETTER PUBLISHED IN BULLETIN 2431, ITEM 4, REGARDING ISSUANCE OF NEW PLENARY RETAIL CONSUMPTION LICENSE PURSUANT TO N.J.S.A. 33:1-12.14-POLICY NOW EXCLUDES FROM COMPUTATION REQUIRED UNDER THE POPULATION QUOTA LAW ANY LICENSE WHICH QUALIFIES AS A HOTEL/MOTEL EXCEPTION UNDER N.J.S.A. 33:1-12.20.

In Bulletin 2431, Item 4, an Opinion Letter which had been furnished to Phillip Lewis Paley, Esq., Township Attorney for Piscataway Township, which letter was dated June 13, 1983, was published. Subsequently, a request for reconsideration was received and favorably considered. A letter was sent on March 12, 1984 to Mr. Paley indicating the Division's reconsidered policy:



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

THOMAS H. KEAN
GOVERNOR

OFFICE OF THE DIRECTOR
Richard J. Hughes Justice Complex
CN 087
Trenton, NJ 08625
(609) 864-3230

IRWIN I. KIMMELMAN
ATTORNEY GENERAL
JOHN F. VASSALLO, JR.
DIRECTOR

March 12, 1984

Phillip Lewis Paley, Esq.
Kirsten, Friedman & Cherin
17 Academy Street
Newark, NJ 07102

RE: Township of Piscataway issuance of plenary retail
consumption licenses under N.J.S.A. 33:1-12.14

Dear Mr. Paley:

Receipt is acknowledged of your letters dated December 1, 1983 and December 22, 1983 wherein you submit further information and request a reconsideration of a Division policy determination articulated in letter to you of June 13, 1983 and reported in ABC Bulletin 2431, Item 4. The issue presented for reconsideration involves the determination whether in assessing the allowable number of plenary retail consumption licenses that can be issued in the community based upon the last Federal Census, the municipality must include within the Population Quota Law Standards liquor licenses that were issued as an exception to the Population Quota Law under N.J.S.A. 33:1-12.20.

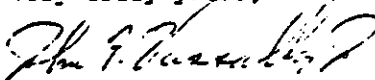
Subsequent to the original determination provided to you on July 13, 1983, the Division has had to assess a comparable issue involving the Two License Limitation Law, N.J.S.A. 33:1-12.31 et seq. Involved in that determination was the evaluation of the importance or lack of importance in the chronological acquisition of retail licenses, some of which would qualify as exceptions to the law under N.J.S.A. 33:1-12.32. It was specifically determined therein that the fact that an individual who had an interest in two retail licenses, any one or both of which would satisfy the terms of the exceptions set forth in N.J.S.A. 33:1-12.32 because of its utilization in conjunction with a hotel containing at least

fifty (50) sleeping rooms or a restaurant as defined by statute, could thereafter acquire an interest in a retail license which would not qualify as an exception. In effect, the determinations to be made would not be based upon chronological acquisition of interests in licenses but upon review of the total number of retail licenses an individual could have an interest in and the conclusion that no more than two (2) of them do not qualify as an exception.

Applying such analogy to the within matter, it is now the policy of the Division as it relates to the specific question you have raised to exclude from the computations required under the Population Quota Law any license which qualifies as an exception under N.J.S.A. 33:1-12.20.

Applying the indicated statistics as they relate to the Township of Piscataway, the population reflected in the last Federal Census of 1980 indicates a population of 42,223 persons. At the ratio of one license to each 3,000 in population, the Township may issue a total of fourteen (14) plenary retail consumption licenses. In determining what licenses must be included in reaching the fourteen (14) allowable licenses under N.J.S.A. 33:1-12.14, the Township does not have to include those licenses which were authorized under the hotel-motel exception provided in N.J.S.A. 33:1-12.20.

Very truly yours,

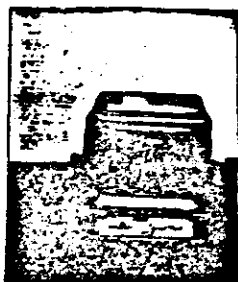

JOHN F. VASSALLO, JR.
DIRECTOR

4. VIDEO POKER AND OTHER SIMILAR TYPE MACHINES ON LIQUOR LICENSED PREMISES--ADDITIONAL EXCEPTIONS TO BAN.

In Bulletin 2434, Item 9, March 13, 1984, the Director set forth identities of the first four exceptions which were issued to the ban on video machines which resemble games of cards, dice, roulette, etc., from liquor licensed premises, which ban had been noticed in Bulletin 2430, Item 3, March 31, 1983.

Since the publication of Bulletin 2434, Item 9, three additional exceptions have been issued, making a total of seven exceptions issued to date. The three new exceptions are:

Video card game exception #005 (March 22, 1984):

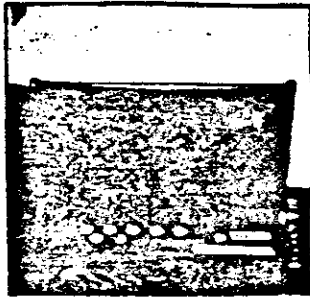


Re: "Little Casino"
Copyright 1981, 1982, 1983, 1984
by:
Digital Controls, Inc.
5555 Oakbrook Parkway, Suite 200
Norcross, Georgia 30093

Version: Countertop

Games included:
Poker
Blackjack
Hi-Lo
Craps
Horse Race

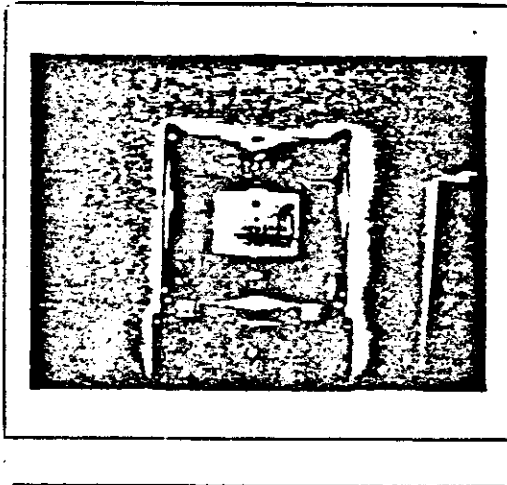
Video card game exception #006 (March 26, 1984):



Re: "Just For Fun-Fourth One"
 Copyright 1984
 by:
 M. Kramer Manufacturing Co.
 1100 Towbin Avenue
 Lakewood, NJ 08701
 Version: Countertop

Games included:
 Riverboat Poker
 Acey-Ducey
 Blackjack
 Skilldraw Poker

Video card game exception #007 (March 5, 1984):



Re: "GRAND PRIX"
 Model 602
 Version 031384
 copyright 1984
 by:
 SMS Manufacturing
 Corporation
 3 Broadway
 Point Pleasant Beach,
 NJ 08742

Three versions:
 "Little Brother" cabaret
 Upright (pictured at left)
 Countertop
 (with swivel base)

Games Included:
 Joker Poker
 ShowDown Poker
 Blackjack

5. NOTICE - MULTIPLE DELIVERIES IN A COOPERATIVE PURCHASE-
 NOT PERMITTED.

A question has arisen as to whether multiple deliveries in a cooperative purchase are permitted. The position of the Division is that they are not, unless they can be cost justified.

The cooperative purchase is treated as a single purchase transaction and one delivery is mandated. Multiple deliveries in a cooperative sale are, in effect, discriminatory pricing against single retailers purchasing the same amount of products but at a higher price because they were not able to achieve the purchase quantity discount price which the cooperative receives as a whole. This discrimination can only be justified if there are actual differences in the wholesaler's sale or delivery costs and if those cost differences are equal to the price differential between the price to the retailer that purchases

BY THE DIRECTOR:

Written Exceptions were filed on behalf of the Division and written Answers were filed on behalf of the Applicant in this proceeding seeking the issuance of a State Concessionaire's Permit to allow the Applicant to sell alcoholic beverages at retail at a State owned recreational facility. In order to permit the transcription of the testimony below and to properly consider the filed Exceptions and Answers within the framework of such testimony, the time limit for the Director's review and rendering of a Final Decision was extended, by a properly executed Order, until March 15, 1984.

In its Exceptions, the Deputy Attorney General representing the Division contends that the concession agreement entered into by the Applicant and the State of New Jersey expired on December 31, 1983. Therefore, it is argued that since a valid contract no longer exists, the Applicant no longer retains any rights to possession of the premises and the matter has been mooted. Additionally, the exception is taken to the Administrative Law Judge's conclusions that "data gained from the actual operations (of the concession's food sales) is sufficient to quell any doubts concerning financial capacity" of the applicant. The Applicant Answers by asserting that he is in lawful possession of the premises and further argues that the financing of this business was conducted pursuant to normal business practices and same should not be held against him. The Applicant also took Exception to my request for the issuance of an Order of Extension of the time limits for making a decision in this case.

Initially, I note that the Administrative Law Judge found below that the applied-for permit was for a limited duration and, if granted would expire on December 31, 1983, coincidental with the concession agreement terms entered into between the applicant and the New Jersey Department of Environmental Protection. Therefore, he stated that if this case was not finally decided in the Applicant's favor by December 31, 1983, the Applicant would be required to reapply for a permit in 1984. Additionally, the Division, in replying to the Applicant's Answers, has submitted documentation which indicates that the Applicant may no longer have a lawful possessory interest in the premises, by virtue of his not complying with a Court Order to pay certain moneys into his attorney's trust fund, by the time required. Therefore, based on the evidence of record, I find by a fair preponderance of such evidence, that the Applicant no longer has the required possessory interest in the premises and thus is not entitled at this time to have issued to him a special concessionaire's permit. This contested matter in this case being mooted, I reject the Initial Decision of the Administrative Law Judge.

Beyond this issue, however, there are several other concerns raised in this proceedings which I feel must be addressed. Although the Judge found in the Applicant's behalf, there can be little question upon reviewing his Initial Decision and the testimony and matters of record, that there were serious issues raised concerning the Applicant's fitness for receiving a permit. Although it is true that some of the negative information supplied concerning the Applicant was not of the quality sufficient to enable same to be found as an evidentiary fact, the totality of same is sufficient to raise a bona fide concern about Applicant's licensure qualifications.

It is crucial to the proper resolution of this case to bear in mind that the Applicant bears the burden of proof with respect to establishing his fitness and qualifications for licensure. Lyons Farms Tavern v. Mun. Bd. of ABC, 68 N.J. 44 (1975). Furthermore, it is well settled that a license or permit to dispense alcoholic beverages is a mere privilege and that no person is entitled to such license as a matter of law. Paul v. Gloucester County 50 N.J.L. 585 (E.&A. 1888); Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1935), Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946).

In the instant case, the Administrative Law Judge, upon determining that the Applicant was of the legal age and had not been convicted of a crime, found that he met the threshold requirements of licensure. The Judge then noted that the Division had questioned the Applicant's worthiness and, after reviewing the Division's concerns, he found that its apprehensions lacked concrete proof. I view the evidence presented and the law applicable to this case much differently. Prior to discussing my assessment of the facts, I believe it would be helpful to review briefly, the history and development of New Jersey's laws regarding alcoholic beverage control.

In the first place, it is important to realize that the history of New Jersey's liquor control activities is founded on the fundamental premise that a license to sell intoxicating liquor at a particular location is essentially a permit to pursue there an otherwise illegal occupation. In light of this foundation of our laws and implementing regulations, the Legislature has conferred the discretionary power to grant such privilege upon designated governmental licensing agencies. Hickey v. Division of Alcoholic Beverage Control, 31 N.J. Super. 114 (App. Div. 1954). Beyond this, the Director has been given extensive authority regarding the sale of intoxicating liquors and has powers of supervision and control. Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962); Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946). In determining whether or not a license should be issued in such a case, it is necessary to decide whether the public good requires it. Blanck v. Mayor and Borough Council of Magnolia, *supra*.

Besides these general considerations, however, there are specific unique factors which must also be considered before one can reach the proper determination in the instant case. Of significant import, is the fact that the applicant wishes to conduct alcoholic beverage activity in the Atlantic City area. It is well known that the State of New Jersey generally, and this Division in particular, has had special concerns with alcoholic beverage activities in Atlantic City. Indeed, pursuant to N.J.A.C. 13:2-3.10 no action can be taken by the local issuing authority until an appropriate investigation has been conducted and the Division has made a finding that a granting of an application would not be contrary to the public interest. Although in this particular case, because the premises to be "licensed" is a State-owned facility and the local issuing authority is not involved, the concern which gave rise to this regulation remains intact. That concern, simply stated, dealt with the extraordinary situation which was created by the establishment of legalized casino gaming in Atlantic City and the fear of its being infiltrated by persons and organizations associated with crime. Those concerns remain vital today and this Division retains its special interest in all alcoholic beverage matters concerning Atlantic City. Narducci et al v. Atlantic City, Bulletin 2305, Item #3, Affirmed per curiam (App. Div., January 18, 1980, A-706-78) (unreported).

The Administrative Law Judge in reaching his determination in this case, did not, I believe, take into sufficient account the substantial and special interest that the Division has in ensuring that applicants are properly fit for licensure, as it especially applies to the Atlantic City area. Moreover, even beyond the special regulatory provisions required for Atlantic City issued licenses, a differentiation in the test to be applied for licensing matter has been approved upon recognition that different times, places, and circumstances realistically require such an approach, Accord, Lyons Farms v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292, 304 (1970).

Reviewing the appropriate law to be applied, I must first take issue with the Judge's viewpoint that by virtue of the Applicant's being of legal age and not having been convicted of a crime, he met the "threshold of licensure." By that, I take it, the Judge means that the Applicant is qualified for licensure. In contrast, I view these two conditions as merely indicating that the Applicant is not statutorily disqualified from being licensed. The burden still remains on the Applicant to prove that he is qualified. Accord, Narducci et al v. Atlantic City, Supra. See Downie v. Sommerdale, 44 N.J. Super. 89 (App. Div. 1957), Nordco Inc. v. State, 43 N.J. Super. 277 (App. Div. 1956).

It has long been held that "it is competent for... issuing authorities to confine their selection of applicants to those who are clearly worthy." Speranzo v. Millburn, Bulletin 57, Item #8. It matters not that an applicant had no convictions against it (Speranzo, Id.) It has been further held that "there is no 'must' in the Alcoholic Beverage Law. Each case must be considered on its own merits, based among other factors, upon the worthiness of the applicant." Barresi v. Ridgefield, Bulletin 1770, Item #2. Although the Judge states that he found the Applicant worthy, and therefore fit for licensure, his assessment and application of the laws and facts leads me to suspect that he really found that the Division did not sufficiently prove the Applicant was not worthy, and was therefore unfit for licensure. As noted, the burden does not shift, but remains on the Applicant. Now I shall discuss the facts of this case.

With respect to the Applicant's own activities concerning criminal conduct, it appears that his only conviction was in 1967 for stealing pastry buns, which resulted in a finding of guilt to a disorderly conduct charge and a fine of \$50.00. The presently pending State Grand Jury indictment, while hearsay and admittedly not having the force and effect of a finding of guilt, does allege that the Applicant committed acts which are classified as offenses of criminal mischief in the fourth degree and was associated with persons who were either criminals or of disreputable character. The Applicant in his testimony, while denying any knowledge of such activities or the reputation of such persons, admitted that he knew Joseph LaMannia, a person who was convicted of embezzling a car from a labor union. He also testified that he had met a Rick Casali who is reputed to be an associate of the Atlantic City Organized Crime family allegedly controlled by Nicodimo "little Nicky" Scarfo. The record further indicates that in 1981 the Applicant was the subject of a criminal complaint alleging that he had defrauded the Atlantic National Bank in the amount of \$8,350.00. At that time, the complaining witness apparently was of the opinion that the Applicant was associated with members of the Bruno/Testa crime group. That complaint was withdrawn. In October of 1981 the Applicant was charged with credit card theft as well as driving while revoked and without insurance. The information indicates the Applicant, when confronted with the credit card issued in the name of George D. McCormick, stated he had found the card in the trash. He gave no reason for carrying it. Apparently, these charges were dismissed.

While it is noted that much of the above noted information is hearsay and would not be admissible in a judicial proceeding, the issues raised by same are of proper concern to the Division in determining the resolution of this matter. Indeed, in administrative proceedings such as these, hearsay evidence may be employed to corroborate competent proof or competent proof may be supported or given added probative force by hearsay testimony. It is only required that an administrative decision must be based on a residuum of legal and competent evidence and cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). The Applicant's attorney understood this rule and in fact introduced hearsay documents himself. (Tr. 10-17),

We have the Applicant's testimony regarding his knowledge of and association with two persons who are identified felons or members of organized crime. The Applicant admits that, at least now, he knows that Joseph Lamania was convicted of embezzlement (Tr. 72, 74). Such competent facts, may therefore, now be further reviewed and supported in light of the hearsay evidence introduced. While I do not suggest that we have carte blanche to assume all of the derogatory hearsay evidence should now be considered against the Applicant, I do believe it does provide a basis for concern. Nevertheless, even totally disregarding these matters, there are other facts competently proven in the record which support denying a permit to this Applicant.

With respect to the Applicant's financial capacity, the Administrative Law Judge admits that there is little doubt the Applicant embarked upon this operation on less than a shoestring budget. Moreover, the record establishes that he has at least been late, if not having totally failed, to pay the proper amounts due to the Department of Environmental Protection under the concession agreement. The Applicant holds himself out as a competent business man who dealt with 12 to 14 million dollars worth of funds (Tr. 83), but a search of appropriate credit records found no credit history for him. He asserts that he did not have a credit record because he never found it necessary to have same. He states he does not believe in credit cards, but was arrested for credit card theft. I find the lack of a credit record coupled with the delay of payments and shoestring "bootstrapped" financial strategy utilized by the Applicant to cast grave doubts on his fitness as a proper person to hold such a special concessionaire's permit.

In finding the Applicant worthy, the Judge considered his "particular and specialized experience in the food - liquor industry" as a "strong plus factor" in his decision. However, he admittedly reached this finding based on the Applicant's testimony and on Exhibit R-5, which appears to be a self-composed promotional brochure contrived by the Applicant in an attempt to solicit contracts for his consulting corporation, Cities and Resorts, Inc., of which he is the president. This document contains brief indications of many supposed contacts and contracts with the industry and he indicates that since 1977 to date, his consulting business has been his main source of employment. However, he has submitted no independent testimony or even hearsay evidence from any of his satisfied customers. Certainly any legitimate and competent businessman who has been working in this industry for 6 years and knew he had to prove his fitness for licensure, would have had numerous testimonials, both written and verbal. Mr. Dunn only had his own testimony, and I note that he has a strong reason to be self-serving in the recitation of same. The failure

to call such witnesses or produce such evidence permits an adverse inference to be made. Cf. In the Matter of Victor Colon et al, Bulletin 2155, Item 2, and cases cited therein. Moreover, I find his testimony regarding the reasons behind his lack of a credit history to be incredible and very disturbing.

This Division is specifically charged with eliminating racketeers from the industry. N.J.S.A. 33:1-3. One of our most important tools in the discovery and elimination of such persons is the use of audit trails of funds, generally established from credit transactions and other recordable documentation. The evils of having freely flowing cash without traceability are well known and need not be further recounted. Therefore, it is with due concern that I assess Mr. Dunn's lack of a credit history.

Regarding his administrative background allegedly derived at a Philadelphia bicentennial organization, again we only have his testimony. The documents submitted appear to again have been generated with Mr. Dunn's assistance if not as his initiation. I have already described the documented "shoestring" financing of his restaurant and I will not further recount my concerns. It appears, however, that the lack of adequate initial capitalization is a factor in his not meeting his concessionaire's agreement payments at the time required. Moreover, I am not persuaded that the lack of a permit is relevant, since his figures show he was grossing more revenue from his restaurant business than the prior concessionaire grossed from both food and alcoholic beverages. (Exhibit P-1).

In summation, given the totality of the evidence as noted above, I find that the Applicant has not met the burden of establishing his fitness for licensure and thus it would not be in the public interest to grant the Applicant a permit to conduct alcoholic beverage activity at this State-owned facility. It is clear that even though the Applicant may not be criminally disqualified, and he may have operated the restaurant facility sans alcoholic beverages on an allegedly profitable basis, he need not be awarded a permit if it is still not in the public interest to grant the Applicant one. Cf. Lyons Farms Tavern v. Mun. Bd. of Alcoholic Bev., 55 N.J. at 304. For these reasons I further reject the Initial Decision of the Administrative Law Judge.

Accordingly, it is on this 15th day of March 1984

ORDERED that the application of George W. "Chip" Dunn for a special concessionaire permit for premises located at the Senator Farley Marina, Atlantic City, New Jersey, be and the same is hereby denied.



JOHN F. VASSALLO, JR.
DIRECTOR

APPENDIX: INITIAL DECISION BELOW



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPTORAL INITIAL DECISION

OAL DKT. NO. ABC 7909-83

AGENCY DKT. NO. 09-83-277

IN RE APPLICATION OF
GEORGE W. "CHIP" DUNN,
105 SOUTH VICTORIA AVENUE,
VENTNOR, NEW JERSEY 08406

APPEARANCES:

Harold I. Garber, Esq., for George W. "Chip" Dunn, petitioner
Carol L. Widemon, Deputy Attorney General, for the respondent
(Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Record Closed: December 14, 1983

Decided: December 14, 1983

BEFORE J. ROGER PERSICILLI, ALJ:

This matter concerns the appeal of George W. "Chip" Dunn for a special concessionaire permit, pursuant to N.J.S.A. 33:1-42 and N.J.A.C. 13:2-5.2. Mr. Dunn's application was filed with the Division of Alcoholic Beverage Control on April 26, 1983.

Also on April 26, 1983, Mr. Dunn entered into a written concession agreement with the State Department of Environmental Protection. The concession to operate a restaurant-bar at the Senator Farley Marina, a State-owned facility, was granted to Mr. Dunn after public bidding. The term of the concession agreement extended from March 15, 1983 to December 31, 1983. Therefore, if granted, the right to serve alcoholic beverages by virtue

of a special concessionaire permit will expire on December 31, 1983.

Pursuant to N.J.A.C. 13:2-5.2(f), the Division of Alcoholic Beverage Control notified the applicant of its intent to deny the application by letter dated September 7, 1983. In a letter dated September 15, 1983, the applicant requested a hearing and, pursuant to N.J.S.A. 52:14F-1 et seq., the case was transmitted to the Office of Administrative Law for determination as a contested case on September 28, 1983. The matter was scheduled for prehearing for December 22, 1983, and appellant's motion for an expedited hearing was granted, and the matter was heard on December 14, 1983, at the Office of Administrative Law, Trenton, New Jersey.

Considering this background, I feel constrained to issue this opinion orally and will have my secretary transcribe it, certify that it is an accurate transcription, and direct it to the Director's attention. Under the rules of the Office of Administrative Law, the Administrative Law Judge and the agency head each have a 45-day time period to issue their respective decisions. Because of the time limitations, I can only hope that the Director will treat this matter expeditiously.

In this case, the applicant is of legal age, has never been convicted of a crime and the Alcoholic Beverage Control law specifically prohibits individuals convicted of a crime involving moral turpitude from obtaining a license. He meets the threshold of licensure; however, the Alcoholic Beverage Control questions his worthiness and it is within their prerogative to question further. They question his worthiness concerning Mr. Dunn's financial capacity to independently support this venture, and they question past business associations with individuals who have been engaged in criminal activity. I FIND that the Division's apprehensions lack concrete proof. Specifically, I FIND:

1. that the applicant has never been convicted of a crime;
2. he is presently under indictment, but the presumption is one of innocence not guilt. If a license is granted and the licensee is subsequently found guilty, his license or permit can be revoked.

3. Atlantic National Bank filed a complaint alleging that it was defrauded in the amount of \$8,350. That complaint was withdrawn. The FBI apparently conducted an investigation on the claim; nothing resulted.
4. Mr. Dunn was charged with credit card theft sometime in October 1981 and that charge was dismissed.
5. Mr. Dunn was not sued civilly by the Atlantic National Bank or by the owner of the credit card or credit card company.
6. The investigative report, R-2, states that Mr. Dunn was employed as the office manager of Frankfurters Unlimited; but there is nothing in the record to show who the owner of Frankfurters Unlimited is or nothing to really establish Mr. Dunn's relationship to this business. Mr. Dunn testified that he was retained as a consultant to organize the bookkeeping and arrange for purchasing. His testimony is the only competent proof on the subject. I accept it as factual. His interest in this business was short term as a consultant.
7. The State alleges a business relationship with persons engaged in criminal activity. This allegation has no competent proof to support it whatsoever. Furthermore, it fails to show any social relationship.

The Division also questions the financial capacity of the applicant. There is little doubt that he embarked in this operation on less than a shoestring budget. As a business venture, it is undercapitalized and, because of the lack of credit experience, Mr. Dunn has no credit rating. However, Mr. Dunn's actual operation experience as reflected in Exhibit P-1 demonstrates that he has been able to generate food sales substantially in excess of his predecessors. If one were to extrapolate these statistics and anticipate a 70% liquor sales to 30% food sales ratio, as represented by the former concessionaires in 1981 and 1982, and by the Department of Environmental Protection representatives, it is clear that gross sales would enjoy a commensurate percentage increase over prior years' gross sales. It is not my function to project what that profit picture would be, but I think it safe to assume that a profit would in fact be generated. Thus, I am persuaded that the data garnered from the actual operations is sufficient to quell any doubts concerning financial capacity.

In concluding that Mr. Dunn is worthy and should be issued a special concessionaire permit, I think worthiness is an issue before me; I have affirmatively and positively considered:

1. Mr Dunn possesses particular and specialized experience in the food-liquor industry, as demonstrated by Exhibit R-5 and his testimony. He opened and managed numerous restaurants with liquor licenses, and apparently, without Alcoholic Beverage Control incident or violation. His experience in this area is a strong plus factor in my consideration.
2. It is also apparent that the applicant has a good administrative background as demonstrated by his bicentennial experience and his ability to secure large funding for the benefit of the city of Philadelphia during that bicentennial project. The administrative ability that he possesses is not limited to this one area, but is exemplified in his managerial background as well.
3. Additionally, I have considered the impact of an inquiry into financial capacity. In a normal licensing situation, where an individual seeking to acquire a liquor license, that license has a particular value which, for example, may range from \$1,500 to \$250,000. The source of all funds to purchase that license is especially relevant to determine whether the purchaser is the true and sole party in interest. I think the inquiry is also appropriate here, but the nature of the inquiry is to a lesser degree by virtue of the license or permit itself and its attendant nominal costs.

In determining worthiness, I have discounted in large measure Exhibit P-3 because of Mr. Dunn's professed friendship with Mr. Letizia, but the operations experience, P-1, speaks for itself. (At this juncture, I have to note counsel's objection in the nature of a clarification, notwithstanding my thinking process, it appears that the two Letizia's are not one in the same but are, in fact, related. Nevertheless, the record will stand as it is.)

I have considered also the cases cited by the Deputy Attorney General as best I could in this limited time period. The Irizarry matter, Bulletin 2105, Item 2, concerned a denial of a person-to-person application. In that case,

approximately 38% of the purchase price was advanced by a vending machine company who maintained machines in the licensed premises. Additionally, it was a mother and daughter who sought to transfer the license and there was concern that certain male members of the family were persons associated with criminal activity. All the inferences are strong. In this case, we are not concerned with loans; the license purchase price or permit appears to be \$500, so I am not sure whether we can get into any serious question in that area. We have no family members directly involved and there is no failure to show capitalization or source of funds in this present case. In the Greene case, cited in Bulletin 2184, Item 3, also concerning a denial for person-to-person transfer, that applicant had no regular employment nor experience in the liquor business or any business whatsoever. I think this case is vastly different. In the Narducci and Testa case, referred to in Bulletin 2305, I think that case concerned itself with questions of true party in interest. In that case, there is a \$100,000 unsecured third-party loan. That loan was not in writing; there were no repayment terms. In addition, there appeared to be a real question as to who would run the day-to-day operation. In that case, the fathers of Narducci Jr. and Salvatore Testa were individuals with known criminal records and in addition to just being sons, they apparently enjoyed a very close relationship including still residing in the homes. The decision spells it out quite adequately. I do not think I have to go into it any further, but I do not see any gravity of those circumstances present in this case.

In some measure, the Division's case seems to translate to "where there's smoke, there's fire." I don't mean this in a depreciating sense because I know the Division investigates thoroughly & to the best of its ability. There is cause for apprehension in granting a license or permit to any individual who seeks to become involved in the sale of alcoholic beverages. And in recent years particularly, there is extra concern for those individuals seeking to gain entry into Atlantic City. But the apprehension and concern, I think, should be alleviated by this hearing record and, furthermore, by recognition of the fact that the subject permit is for a limited duration. If granted, it will expire on December 31, 1983, coincidental with the concession agreement terms. Mr. Dunn would be required to reapply for a permit in 1984. This is not a typical renewal situation. At that time, his application will be judged on its own merits.

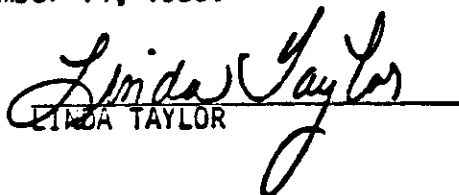
In essence, I have found and concluded that Mr. Dunn is worthy to hold the subject license and/or permit, and I ORDER that the application for special concessionaire permit be issued to George W. "Chip" Dunn, and that its term shall expire on December 31, 1983, coincidental with the term of the concession agreement between Mr. Dunn and the Department of Environmental Protection. I will note to the extent that Mr. Dunn may, in fact, be a hold over tenant, that the right to sell alcoholic beverages on the premises by virtue of the grant of this permit expires on December 31, 1983, unless Director Vassallo dictates otherwise.

END OF TRANSCRIPT

I, Linda Taylor, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge J. Roger Persichilli's oral decision rendered in the above matter on December 14, 1983.

Date

12/14/83


LINDA TAYLOR

Written exceptions should be directed to the Director of the Division of Alcoholic Beverage Control. Either or both parties may take exceptions to this decision. Should the parties wish to file exceptions, the Director will consider the exceptions, together with the entire record in this matter in reaching a final determination.

This oral decision is a recommended decision which may be affirmed, modified or rejected by John F. Vassallo, Director, Division of Alcoholic Beverage Control, who is empowered to make a final decision in this matter. However, if the Director does not so act in 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. 52:148-10. This concludes my oral decision.

Date

12/15/83

Alcoholic Beverage Control

John W. Warner

Date

Dec. 19, 1983

Office of Administrative Law

Ronald L. ParkerWITNESSES

George W. "Chip" Dunn, applicant-petitioner

EXHIBITSPetitioner's Exhibits:

- P-1 Schedule of Food Sales and Gross Sales, Senator Farley Marina (two pages)
- P-2 Letter from John W. Warner to William L. Rafsky, Executive Director, Philadelphia '76, Inc., dated July 8, 1984 (one page)
- P-3 Memo from Carl Letizia to A.F. Rudkin, dated November 16, 1983 (one page)
- P-4 News Release, Philadelphia '76, Inc., re: G.W. Dunn (two pages)
- P-5 Portfolio, re: Cities and Resorts, Inc. (seven pages)

Respondent's Exhibits:

- R-1 Memorandum from Russell W. Myers, Director, Division of Parks and Forestry, dated March 15, 1983 (one page)
- R-2 Investigation Report of ABC Inspector Carl N. Gravel, dated July 13, 1983 (four pages)
- R-3 Letter dated May 2, 1983 from Chip Dunn to Fred Dimenna, N.J. Division of ABC and attachments (three pages total)
- R-4 Application for Concessionaire's permit, dated April 26, 1983 (twelve pages)

- R-5 Concession Agreement, dated April 26, 1983 (sixteen pages)
- R-6 Letter from Chip Dunn to Frank F. Guidotti, Assistant Director, State Park Service, dated April 28, 1983 (one page)
- R-7 Letter from Frank F. Guidotti to George W. Dunn, dated May 12, 1983 (two pages)
- R-8 Mailgram from Chip Dunn to Frank F. Guidotti, dated May 31, 1983 (one page)
- R-9 Letter dated June 1, 1983 from Frank F. Guidotti to G.W. Chip Dunn (one page)
- R-10 Statement of George W. Dunn, dated May 17, 1983 (five pages)
- R-11 Statement of George W. Dunn, dated June 6, 1983 (two pages)
- R-12 Agreement between George Chip Dunn and Terminal Vending Company, dated April 18, 1983 (one page)
- R-13 Letter dated June 6, 1983 from Colleen Kelly, Vice-President of Guarantee Bank (one page)
- R-14 Credit check from Credit Bureau Associates, dated May 12, 1983 (one page)
- R-15 Direct Complaint Report, dated April 21, 1981 and signed by Daniel Halstrom, Atlantic National Bank (four pages)
- R-16 Investigation Report of Officer Bergh of Mount Laurel Township Police, dated October 17, 1981 (one page)
- R-17 Supplementary Investigation Report of Carl N. Gravel, dated September 19, 1983 and attached copy of newspaper article (three pages total)
- R-18 Letter from Harold F. Damon, Jr., Deputy Director-Licensing to George W. Dunn, dated September 7, 1983 (one page)
- R-19 Grand Jury Indictment filed September 15, 1983 (twenty-six pages)

7. "KNOW YOUR LIMITS" CAMPAIGN

The New Jersey Alcohol Beverage Industry has undertaken a campaign, wholly sponsored and paid for by the industry, to distribute six million wallet sized cards, a facsimilie of which appears below. The card shows a chart of blood alcohol percentages on the front and lists the penalties for conviction of drink driving on the reverse. The cards are being distributed to the public through retail licensees.

KNOW YOUR LIMITS

CHART FOR RESPONSIBLE PEOPLE WHO MAY SOMETIMES DRIVE AFTER DRINKING

APPROXIMATE BLOOD ALCOHOL PERCENTAGE

Drinks	Body Weight in Pounds								
	100	120	140	160	180	200	220	240	
1	.04	.03	.03	.02	.02	.02	.02	.02	Rarely
2	.08	.06	.05	.04	.04	.03	.03	.03	Influenced
3	.11	.09	.08	.07	.06	.05	.05	.05	
4	.15	.12	.11	.10	.09	.08	.07	.06	Possibly
5	.19	.16	.15	.14	.13	.12	.11	.10	
6	.23	.19	.18	.17	.16	.15	.14	.13	
7	.26	.22	.21	.20	.19	.18	.17	.16	
8	.30	.25	.24	.23	.22	.21	.20	.19	Definitely
9	.34	.28	.27	.26	.25	.24	.23	.22	(Unlawful to drive)
10	.38	.31	.30	.29	.28	.27	.26	.25	

Subtract .01 for each 40 minutes of drinking.
One drink is 1 1/2 oz. of 80 proof liquor, 12 oz. of beer, or 4 oz. of table wine.

FRIENDS DON'T LET FRIENDS DRIVE DRUNK.

PENALTIES FOR CONVICTION OF DRUNK DRIVING*

	Loss of Driving Privilege**	Fine	Jail Sentence
1st offense	6 months to 1 year	\$250-\$400	up to 30 days
2nd offense	2 years	\$500-\$1000	up to 90 days***
3rd offense	10 years	\$1,000	at least 180 days

*It is also unlawful to operate a motor vehicle with a Blood Alcohol Concentration of 0.10% or more by weight of alcohol in the blood.
**After any offense, regarding your license entails satisfying requirements in Div. of Motor Vehicles screening and evaluator programs. The requirements for each program vary with each offense, but include attendance at the Intoxicated Driver Resource Center, community service, the New Jersey Merit Rating Plan, surcharge of between \$1000-\$1500 per year for three years, and the Drunk Driving Enforcement Fund surcharge of \$100 for each offense.
***Not less than 48 consecutive hours nor more than 90 days.

The chart is only a guide and your actual tolerance level could be lower. You should NEVER exceed the number of drinks shown as your limit.

Endorsed by the State of New Jersey:
Thomas H. Kean, Governor;
Irwin I. Kimmelman, Attorney General;
John F. Vassallo, Jr., Director, Div. of Alcoholic Beverage Control

This program is funded in the interest of your safety and enjoyment by the New Jersey Alcohol Beverage Industry.

The Division is very pleased with the approach being taken by the entire New Jersey Alcohol Beverage Industry in this "Know Your Limits" Program.

PUBLICATION OF BULLETIN 2435 IS HEREBY DIRECTED THIS

19th DAY OF APRIL, 1984.

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