JON S. CORZINE
GOVERNOR

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
P.O. BOX 087
TRENTON, NJ 08625-0087
PHONE: (609) 984-2830 FAX: (609) 633-6078
HTTP://WWW.NJ.GOV/LPS/ABC

ANNE MILGRAM
ATTORNEY GENERAL

JERRY FISCHER
DIRECTOR

A.B.C. BULLETIN 2484
January 4, 2010

Table of Contents

This Bulletin is hereby published and disseminated to the alcohol beverage industry, pursuant to N.J.S.A. 33-1-39.

Jerry Fischer, Director

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2282-07T3

DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Petitioner-Respondent,

v.

MAG ENTERTAINMENT, L.L.C., t/a CHEERLEADERS GENTLEMEN'S CLUB,

Respondent-Appellant.

Argued September 15, 2008 - Decided November 14, 2008

Before Judges Reisner, Sapp-Peterson and Alvarez.

On appeal from the Division of Alcoholic Beverage Control.

Kevin E. Raphael argued the cause for appellant (Pietragallo Gordon Alfano Bosick & Raspanti, L.L.P., and Piltzer & Piltzer, attorneys; Mr. Raphael, of counsel and on the brief).

Kevin M. Schatz, Senior Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney for respondent; Lorinda Lasus, Deputy Attorney General, of counsel, Mr. Schatz, Senior Deputy Attorney General, on the brief).

PER CURIAM

MAG Entertainment, L.L.C. t/a Cheerleaders (MAG, the bar or the licensee) appeals from a September 11, 2006 final decision of the Director of the Division of Alcoholic Beverage Control (ABC), and from the Director's December 21, 2007 decision on reconsideration. We affirm the finding of a regulatory violation, modify in part as to the penalty imposed and remand for further proceedings consistent with this opinion.

I

A. Background

This case arises from a fatal automobile accident in which Humberto Herrera-Salas (Herrera) left a bar known as Cheerleaders, turned the wrong way down a divided highway adjacent to the bar's parking lot and struck an oncoming car head-on, killing two people. The ABC Director revoked the bar's alcoholic beverage license, on the theory that the bartender had served Herrera while he was intoxicated, in violation of N.J.A.C. 13:2-23.1(b),[1] and that the bar personnel had then ejected him from the premises without taking sufficient precautions to make sure that he did not drive. In response to a motion for reconsideration, the ABC Director gave MAG six

[1] "No licensee shall . . . serve . . . or allow, permit or suffer the . . . service . . . of any alcoholic beverage, directly or indirectly, to any person actually or apparently intoxicated, or permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises." Ibid.

months to sell the liquor license in lieu of revocation, provided the owners could also reach a settlement with the agency to pay a monetary penalty.

The following evidence was produced at the hearing before the Office of Administrative Law.

B. The Events Preceding Herrera's Arrival At Cheerleaders

In April 2000, Herrera was 23 years old, 5 feet 3 inches in height, and weighed approximately 135 pounds. According to his testimony, he began drinking alcohol at the age of eighteen and, for the next five years up until around the age of twenty-three, he would normally drink only two to three beers a month.

On the morning of April 15, 2000, Herrera felt tired and decided to purchase alcohol rather than going to work. By 11:00 a.m., Herrera had already consumed two beers while watching television. Herrera may have cooked eggs for himself around noon, although he was not sure he ate anything.

At around 4:30 p.m., Herrera left his house to pick up his brother and sister-in-law from their place of employment. On his way there, Herrera spotted his friend Robles walking. They decided to purchase alcohol and return to Robles' house. At the liquor store, Herrera bought a twelve pack of light beer, and Robles bought a twenty-four pack of light beer.

They arrived at Robles' home at approximately 5:00 p.m. Herrera initially testified that he drank three beers in total. Later in his testimony, however, Herrera was presented with his deposition from a previous civil case, where he testified that he actually drank anywhere from five to eight beers at Robles' house. In response, Herrera indicated that he might have consumed five to eight beers because he drank three of his, plus some that Robles gave him.

At around 10:00 or 11:00 p.m., Robles and Herrera left Robles' house to get something to eat at a restaurant in Camden. It was closed, however, and they decided to purchase a six pack of beer instead. Herrera testified that he drank one beer. Robles then suggested that they go to a bar, and Herrera drove them to Cheerleaders in Gloucester City. At this point, Herrera testified, he was "a little bit dizzy but [he] could drive."

C. *Inside Cheerleaders*

Herrera and Robles arrived at Cheerleaders, a gentlemen's club, sometime between 10:30 and 11:00 p.m. According to Herrera, he felt "almost normal" as he walked in. In a recorded statement, the Cheerleaders' doorman, Mark Vogeding, opined that Herrera and Robles did not appear to be intoxicated upon entering.

At the hearing, differing accounts were presented concerning what happened inside Cheerleaders. According to Herrera, he sat at the front of the bar with Robles, and they each consumed three beers. After that, Herrera switched to tequila and drank three shots. Robles and Herrera then relocated from the front of the bar to a table, where Herrera drank two more beers. According to Herrera, he "[n]ever drank like that" before this night at Cheerleaders. He testified that on that day, he "crossed the limit." Herrera further testified that at no time did any Cheerleaders bartender refuse to serve him a drink when requested or take any drinks away.

While Robles was in the bathroom, Herrera began observing a woman dancing. When he began to feel dizzy and tired, Herrera lowered his head onto the table for a while. He then raised his head and resumed observing the woman. At this time, Herrera noticed a man staring at him. An argument ensued after Herrera asked the man what he wanted, and Cheerleaders' security escorted Herrera out of the tavern.

Cheerleaders personnel present in the club on the night in question gave a somewhat different version of events. According to Laura D'Amico, a Cheerleaders bartender, in her opinion, Robles and Herrera were not intoxicated when they first entered Cheerleaders. Throughout the course of the night, they each had

approximately three beers and three shots of tequila. D'Amico testified that at no point while she was serving Herrera drinks, did she believe he was intoxicated.

Shortly after serving the third round, D'Amico observed one of the two men with his head down on the bar[2] falling off the stool. Contrary to Herrera's testimony, D'Amico insisted that she "flagged" Herrera and Robles at this point, meaning that she refused to serve them any more alcohol. She testified that she also took away the two shots and two beers that had been on the bar in front of the men. When Herrera indicated that he would be driving home, D'Amico told him that she would call a taxi. However, she did not immediately call the taxi, because she had to assist the other bartender who was extremely busy across the bar.

Meanwhile, Isiar Jazmin Gauatt (Jazmin)[3], a Cheerleaders dancer, observed Herrera and Robles sitting next to each other at the bar while she was dancing on stage. Herrera was slumped over with his head down and his eyes open. According to Jazmin, he "was not coherent to what was going on around him . . . and

---

[2] Contrary to the testimony of all other witnesses on this issue, D'Amico gave a description of this man that matched Robles, not Herrera.

[3] Jazmin and several other Cheerleaders employees gave audio recorded statements to State investigators. The Director concluded these were admissible as statements of a party pursuant to N.J.R.E. 803(b)(4).

was not paying attention to his surroundings." Therefore, when she began approaching customers for tips, Jazmin skipped over Herrera and approached Robles, who proved to be "obnoxious and grabby." She pushed his hand aside, and then proceeded to dance for other customers.

While Jazmin was changing after her shift, another dancer, Jennifer Noval (whose stage name was Apple Pie), entered the dressing room crying. Jazmin saw scratch marks all the way across her stomach, perhaps caused by a ring. According to Apple Pie, while she was sitting at the bar with a customer, Donald Tucker, awaiting her turn to dance on stage, she observed a Mexican male (Herrera) sitting around the corner of the bar "passed out . . . with his eyes closed [and] head down." According to Tucker, while he was speaking to Apple Pie, his back was to Herrera, who was approximately eight feet away.

Suddenly and without provocation, Herrera walked over to Tucker and struck him in the back of the ribs, causing Tucker and Apple Pie to fall off their chairs. Herrera also hit Apple Pie, "like a sideswipe across" her stomach. Herrera then picked up a chair but was quickly restrained from behind by the barback, Jeremy Whitman, who had observed Herrera knock Tucker down. The barback escorted Herrera outside in a "bear hug," with the help of John Zerggen the cook, and the doorman.

At this point, D'Amico, who testified she was unaware of the entire incident, finished assisting the other bartender and moved toward the telephone located in the middle of the bar. She picked up the phone and dialed the number of a taxi company. Before someone answered, D'Amico looked over at Robles and Herrera to get a description to relay to the taxi operator. To her surprise, she saw Christopher Ginty, the manager, speaking to a thin man whose description corresponded to Herrera. The other man was not in sight. Knowing something was wrong, D'Amico hung up the phone and approached the manager, who told her that he would call a taxi.

The Cheerleaders employees had differing opinions on the state of Herrera's intoxication when he was ejected from Cheerleaders. Each employee was asked to rate Herrera's intoxication on a scale of one to five, with one being slightly tipsy, and five being totally inebriated. Both Jazmin and the cook opined that he was about a five. Jazmin specifically noted that Herrera could not even get up from his seat, while the cook stated that Herrera "wasn't in good shape." D'Amico stated that the man resting his head on the bar was clearly intoxicated and was falling off his stool. Apple Pie believed that Herrera must have been under the influence of drugs based on his actions; his eyes were "crooked" and "squinting". The bouncer had a

different assessment, concluding that Herrera was about a three, or "moderately inebriated" and in control of himself. Ginty, the manager, claimed that he did not interact with Herrera enough to establish an opinion regarding his sobriety.

D. Outside Cheerleaders

After ejecting Herrera from the bar, the bouncer, the barback and the cook placed Herrera "on the pavement in front of the front door". Herrera tried to re-enter the bar, but was quickly subdued by the bouncer, who told him to remain outside. The manager went back inside to look for Robles.

At this point, Herrera was left unsupervised, as the bouncer and the cook returned to their posts in the bar. Herrera proceeded to enter the driver's side of his van because he "wanted to go home." According to Herrera, none of Cheerleaders' employees attempted to prevent him from driving, nor did they offer to call him a taxi.

When the manager brought Robles outside, Herrera had vanished. The manager then asked Jazmin, who had just arrived outside after changing, to serve as a translator for Robles, who spoke primarily Spanish. According to Jazmin, Robles could not even stand up on his own; he was "staggering and wobbling". The manager instructed Jazmin to inquire where Herrera had gone. Robles did not respond. Jazmin then asked Robles if he wanted a

taxi, to which he responded in the affirmative. The manager re-entered Cheerleaders and called the cab company. According to the bouncer, it was customary for the manager to call a taxi for intoxicated patrons, and in this case, the manager had called a taxi for both Herrera and Robles.

After calling a local taxi company, the manager returned and informed Robles that a taxi would be coming shortly, telling Robles to wait outside next to the steps. Jazmin then left Robles hanging onto the handrail and went home. When asked if she believed Robles could transport himself, she responded "[a]bsolutely not." If it were not for the hand rail, Jazmin opined, Robles would have fallen to the ground.

A short while later, before the taxi arrived, Robles walked away from Cheerleaders and joined Herrera in the van. According to numerous eyewitnesses present at the scene, after proceeding slowly through the parking lot in reverse, Herrera accelerated violently and crashed his van into a parked vehicle in the adjacent parking lot, causing its back end to elevate off the pavement. Robles, concluding that Herrera was intoxicated, exited the vehicle, and Herrera drove away.

E. The Accident

The loud crash in the parking lot caused many inhabitants of nearby apartment buildings to run outside. Once outside,

they began chasing after the van on foot, yelling "Stop." Nonetheless, Herrera continued to pull out of the Cheerleaders driveway onto Route 130, which at the time had two lanes going northbound, and two lanes going southbound separated by a concrete median divider. Herrera drove past the divider and turned left, going south onto the northbound side. In other words, Herrera was driving on the wrong side of the road, against oncoming traffic. After traveling about a mile, Herrera's van collided head first with a northbound vehicle, resulting in the deaths of the front seat passenger and driver. The two backseat passengers were seriously injured.

F. Police Investigation

The first officer to arrive at the scene at approximately 12:50 a.m. was Patrolman Crothers, who found Herrera trapped inside his vehicle. While trying to remove him, Crothers detected "a strong odor of alcohol coming from his person and his breath." He also found a beer can lying in the street near Herrera's van. Herrera was taken to the hospital by ambulance.

Patrolman Steven Burkhardt arrived at the scene at approximately 12:53 a.m., shortly after Crothers. Burkhardt opined that this was "by far the worst accident that [he had] handled up to that point or since." After fifteen minutes, however, he was dispatched to the site of a hit and run accident

at the parking lot of the Chatham Square Apartments on Route 130, adjacent to the Cheerleaders parking lot.

At the Chatham Apartments, several witnesses told Burkhardt that a blue van had backed across the parking lot at a high rate of speed, struck a parked car, and fled the scene heading south on northbound Route 130. Another witness told Burkhardt that Robles was in the witness's apartment, having walked there from Cheerleaders after the hit and run occurred. Robles told Burkhardt that he was drinking with his friend Herrera earlier that evening in Cheerleaders, when his friend was kicked out and left without him. Burkhardt transported Robles to the police station for further questioning, and then returned to the scene of the head on collision. When Burkhardt arrived, he observed that Herrera's vehicle was a blue van that had brown paint on the rear bumper, consistent with the paint color of the vehicle that had been struck in the parking lot.

Sergeant Willie Mahan interviewed several witnesses who were present at Cheerleaders after Herrera smashed into the parked vehicle.[4] Donna Gaber, a tenant of an apartment complex adjacent to the bar, informed Mahan that, after hearing a loud crash in the parking lot, she peered out her window and observed

[4] Mahan conducted audiotaped interviews with these witnesses. The audiotapes were admitted in evidence at the hearing, over the hearsay objections of defense counsel.

Robles urinating. Gaber, Vincent DiCarlo, Mariano Rivera, and Steven Harris all opined that Robles was extremely drunk, incoherent, and could barely stand up. Robles told Rivera that he had been drinking with his friend, Herrera, in Cheerleaders for about four hours before departing. Harris stated that the doorman informed him that he kicked Herrera and Robles out of Cheerleaders because they were both "too drunk."

During the course of the investigation, Sergeant Mahan contacted the taxi company that the manager allegedly called on the night in question. The cab company employee advised him that "there was no record of a request for a cab for Cheerleaders to respond to take anyone."

1. Herrera's Blood Alcohol Content

At the hospital where Herrera was admitted, Crothers directed the medical personnel to provide him with samples of Herrera's blood for testing. According to Crothers, the emergency staff in the trauma unit drew blood from Herrera, placed the vials in a small plastic cup with ice, sealed them, and then handed them to him. Dr. Raja R. Salem, a trauma surgeon at the hospital, testified that this was the normal procedure implemented when asked by policemen to draw blood samples.[5]

---

[5] Dr. Salem could not recall specifically taking Herrera's blood. However, a document was submitted to the court with his (continued)

Afterwards, Crothers transported the blood vials to the police station and placed them in an evidence freezer, secured with a lock. Crothers then filled out a chain of evidence custody report form and placed it in the investigator's mailbox. According to the Chain of Custody Information located in the Blood Alcohol Content Analyst Report, Investigator G.E. Clodfelter from the Prosecutor's Office, Crime Scene Unit, turned the samples over to Charles Johnson, a Camden County Medical Examiner's Investigator, on April 17, 2000. The following day at 5:00 p.m., the samples were turned over to Analytic Bio-Chemistries Incorporated for analysis.

The physician who tested Herrera's blood, Theodore John Siek, Ph.D., submitted a certification describing the laboratory analysis he performed. According to Siek, Herrera's blood was analyzed on April 20, 2000, to ascertain the presence of alcohol. Siek performed a gas chromatography test using a gas chromatograph, which is "commonly used in the industry to determine the presence of alcohol in blood samples." The test results "revealed a blood alcohol content of 0.28% by volume."[6]

(continued)
initials, indicating that he did, in fact, personally draw Herrera's blood.

[6] The Blood Alcohol Content (BAC) report, showing a BAC of .28, was admitted in evidence. Siek's certification was marked for identification but was not moved into evidence.

G. Expert Witnesses

1. ABC's Expert

Robert J. Pandina, Ph.D., had been the director of the Rutgers University Center of Alcohol Studies for the previous fifteen years. He specialized in psycho-pharmacology, or the study of how alcohol and other drugs affect the body and the brain and how they affect behavior.

The ABC retained Pandina to: (1) determine whether Herrera was intoxicated while he was at Cheerleaders on the night in question; (2) extrapolate Herrera's BAC at various points in the evening commencing at 6:30 p.m., up until the accident, including what signs or symptoms Herrera would likely have exhibited in accordance with his projected BAC; and (3) determine if Herrera was intoxicated at the time of the accident, and "if so[,] what role his intoxication played." Pandina defined "symptoms" as what an intoxicated person feels in relation to his BAC, and "signs" as what "other people may observe of you relative to the" BAC.

a. Extrapolation

An extrapolation, according to Pandina, is a scientific method that allows for the construction of a "dose curve," or a graph depicting what a person's BAC was at any given particular moment in time. In order to formulate an extrapolation of

Herrera's BAC, Pandina relied on the following scientific principles: (1) once alcohol is consumed, the BAC elevates at an average rate, and then peaks in approximately forty-five minutes to an hour, also known as the absorption rate; (2) after peaking, the alcohol in one's blood metabolizes and decreases at a rate of approximately 0.015% per hour, also known as the metabolism rate. In other words, "a person loses .015 percent of the alcohol [consumed] in about an hour."

Pandina testified about the percentage of the population that experiences physiological effects after consuming alcohol in relation to a specific BAC. Generally, at 0.10%, 40% of the population would exhibit visible signs of intoxication; at 0.14%, over 60-65% of the population would exhibit visible signs of intoxication; at 0.15%, 85% of the population would exhibit visible signs of intoxication, including, but not limited to, the general onset of sedation, stumbling of speech, and lack of coordination; at 0.20%, 96-97% of the population would exhibit visible signs of intoxication; at 0.25%, virtually everyone would exhibit visible signs of intoxication; and at 0.40%, over 50% of the population would either be in a coma or dead. Notwithstanding these statistics, however, Pandina indicated that there were reports of certain persons who did not show visible signs of intoxication at 0.20% and even 0.40%, although

at this level it is quite rare, about one in 300,000-400,000 people.

To formulate an extrapolation of Herrera's BAC, Pandina took into consideration Herrera's age at the time of the accident (23), his body weight (135 pounds), his gender (male), and the type of alcohol consumed (combination of light beer and tequila shots). The starting point of Dr. Pandina's analysis was Herrera's BAC of 0.28% taken at about 2:00 a.m. on April 16, 2000, the early morning of the accident. From this value, Pandina "worked backwards" to calculate Herrera's BAC during other points in time, incorporating available objective information.

First, Pandina calculated Herrera's peak BAC. To arrive at this value, Dr. Pandina assumed that Herrera did not consume alcohol after 12:15 a.m., around the time when the bartender testified that she "flagged" him. As indicated, once alcohol is consumed, the BAC elevates at an average rate and then peaks in approximately forty-five minutes to an hour. Incorporating this figure, Dr. Pandina concluded that Herrera's BAC peaked around 12:45 to 1:00 a.m., in close proximity to the accident. It follows, therefore, that when Herrera's BAC was measured at 2:00 a.m., it was falling. At its peak, adding 0.015% in order to account for alcohol that had been metabolized at a rate of

0.015% per hour as indicated above, Herrera's BAC was 0.295%, an extremely high level of intoxication.

Next, Pandina determined Herrera's BAC when he first arrived at Cheerleaders around 10:30 p.m. Since there was conflicting testimony regarding the precise number of drinks Herrera consumed prior to arriving at Cheerleaders, Pandina analyzed several different scenarios. If Herrera consumed nine light beers, or some combination of drinks with equivalent alcohol content, at a steady rate commencing at 6:30 p.m., Pandina opined that his BAC would have been around 0.18% when he entered Cheerleaders, give or take 0.01%. If, on the other hand, Herrera only consumed five or six beers beforehand, his BAC would have been around 0.10% upon entering Cheerleaders.

However, assuming Herrera drank three beers and three shots within Cheerleaders as he testified (or six drinks), Pandina explained that Herrera could not have reached a peak BAC of 0.295% by drinking only five to six beers from 6:30 p.m. to 10:30 p.m. Using these figures, it would have been necessary for Herrera to have consumed eight or nine drinks inside Cheerleaders, a figure which is not supported by the record. On the contrary, consuming nine beers before entering and six drinks afterwards coincides with Herrera's peak BAC of 0.295%.

Under any of these scenarios, Pandina concluded that Herrera was legally intoxicated when he entered Cheerleaders.

Finally, when Herrera was served his last order of drinks at around 11:15 p.m., according to Dr. Pandina's extrapolation, Herrera's BAC was about 0.26%. When asked whether Herrera would have shown signs or symptoms of intoxication around this time but prior to lowering his head onto the bar, Pandina responded in the affirmative. He testified that, "[v]isible signs and symptoms are reliably detectable in the majority of individuals when BAC levels reach [0].15%." At 0.26%, Herrera would have had to have been in a group comprising less than 3% of the population in order not to demonstrate signs of intoxication.

Significantly, Pandina opined that

> [i]ntoxication is not an all or nothing phenomena. We don't start with a person who is not intoxicated and then at some point falls off the edge of a table is intoxicated
>
> . . . .
>
> You would consider that type of somnolence [laying one's head onto a bar] a more extreme form of -- the more extreme [indicia] of intoxication. So . . . he certainly would have had difficulty in doing other motor tasks, slurring his words, fumbling for money, falling off stools, difficulty walking, general sensory demeanor that a person at that blood alcohol level has in just conducting themselves even in bar room settings.

On cross-examination, Pandina was instructed to assume that in the five years prior to the accident, Herrera frequently consumed eight beers and three to four shots of tequila without exhibiting sign of intoxication. This assumption was based upon a certification from Robles that Herrera could drink heavily without showing signs of intoxication. Using this hypothetical, MAG's counsel asked Pandina whether Herrera would have acquired a tolerance for alcohol. Pandina responded that if indeed that history were accurate and stayed consistent up until the date of the accident, Herrera could have developed a tolerance.

Pandina, however, rejected the assumption that Herrera could have had a high tolerance for alcohol, based on inferences that could be drawn from his behavior throughout the night. He opined that if Herrera were one of those rare people who do not show visible signs of intoxication at 0.20% or even rarer, 0.40%, he would not "expect Mr. Herrera to drive away, back into a car, immediately go down a one way street the wrong way and hit someone head on. If his tolerance was so great, you would not expect that level of impairment in his driving behavior."

Pandina also recalled reports from patrons at Cheerleaders rating Herrera, when his head was pressed against the bar, a five on a scale of one to five, with five being totally inebriated. Based on this evidence, Pandina inferred that it

was not likely that Herrera went from no visible signs of intoxication, or a zero, to a five, without showing intermittent signs, especially considering the extreme BAC Herrera reached at his peak.

> I don't think you go from a one[,] no signs of intoxication[,] to a five without showing stages in between, at the point they observed [Herrera] at or about the time he had his head down, they rated him to be a five. I believe he would have had[,] given those circumstances in this case, he would have shown visible signs earlier than that point in time.
>
> I don't believe you go from a zero to a five. Particularly within his blood alcohol range. We're not just talking about a [0].15 or a [0].20. We're talking about a guy who had to have a [0].25 and then drink more before he could reach the ultimate blood alcohol level of [0].295 that he reached in my extrapolation.

2. MAG's Expert

To refute the testimony of Pandina, MAG presented its expert witness, Dr. Stanley Broskey. Broskey has a Ph.D. degree in chemical dependency,[7] and was an analytical chemist for forty-four years and a forensic toxicologist for thirty-six years. At the time of his testimony, Broskey was self-employed as a forensic chemist, toxicologist, and criminalist, appearing exclusively on behalf of defendants as a forensic scientist and

[7] Broskey admitted that he obtained his degree by correspondence from "LaSalle University" in Louisiana.

witness for the previous thirty-one years. He testified on issues such as potential errors in DWI/DUI breath, urine, and blood cases, and acquired human tolerance and resiliency to alcohol or drugs.

Broskey began by giving a general overview of acquired tolerance. He described acquired tolerance as follows:

> Essentially, your body has been conditioned, and your liver knows how to get rid of it, how to get it out of your system, and just everybody knows somebody in their family or in their acquaintance or friends who remarkably can drink a lot and not show any symptoms . . . after drinking copious amounts of alcoholic beverages . . . in a very short period of time.

For this reason, Broskey concluded, persons with an acquired tolerance can walk into a tavern with a BAC of 0.20%, 0.25%, or 0.30% and not display any visible signs of intoxication.

MAG's counsel then asked Broskey to assume the following facts: pursuant to Robles' certification, Herrera frequently drank eight to twelve beers and three to four tequila shots without showing visible signs of intoxication; Herrera entered Cheerleaders at 10:30 p.m. on April 16, 2000, with a BAC of 0.10%; and afterwards, Herrera was treated at a hospital for potential alcohol withdrawal and alcoholism. Based on these assumptions, Broskey was asked whether Herrera had an acquired tolerance. Broskey opined that Herrera indeed "had acquired

great tolerance for alcohol," and that it would not have dissipated to any great extent even if, as Herrera testified, he had refrained from drinking alcohol for two weeks before the accident. His conclusion was based on Herrera's ability to successfully drive from Robles' home to Camden and then to Cheerleaders, followed by walking into Cheerleaders without showing any visible signs of intoxication, even after drinking large amounts of alcohol. His opinion was further based on Herrera's alleged extensive drinking history, adding that a tolerance for alcohol can be acquired fairly quickly.

Based on Herrera's acquired tolerance, Broskey first concluded that when Herrera entered Cheerleaders with a BAC of 0.10% as Pandina found, he did not exhibit visible signs of intoxication. Broskey further opined that based on Herrera's acquired tolerance, Herrera would not have shown visible signs of intoxication up through when he was served his third and final round of drinks, at which point, according to Pandina's analysis, his BAC was around 0.19%. According to Broskey, persons with an acquired tolerance "have to be significantly above 0.20[%] before you even start to see any symptoms." In further support of his conclusion, Broskey opined that an individual who is merely sitting on a bar stool would be less

inclined to exhibit visible signs of intoxication when compared to someone performing complex tasks.

3. Rebuttal

In rebuttal testimony, Pandina characterized Broskey's position as "extreme," when compared to the general view of experts within their field. Pandina also criticized the manner in which Broskey performed the experiments upon which he based his conclusions about tolerance to alcohol. According to Pandina, the tests Broskey employed are inaccurate and may lead to false negatives. Broskey only gave the subjects one type of sobriety test. Pandina testified that this was an inappropriate methodology because certain persons may be non-reactive, or not "sensitive," to that procedure. It is more appropriate to administer multiple tasks, as done by police officers during road sobriety checks.

Pandina also disputed Broskey's conclusion that Herrera had acquired a high tolerance for alcohol. Pandina agreed that during excessive exposures to alcohol, the liver begins to increase its production of enzymes that break the alcohol down. However, contrary to Broskey's conclusion, after a period of alcohol abstinence, even as little as several days, "the enzyme systems begin to, in a sense, relax."

H. Administrative Law Judge's Decision

At the conclusion of the hearing, the ALJ issued his initial decision, finding that Cheerleaders served alcohol to Herrera while he was visibly intoxicated. In reaching this conclusion, the judge rejected Broskey's testimony, reasoning that his opinions conflicted with Herrera's credible testimony that he never drank in the past as much as he had on the night in question. Further, Broskey had not actually tested Herrera, thus undermining his supposition that Herrera had an acquired tolerance for alcohol.

The ALJ also based his decision on the following pertinent findings of fact. On the date in question, Herrera drank two beers from 11:00 a.m. to noon. From 5:30 p.m. to 10:30 p.m., Herrera drank six to ten beers. When he arrived at Cheerleaders at around 10:30 p.m., his BAC was approximately 0.18%. At the tavern from 10:30 p.m. to 12:30 a.m., Herrera consumed three beers and three shots. Afterwards, Herrera lowered his head onto the bar, and then proceeded to assault another patron who was looking at him strangely. He was forcibly escorted from the bar around 12:30 a.m. At this point in time, Herrera's BAC was 0.28%. No Cheerleaders employee called him a taxi, nor was he supervised after he was taken outside. After Robles exited Cheerleaders, he entered the van with Herrera driving. Herrera

slammed into a parked vehicle, causing Robles to exit the van. Herrera exited the parking lot and turned left (south) onto the northbound lane of Route 130, resulting in a head on collision with a northbound vehicle, in which the two front passengers were killed and the two backseat passengers were critically injured. At the time of the accident, Herrera's BAC was 0.295%. The ALJ recommended that the Director revoke MAG's liquor license due to the seriousness of the violation and its fatal consequences.

I. Director's Final Decision

In his Final Decision, the ABC Director adopted the ALJ's findings of fact, with the following exception. The Director rejected the finding that Cheerleaders had failed to phone a taxi for Herrera; he based this on the decision of the judge who had presided over Herrera's criminal sentencing. In imposing a twenty-two year sentence, the judge noted that Herrera had refused to wait for the taxi that had been called for him. The Director concluded, however, that even if the bar employees had called a taxi, they had done so because they had observed Herrera's intoxication and inability to operate a vehicle. More significantly, after escorting Herrera from Cheerleaders, the employees left Herrera unsupervised and failed to call the

police or otherwise intervene, even after the accident in the adjacent parking lot.

> Indeed, by MAG's own admission, its employees had forcibly removed Herrera from Cheerleaders after he became drunkenly violent and abusive, and left him unattended in the parking lot. They did not pay any attention to him, did nothing to stop him from getting into his car, intentionally turned a blind eye to his erratic driving in the adjoining parking lot where he backed into a car, and did nothing to stop him before he drove the wrong way down a major divided highway killing two people, and injuring two others.

The Director rejected MAG's contention that there was no evidence establishing that Herrera had exhibited visible signs of intoxication prior to being "flagged" by the bartender. According to the Director, "[t]he basic fact which is uncontroverted, and which [he found] most compelling, is that after Herrera left Cheerleaders[,] he was so drunk [that] he was unable to operate his vehicle." Moreover, although Herrera's testimony fluctuated with regards to the amount he drank (from four to ten beers before arriving, and three to five beers and three to four shots of tequila at Cheerleaders), there was nonetheless ample evidence supporting the conclusion that Herrera consumed a "large quantity of alcohol both before he arrived at Cheerleaders and while he was in the bar."

This finding was also supported by eyewitness accounts. For example, Jazmin, a Cheerleaders dancer, observed that Herrera was "so incoherent that she did not even bother soliciting a tip from him because it looked like it would be a waste of time." Moreover, on a scale of one to five, she rated Herrera's level of intoxication a five. Another dancer, Apple Pie, observed Herrera passed out at the bar with his eyes closed and opined that he was "under the influence of something." The cook described Herrera as "not in good shape" when he escorted him out and also rated him a five. The doorman rated Herrera a three. These observations were significant because, as Dr. Pandina concluded, one does not go from appearing sober to appearing completely inebriated without showing stages in between.

The BAC results in conjunction with Pandina's testimony also supported the conclusion that Herrera exhibited visible signs of intoxication while inside Cheerleaders. In making this determination, the Director rejected MAG's assertion that Pandina's testimony relied exclusively on the BAC test results. Although conceding that Pandina did not personally test Herrera, the Director noted that Pandina also relied on Herrera's own testimony concerning his drinking behavior and the Cheerleaders employees' observations, which the Director opined were legally

competent evidence and could "serve as the residuum to support the relevant hearsay evidence."

Finally, the Director rejected MAG's argument, based on Dr. Broskey's testimony, that Herrera would not have demonstrated signs of intoxication due to his acquired tolerance. This argument was founded on Robles' certification that Herrera was capable of consuming eight to twelve beers and three to four shots of tequila and then afterwards, acting and speaking normally without motor function impairment. However, the Director noted that Robles' certification conflicted with Herrera's own testimony that he only sparingly drank with Robles, and that he had never consumed tequila before the night in question, which was the most alcohol he ever drank.[8] Additionally, as concluded by Pandina, if Herrera was so tolerant, he would not have slammed into a parked vehicle, then driven down a major highway against traffic for over a mile, ultimately resulting in a head on collision.

1. Penalty

After concluding that Cheerleaders served an intoxicated patron, the Director determined to revoke the bar's license.

[8] Our own review of Robles' various statements supports the view that he was an inconsistent witness who would say whatever the questioner seemed to want him to say. Notably, the certification about Herrera's alleged alcohol tolerance was prepared at the behest of the defense.

In making his determination, the Director cited the following aggravating circumstances. First, the Director noted MAG's "callous disregard for public safety," demonstrated by its acknowledgment that "it knew Herrera was intoxicated when it 'flagged' him." Moreover, after Herrera was ejected from Cheerleaders for drunken and combative behavior, he was left unattended in the parking lot with his car keys in his pocket. He concluded that MAG's "attitude of irresponsibility for a person who became intoxicated on their premises, and who it knew to be driving, is an extreme aggravating circumstance."

II

On this appeal, the licensee contends that the Director's decision is not supported by sufficient credible evidence and that the penalty is excessive. MAG presents the following points for our consideration:

> POINT I: THERE IS NOT SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT MAG VIOLATED N.J.A.C. 13:2-23.1(B).
>
> A. The Evidence Offered Did Not Support The Finding That Herrera Exhibited Signs Of Intoxication At The Time He Was Served.
>
> 1. The Division's Expert Testified That He Could Not Predict Whether Herrera Would Have Exhibited Signs Of Intoxication At The Time He Was Served.

2. No Evidence Was Offered To Show That Any Person Observed Herrera To Be Intoxicated At The Time He Was Served Alcohol.

B. The ALJ And The Director Committed Reversible Error By Relying On Hearsay In Violation Of The Residuum Rule.

C. The BAC Test Result Did Not Conform To The Requirements For The Admission Of Hearsay Chemical Analysis.

D. The BAC Test Results Were Adversely Affected Due To The Defects In The Chain Of Custody.

POINT II: THE ALJ'S EXCESSIVE PENALTY OF REVOCATION OF MAG'S LIQUOR LICENSE SHOULD BE REVERSED.

A. The Director's Final Decision Overturned One Of The ALJ's Aggravating Factors, But Failed To Adjust The Penalty Accordingly.

B. The Initial And Final Decisions Failed To Address The Mitigating Factors Presented By MAG.

Our review of an administrative agency's factual findings is limited to determining whether they are supported by substantial credible evidence in the record. Division of Alcoholic Beverage Control v. Bruce Zane, Inc., 99 N.J. Super. 196, 199-200 (App. Div. 1968). The agency's decision is entitled to particular deference where the director adopts the credibility determinations of the administrative law judge who

heard the witnesses testify. See Clowes v. Terminix, Int'l Inc., 109 N.J. 575, 587-88 (1988); State v. Locurto, 157 N.J. 463, 474 (1999). While hearsay is admissible in administrative proceedings, the agency's findings of fact cannot be based entirely on hearsay evidence; those findings must be supported by a residuum of legally competent evidence. Weston v. State, 60 N.J. 36, 51 (1972); In re Toth, 175 N.J. Super. 254, 262 (App. Div. 1980); N.J.A.C. 1:1-15.5.

Having reviewed the entire record, we conclude that the Director's finding of a violation was supported by sufficient credible evidence. We begin by considering the evidence of Herrera's intoxication. Herrera got into the fatal accident at 12:53 a.m., within minutes after leaving the bar, and a blood sample was drawn from him at the hospital at 2:00 a.m. The blood test showed that he had a blood alcohol level (BAC) of 0.28%, or more than three times the legal limit to drive a vehicle. If the test was accurate, it follows that Herrera was extremely intoxicated when he left the bar.

MAG raises three challenges to the BAC test results: First, it contends that the State failed to establish the trustworthiness of the test results. Second, it argues that, after the State produced a certification from the chemist who performed the test, the licensee was denied the opportunity to

examine the chemist. Third, the licensee contends that the test was unreliable because there were defects in the chain of custody of Herrera's blood sample.

To address the last objection first, we find no merit in the chain of custody argument. "Whether the requisite chain of possession has been sufficiently established to justify admission of the exhibit is a matter committed to the discretion of the trial judge, and his determination will not be overturned in the absence of a clearly mistaken exercise thereof." State v. Brown, 99 N.J. Super. 22, 27 (App. Div.), certif. denied, 51 N.J. 468 (1968). We find no mistaken exercise of discretion here. The State produced evidence establishing the chain of custody, beginning with the hospital personnel who drew the blood, to the police officer who took the sample to police headquarters, to the officer who transported the sample to the testing laboratory, and finally to the chemist who performed the analysis. Moreover, even if there had been a defect in the chain of custody it would not have rendered the test results inadmissible, but would only have affected the weight to be accorded the evidence. See State v. Morton, 155 N.J. 383, 447 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001).

Turning to the first two arguments, we recognize that the State is obligated to provide evidence of the trustworthiness of the blood test results. As the court indicated in R.K. v. Dep't of Human Servs., 215 N.J. Super. 342, 348 (App. Div. 1987):

> Ordinarily the report of a chemical analysis is admissible as a trustworthy business entry under Evid. R. 63(13) if evidence is presented of the "'method and circumstances' involved in the preparation" of the report. State v. Matulewicz, 101 N.J. 27, 30 (1985).

However, in a criminal case, a defendant has a Sixth Amendment right to confront and cross-examine the expert who performed the test. As the Court held in a case involving chemical analysis of illegal drugs:

> The State's proffer of a certificate whose form and content conform to the statute [N.J.S.A. 2C:35-19] does not itself preclude a defendant's right to confront the certificate's preparer at trial. The statute merely establishes the mechanism by which a trial court ultimately will determine whether a genuine contest exists between the parties in respect of the proffered certificate that would require production of the analyst.
>
> [State v. Simbara, 175 N.J. 37, 48-49 (2002).]

See also State v. Matulewicz, 101 N.J. 27, 32 n.2 (1985). In criminal cases, however, there is also a statutorily-established procedure requiring the State to provide defendant appropriate notice that it intends to rely on the test as well

as to provide foundational documents supporting the test's validity. N.J.S.A. 2C:35-19. The defendant must object to the admission of the certificate within a strict time deadline, failing which the certificate will be admissible at trial. N.J.S.A. 2C:35-19(c). In State v. Berezansky, 386 N.J. Super. 84, 89-96 (App. Div. 2006), certif. granted, 191 N.J. 317 (2007), appeal dismissed, 196 N.J. 82 (2008), we held that the same procedure should apply to blood alcohol tests in DWI cases:

> We recognize that N.J.S.A. 2C:35-19, as well as Simbara and [State v. Miller, 170 N.J. 417 (2002)] literally address only a drug test certificate. We fail, however, to see any reasonable basis for holding the State to a lesser standard, or according a defendant lesser rights, with respect to use of such a certificate as evidence of an essential element of the DWI offense.
>
> [Id. at 95.]

Berezansky reasoned that the certificate itself was not admissible as a business record, because it was prepared for litigation purposes, e.g., for purposes of prosecuting the defendant, id. at 94, although it was admissible pursuant to the procedures set forth in N.J.S.A. 2C:35-19. However, if there is an issue concerning the validity of the test, defendant must be given the opportunity to examine the expert who prepared the certificate. See Berezansky, supra, 386 N.J. Super. at 94.

In this case, the State produced the BAC report well in advance of the hearing and was evidently unaware until mid-hearing that respondent was going to object to the report. In response to counsel's objection, the State produced a certification from the chemist who prepared the report. Our review of the record reveals that the certification was marked for identification on the third hearing day, pending respondent's right to cross-examine the chemist, but the certification was never admitted in evidence and the chemist was not produced. Nonetheless, in this case, we conclude that it was not an abuse of discretion for the ALJ to have admitted the BAC report in evidence without the certification.

Unlike a criminal case, in a civil case such as this one, the respondent has the opportunity to conduct pre-trial discovery through interrogatories and depositions. N.J.A.C. 1:1-10.2. There appears to be no dispute that respondent engaged in extensive pre-hearing discovery and discovery motion practice, as well as some unrelated mid-trial discovery. The State provided opposing counsel with a copy of the BAC report in discovery. In this case, the BAC report was a very significant piece of evidence, which was well-known to both sides. In addition to being a proposed exhibit in this case, it had been central to the criminal prosecution of Herrera.

The OAL rules contemplate that the parties will raise significant evidentiary issues prior to the hearing, so as to avoid surprises during the hearing. N.J.A.C. 1:1-13.1, -13.2. If MAG had a genuine concern about the accuracy of the BAC report, it should have raised the issue prior to the hearing. Moreover, while the State should have produced the chemist's certificate prior to the hearing, MAG could have engaged in discovery about the test methods prior to the hearing, including but not limited to deposing the chemist who prepared the report.

In summary, under the circumstances of this civil administrative case we find no abuse of discretion in the ALJ's admitting the BAC report in evidence. That report, plus the manner in which the accident occurred, i.e, Herrera turned the wrong way down a major divided highway and was found reeking of alcohol after the accident, supports an inference that he was heavily intoxicated. See Bauer v. Nesbitt, 399 N.J. Super. 71, 84 n.1 (App. Div.)("[W]e have found that the tortfeasor's manner of driving after leaving the defendant bar may be probative of the tortfeasor's condition while at the bar, depending on the time interval that has elapsed."), certif. granted, 196 N.J. 85 (2008); Truchan v. Sayreville Bar and Rest. Inc., 323 N.J. Super. 40, 51 (1999).

Having concluded that the evidence supported the Director's finding that Herrera was intoxicated at the time of the accident, we continue to look at the evening's events in reverse, turning first to the evidence that Herrera was intoxicated before he drove away from the bar. Immediately before he pulled out into traffic, Herrera drove his van erratically in the parking lot, reversing at high speed and backing into a parked car. Observing Herrera's apparent intoxication, his companion Robles then got out of Herrera's van and declined to ride with him. Robles' testimony at the hearing constituted legally competent evidence of these facts. Recorded statements from other witnesses corroborate that Herrera drove erratically and backed into a vehicle in the parking lot. Further, ABC presented both hearsay and non-hearsay evidence that Robles was very intoxicated (falling-down drunk might be a fair characterization) when he left the bar.

There is also evidence that Herrera was intoxicated when he was in the bar. Eyewitness testimony from Donald Tucker confirms that at some point shortly before Herrera left the bar, he engaged in an unprovoked attack on Tucker, who was peaceably sitting at the bar near Herrera. According to testimony from the bartender, prior to the assault, she had refused to serve Herrera and Robles any more alcohol because, based on her

observations, one of them seemed to have collapsed with his head on the bar and the other one was slurring his speech and was otherwise visibly intoxicated. According to the bar manager and the bartender, both of whose statements were legally competent evidence, one or the other of them called a taxi for the men, because they perceived that they were intoxicated.

This brings us to the critical question: whether Herrera was intoxicated before the bartender refused to continue serving him alcohol, and whether signs of that intoxication were observable at the time when she was still serving him alcohol. The State relied heavily on expert testimony from Dr. Pandina. In light of the evidence as to the amount Herrera drank before he got to the bar, and the amount he drank while he was there, plus his observed conduct when he left the bar, as well as his BAC at the time of the accident, Pandina extrapolated that Herrera must have displayed signs of intoxication during the time he was being served alcohol at the bar.[9]

The ALJ credited Pandina's testimony and did not credit the testimony of the bar's expert, Dr. Broskey, who opined that

---

[9] Even if the BAC results were hearsay, an expert may use hearsay information in formulating an opinion. N.J.R.E. 703. However, as noted, Dr. Pandina did not rely exclusively on the BAC test results. He also relied on legally admissible evidence concerning the amount Herrera said he drank, Herrera's weight, his observed behavior, and other factors.

Herrera probably was sufficiently tolerant to alcohol that he would not have showed signs of intoxication. The Director agreed with the ALJ's assessment. The Director placed particular weight on Dr. Pandina's opinion that, as the Director summarized it, "a person does not go from no signs of intoxication to being intoxicated enough to warrant being 'flagged' without showing stages in between."

Having reviewed the record, we find no basis to disturb the ALJ's and the Director's determinations that Pandina was a credible witness and Broskey was not credible. Unlike Pandina, Dr. Broskey was a professional defense witness, with a Ph.D. from a correspondence school. Moreover, in his rebuttal testimony, Dr. Pandina thoroughly discredited Dr. Broskey's methodology.

We find no error in the ALJ's or the Director's reliance on some hearsay evidence. The ALJ carefully and correctly applied the residuum rule as did the Director. With the exception of the testimony of Herrera and Investigator Marcial, the State's evidence consisted of taped witness interviews, plus expert testimony from Dr. Pandina. The interviews with Ginty the manager, and other bar employees, were legally competent

evidence.[10] Although Ginty admitted that Robles was intoxicated, he attempted to minimize the extent. Most of the State's other witnesses who observed the men either in the bar or after they were ejected from the premises, indicated that Robles was falling-down drunk and Herrera was also visibly intoxicated. The taped statements were corroborated by the in-person testimony of Marcial, who spoke to Robles right after the accident and found him to be so drunk he was incoherent. They were also corroborated by evidence of Herrera's blood alcohol level at the time of the accident, and by the expert testimony of Pandina.

We also consider the in-person testimony of the person who served Robles and Herrera. The bartender, Lauren D'Amico, was a nineteen-year old who had been working as an exotic dancer at Cheerleaders before she switched to tending bar. At the time of her hearing testimony, she was serving a jail term for her own involvement in a fatal accident. Her testimony was

---

[10] Ginty, and the other bar employees, were represented by the bar's attorney who was present when they gave their statements to the police. In fact, the bar refused to produce its employees except on its premises and in the presence of its counsel. The Director held that the statements of the employees were legally admissible as statements of a party under N.J.R.E. 803(b)(4). We agree. See Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87, 98-100 (App. Div.), certif. denied, 134 N.J. 560 (1993). In fact, on this appeal MAG has not challenged the Director's ruling on the issue.

significantly at variance with that of most other witnesses, in that she recalled Robles, not Herrera, as having his head on the bar. She claimed to be unaware of the incident in which Herrera assaulted Tucker, although she was working behind the bar when the incident occurred; she alleged she was helping another bartender at the time. She also claimed to have seen Herrera having a conversation with Ginty the bar manager at a point after the incident when, according to Ginty and Tucker (both of whose testimony constituted legally competent evidence), Herrera had already been hustled out of the bar by the bouncer and other employees.

Significantly, D'Amico admitted that she was standing almost directly in front of Herrera and Robles while they were sitting at the bar and that they spoke to her several times both to order drinks and to flirt with her. She thus had ample opportunity to observe their demeanor and hear their speech. Her claim that she observed no sign whatever that either man was intoxicated is at stark variance with the evidence of both men's very drunken conduct immediately after they left the bar, as well as with Herrera's elevated BAC. According to D'Amico, she only flagged the men after she saw Robles put his head down on the bar. She also testified that she had never flagged anyone before she allegedly flagged Herrera and Robles on this

occasion. Based on our review of the record, we find no basis to disturb the ALJ's and the Director's determinations not to credit her testimony. Circumstantial evidence strongly supported the conclusions that Herrera was visibly intoxicated when D'Amico served him and that she knew or should have known that he was intoxicated. See Benedetti v. Trenton Bd. of Commissioners, 35 N.J. Super. 30, 34 (App. Div. 1955).

Despite ample evidence of a violation, MAG argues that the Director improperly held MAG to a standard of "strict liability" and that the Director could not find a violation of N.J.A.C. 13:2-23.1(b) based on circumstantial evidence. We reject these contentions.

The ABC regulations strictly prohibit a licensee from serving intoxicated or "apparently intoxicated" persons. N.J.A.C. 13:2-23.1(b). The regulation requires bar employees to be vigilant in detecting intoxicated patrons and to make inquiries if there is any uncertainty about a patron's possible intoxication:

> When used in conjunction with the words "actually intoxicated," we believe the language challenged provides a sufficiently understandable description of the conduct of persons to whom sale of alcoholic beverages is forbidden. 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. To require proof that the patron is "actually intoxicated" may well place an undue burden upon the Director in carrying out the legislative mandate. 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.
>
> [Div. of Alcoholic Beverage Control v. Zane, 99 N.J. Super. 196, 201 (App. Div. 1968).]

In this case, we need not decide whether the regulation creates a rule of "strict liability," nor the precise contours of such a rule if it exists. While our courts have explicitly found strict liability with respect to regulations prohibiting the sale of illegal drugs on a licensed premises, Div. of Alcoholic Beverage Control v. Maynard's, Inc., 192 N.J. 158, 161 (2007), and service to minors, Essex Holding Corp. v. Hock, 136 N.J.L. 28, 31 (Sup. Ct. 1947), neither side has cited to any authority directly addressing whether the regulation against serving intoxicated patrons is a rule of strict liability.

In Div. of Alcoholic Beverage Control v. Stevens, 5 N.J.A.R. 141 (ABC 1981), the Director adopted an initial decision in which the ALJ concluded that the bartender in fact served an intoxicated patron, but exonerated that licensee because the signs of intoxication were not visible to the

bartender at the time of service. The ALJ found that the sale to the patron took at most half a minute, and the agency did not prove "that the bartender observed the manifestations of apparent intoxication to such a point where he would be required to make the 'suitable inquiry' detailed in Zane, supra." Stevens, supra, 141 N.J.A.R. at 150. The agency also failed to prove that "this bartender should have seen the conduct of [the intoxicated patron]." Id. at 151.

In the case before us, there is sufficient evidence to affirm the Director's conclusion that Herrera was both actually and apparently intoxicated when he was served alcohol, and that unlike the thirty-second transaction in Stevens, supra, Herrera and Robles were sitting at the bar for an extended period of time, ordering drinks from D'Amico and trying to flirt with her. D'Amico had ample opportunity to observe them, and hence she knew or should have known that Herrera was apparently intoxicated. If she had any doubt, she should have made further inquiries of Herrera to determine his condition, Zane, supra, but she did not. This is sufficient to prove a violation of N.J.A.C. 13:2-23.1(b).

In its reply brief, MAG contends that the Division must present eyewitness testimony that the patron was visibly intoxicated at the very moment he was served alcohol and

therefore the agency cannot establish a violation of N.J.A.C. 13:2-23.1(b) based on circumstantial evidence. We find no basis in law or logic for such a novel rule of law.

Circumstantial evidence is often used to establish that a person has been intoxicated at a point in the past. In drunk driving cases, for example, evidence of a driver's conduct and blood alcohol level shortly after a traffic stop is routinely introduced to prove that the driver was intoxicated while driving. See e.g., State v. Ravotto, 169 N.J. 227, 242 (2001). It is not necessary to present an eyewitness to the driver's intoxicated behavior at the exact moment he or she was driving. Moreover, as we observed in Bauer, supra, 399 N.J. Super. at 84 n.1, "we have found that the tortfeasor's manner of driving after leaving the defendant bar may be probative of the tortfeasor's condition while at the bar, depending on the time interval that has elapsed." We reached a similar conclusion in an earlier case involving a bar's tort liability for serving an intoxicated patron:

> The proposed testimony of Shemper and Place [who witnessed Kelly's erratic driving] clearly and substantially contradicted Kelly's version. If their testimony was believed, the jury might well have determined that Kelly was intoxicated when he was driving and was visibly intoxicated when served alcoholic beverages at the Sayreville Bar. We agree with plaintiff that since the accident took place only five

> minutes after Kelly left the Sayreville Bar, his driving between the time he left the bar and the accident was highly probative of his condition when he was driving, and while he was at the bar.
>
> [Truchan, supra, 323 N.J. Super. at 51.]

Courts in other jurisdictions have directly held that a dram shop act violation can be proven by circumstantial evidence. See Dines v. Henning, 466 N.W.2d 284 (Mich. 1991), rev'g on dissent, 459 N.W.2d 305 (Mich. Ct. App. 1990). Notably, in his dissent, with which the Supreme Court agreed, Judge Kelly stated: "Eyewitness testimony of visible intoxication is not required to establish a dramshop claim; visible intoxication may be proven by circumstantial evidence and the inferences drawn therefrom." 459 N.W.2d at 308 (Kelly, J., dissenting). See also Hyler v. Dixon, 408 N.W.2d 121, 127 (Mich. Ct. App.)("This court has repeatedly held that an action under the dramshop act may be proven by circumstantial evidence."), appeal denied, 428 Mich. 922 (1987). The New York Court of Appeals reached the same conclusion in Adamy v. Ziriakus, 704 N.E.2d 216, 218 (N.Y. 1998), stating that "the failure to provide direct proof of visible intoxication in Dram Shop Act cases is not itself dispositive." We perceive no reason to reach a different conclusion in cases alleging a violation of N.J.A.C. 13:2-23.1.

Having concluded that there is substantial credible evidence to support the Director's conclusion that D'Amico violated N.J.A.C. 13:2-23.1(b) by serving Herrera when he was in a state of visible intoxication, we next address the issue of the penalty.[11] The Director initially adopted the ALJ's recommendation that the bar's license be revoked. We find no error in this decision. The determination did not turn on whether Ginty called a taxi for Robles and Herrera. The "extreme aggravating circumstances," as the Director summarized them, were as follows:

> [W]hen Herrera became obnoxiously drunk and combative, MAG's employees forcibly removed him from the bar and threw him out into the parking lot, where they admittedly left him unattended and unrestrained, with keys in his pocket, knowing he had driven to the bar. . . . MAG's behavior . . . appears to have been calculated to keep its premises clear of the obnoxious drunken mess Herrera had become in their bar, where he might have disrupted business. Instead, MAG foisted him on the unsuspecting motoring public, resulting in the death of the [two auto accident victims].

The record supports the Director's conclusion. A licensed establishment must not serve an intoxicated patron. N.J.A.C. 13:2-23.1(b). Ordinarily, the penalty for a violation is a fifteen-day suspension. N.J.A.C. 13:2-19.11. However, the

---

[11] We granted a motion to supplement the record, permitting the parties to submit additional briefs on this issue.

Director may increase the penalty based on a finding of aggravating factors, N.J.A.C. 13:2-19.13(a), and may revoke a license based on a first violation if it is sufficiently egregious. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373, 381 (1956).[12]

We find no error in the Director's conclusion that, once a licensee violates N.J.A.C. 13:2-23.1(b) by serving a patron such as Herrera past the point of visible intoxication, the licensee greatly compounds the violation by failing to ensure that the drunken patron does not drive. Put bluntly, a drunk with car keys in his pocket is a fatal accident waiting to happen. In this case, the bar employees ejected the drunken Herrera from the bar and let him drive away. See Bauer v. Nesbitt, supra, 199 N.J. Super. at 83 (addressing a bar's duty under tort law principles to ensure that a visibly drunken patron does not drive).

While this was the bar's first violation of N.J.A.C. 13:2-23.1(b), the issue is not what penalty we would impose, but whether the Director's decision was so disproportionate to the offense as to shock our sense of fairness. See Maynards, Inc.,

---

[12] After the incident giving rise to this case, the agency amended its regulations to specifically provide that "if death or serious injury occurred as a result of the incident that gave rise to the violation, the Director may revoke the license, even if it is a first violation." N.J.A.C. 13:2-19.13(c).

supra, 192 N.J. at 183-84. The Court found the penalty excessive in Maynard's, where the Director imposed strict liability on a licensee that was making "extraordinary efforts" to prevent drug dealing on its premises, and imposed a very lengthy penalty despite an ALJ's recommendation for leniency. Ibid. The Court reached a similar conclusion in Ishmal v. Div. of Alcoholic Beverage Control, 58 N.J. 347 (1971), where the owner had done everything she could to keep drug dealers out of her establishment. However, the licensee before us in no way resembles the diligent owners in Maynard's and Ishmal. On the facts of the case before us, we cannot conclude that the penalty of license revocation was so disproportionate as to be deemed excessive.

We next address the Director's decision on the bar's motion for reconsideration. We find no error in the Director's decision to reject the motion insofar as it challenged the findings of a violation of N.J.A.C. 13:2-23.1(b). Appellant's arguments to the contrary are without sufficient merit to warrant further discussion here. R. 2:11-3(e)(1)(E). However, we conclude that the Director's penalty decision warrants modification.

In reconsidering the penalty, the Director gave the bar six months to sell the license in lieu of revocation, conditioned on

the bar making an acceptable monetary settlement offer. The difficulty with this decision, as the Director framed it, is that it imposed an un-quantified, and therefore un-reviewable, monetary obligation as part of the penalty for the violation. We recognize that the Director has discretion to reach monetary settlements with licensees in lieu of license revocation. N.J.S.A. 33:1-31; N.J.A.C. 13:2-19.12. However, by incorporating an obligation to reach such a settlement as part of the penalty in this case, without stating an amount that the agency would accept to resolve the matter, the agency is setting a target that it can move at will. All the agency need do to defeat the licensee's ability to sell the license in lieu of revocation is to keep rejecting the licensee's settlement offers.

In these circumstances, we conclude the agency has implicit authority to state a monetary amount it would accept in settlement and to incorporate that amount in its decision.[13] See In re Kim, ___ N.J. Super. ___ (App. Div. 2008) (slip op. at 9).

[13] We acknowledge that in Maynard's, supra, the Court urged the parties to consider the ALJ's recommendation "that respondent propose to the Director, and that the Director fairly consider, a fair and reasonable monetary compromise in lieu of a suspension." Maynard's, supra, 192 N.J. at 188. However, the Court was not addressing the question whether, in an appropriate case, the Director might take the first step and name a figure the agency would accept.

Of course, nothing precludes the agency from engaging in further negotiations over the penalty amount, but at least it will provide a determination that is amenable to meaningful future appellate review if the matter cannot be resolved.

Therefore, we remand this matter to the agency for the limited purpose of issuing a supplemental decision stating an amount that the agency would accept in lieu of revocation provided the bar can produce a legitimate buyer for the license, and for such additional settlement efforts as the parties may thereafter attempt. We note that the Director has stayed the revocation during the pendency of this appeal, and there appears to be no dispute that the licensee has been operating for the past eight years without further violations of N.J.A.C. 13:2-23.1(b). Therefore, in fairness to the licensee, the Director shall also extend, by another six months from the issuance of the supplemental decision, the licensee's opportunity to sell the license. We do not retain jurisdiction.

Affirmed in part, modified in part, and remanded.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

LIC. NO. 0414-33-016-003

AGENCY NO. S-00-23296

DIVISION OF ALCOHOLIC BEVERAGE CONTROL, Petitioner, v. MAG ENTERTAINMENT, LLC, T/A CHEERLEADERS GENTLEMEN'S CLUB, Respondent.	)	SUPPLEMENTAL DECISION ON REMAND FROM APPELLATE DIVISION

Kevin Marc Schatz, Senior Deputy Attorney General, for Petitioner
(Anne Milgram, Attorney General, attorney)

Kevin E. Raphael, Esq., for Respondent
(Pietragallo Gordon Alfano Bosick & Raspanti, LLP, attorneys)

BY THE DIRECTOR:

In this case, the Administrative Law Judge (the "ALJ"), the Superior Court, Appellate Division, and I determined that the violation of N.J.A.C. 13:2-23.1(b) committed by MAG Entertainment, LLC, t/a Cheerleaders Gentlemen's Club ("MAG"), which resulted in the two deaths and severe injuries to three people, warranted revocation of its license. However, because my December 21, 2007 Final Conclusion and Order afforded MAG a six-month period in which to sell its license to a bona fide purchaser, but did not fix the monetary amount to be paid by MAG, the

Appellate Division remanded this matter to me "for the limited purpose of issuing a supplemental decision stating an amount that the agency would accept in lieu of revocation provided the bar can produce a legitimate buyer for the license, and for such additional settlement efforts as the parties may thereafter attempt." Therefore, this Order constitutes the supplemental decision ordered by the Appellate Division.

I. Sale Of The License

First and foremost, I must re-emphasize that MAG must sell its license to a bona fide purchaser approved by the Division of Alcoholic Beverage Control (the "Division"). This is a necessary condition without which no monetary offer in lieu of revocation (the "Monetary Offer") will be accepted. In this regard, MAG must submit a legally binding contract for the sale of its license to a bona fide purchaser for the fair market value of the license. With the submission of the contract of sale, MAG must demonstrate that the sale price is, in fact, the fair market value of the license. The structure of the sale must be such that MAG and its corporate affiliates and owners have no direct or indirect beneficial interest in the license, the property on which the license will be sited or the financing, if any, for the purchase.

In addition, the proposed purchaser must have no business affiliation with MAG's owners other than the purchase of this license. The proposed purchaser must submit a completed Liquor License Questionnaire, as well as provide all of the documents set forth in the License Investigation Required Documents form.[1] The purchaser must undergo a background investigation, including, but

[1] These documents are attached to this Supplemental Decision as Exhibit A.

not limited to, providing fingerprints of all persons with an interest in the proposed purchaser.[2] Fingerprints shall be provided in the manner usually required by the Division, with all fees related thereto paid by the proposed purchaser. Both MAG and the proposed purchaser must fully cooperate with the Enforcement Bureau's background investigation.

Unless all of the foregoing conditions are satisfied and a person-to-person transfer application is filed with Gloucester City (the municipal issuing authority) by June 8, 2009, MAG's license shall be revoked, regardless of MAG's willingness or ability to pay the Monetary Offer as discussed below. The deadline for MAG's submissions will not be extended for any reason.

II. The Monetary Penalty

A. General Background

The Alcoholic Beverage Control Act, N.J.S.A. 33:1-1, et seq. (the "ABC Act"), is a remedial statute. N.J.S.A. 33:1-73. It provides the Director with authority to suspend or revoke a liquor license for violations of the ABC Act or the regulations promulgated pursuant thereto. N.J.S.A. 33:1-31.[3] In addition, the ABC Act provides the Director the sole authority to accept from any licensee

---

[2] N.J.S.A. 33:1-25 requires all persons "holding 1% or more of any of the stock" of a purchaser or licensee to be disclosed on the license application. Thus, for transactions in which the licensee-seller is not disqualified from having an ownership interest in the license post-transaction, the Division requires only persons holding at least 1 percent of the purchaser's stock to be fingerprinted. However, in this case, all current owners of MAG are disqualified from having an interest in the license by virtue of the revocation (N.J.S.A. 33:1-31) and the terms of this Supplemental Decision. Accordingly, all persons with an ownership interest in the purchaser must be fingerprinted to ensure that MAG's owners are fully divested from the subject license.

[3] It bears noting that the Appellate Division has concluded that revocation of MAG's license is appropriate. This remand is directed at making firm the nature of the conditions MAG must meet in order to achieve a compromise in lieu of revocation which I indicated would be considered in my earlier order.

an offer in compromise of any disciplinary action as the Director, in his discretion, deems proper. Ibid. (emphasis added). In my original order, I signaled my willingness to consider such an offer from the licensee. The statutory rationale of placing the obligation to make the offer in compromise on the licensee is predicated on the difficulty for the agency to determine a value prior to protracted investigation, coupled with the difficulty of adjusting those calculated amounts to reflect related public policy issues in each case. As such, I defined no specific dollar amount. However, the Appellate Division has ordered me, under the facts of this case in which I signaled my willingness to accept an offer prior to one being made, to determine an amount which, coupled with the bona fide sale, would be adequate to compromise the affirmed order of revocation. The basis and analysis of this amount follows.

Prior to 1971, the options of the Director were limited to suspension or revocation of the license for violations of the ABC Act. However, in 1971, the Legislature recognized that, under certain conditions, the disruption caused by a suspension could unduly threaten the viability of the licensee as an ongoing business. While those effects were the necessary and inevitable result of the licensee's failure to operate its licensed business in accordance with the governing rules, the Legislature acknowledged that there may be instances in which the nature of the violations or other attendant circumstances might justify a less harsh alternative. Accordingly, the Legislature amended N.J.S.A. 33:1-31 to authorize the Director to accept monetary offers in compromise in lieu of suspensions "in such amount as may in the discretion of the [D]irector be proper under the

circumstances." Thus, although Director may exercise his discretion on a case-by-case basis to accept a monetary offer in lieu of suspension, he has no obligation to do so in any particular case.[4]

The Division has long recognized that monetary offers in lieu of suspension should not present an opportunity for financial advantage to the licensee. Rather, a monetary offer should reflect the policy that a licensee not profit from the privilege to sell alcohol during the period of suspension, while maintaining the viability of its license.

In 1988, the Division issued A.B.C. Bull. 2453, Item 1 (October 31, 1988).[5] This Bulletin formally advised the licensed community how the Division would evaluate monetary offers in suspension cases. That Bulletin provides that "Whenever a suspension is imposed ... the amount [of the monetary offer in compromise] will normally be calculated at one-half the per diem gross profit derived from the operation of the alcoholic beverage license times the number of suspension days imposed as the penalty."[6] This calculation is an estimate of the profits which the licensee would

---

[4] Notably, N.J.S.A. 33:1-31 does not expressly authorize the Director to accept monetary offers in lieu of revocation. I stayed the effective date of my Order On Reconsideration for six months, so that MAG could try to sell its license. The Appellate Division further ordered that I stay the effective date of the revocation for an additional six months from the date of this Supplemental Decision. Accordingly, the revocation will not be effective until six months from the date of this Supplemental Decision. However, once the revocation becomes effective, the statute precludes me from accepting a monetary offer. Technically, only when suspension is a legally viable option can an offer be made. In order to avoid the misunderstanding and issue which exists in the instant matter, in the future, once I have issued a Final Conclusion and Order which revokes a license, I will not permit the licensee to sell its license or to make a monetary offer in compromise of revocation. See, N.J.A.C. 13:2-19.12(b).; Div. of A.B.C. v. Reflections, 9 N.J.A.R. 303, 315 (1984) ("My policy is that if the case is not settled prior to trial, I will not entertain a request to convert the penalty, whether in whole or in part, into a monetary offer in compromise in lieu of suspension.").

[5] ABC Bulletins are compilations of agency decisions and other notices to the regulated community that are disseminated by the agency, pursuant to N.J.S.A. 33:1-39.

[6] Not applicable hereto, the Division requires $100 as the minimum per diem amount.

generate by operating when it would otherwise be suspended. This amount constitutes the monetary offer in compromise of a suspension which is presumptively appropriate in those cases in which a monetary offer will be accepted. These amounts are subject to further adjustment to reflect of public policy issues, such as the nature of the violation and the consequences to others. N.J.A.C. 13:2-19.13; A.B.C. Bull. 2453.

B. Suspensions and Revocations

Suspensions are imposed in cases in which the violations are not so egregious, either by their nature or frequency, that the licensee should be permanently deprived of its privilege to sell alcohol. Revocations, on the other hand, are imposed when the violations, either by their nature or frequency, are sufficiently egregious so as to require the violative licensee to permanently lose its privilege.

The effects of suspension and revocation are different. Some of these differences are obvious. During a license suspension, a licensee is temporarily precluded from exercising its privilege to sell alcohol. In fact, all alcoholic beverage activity on the licensed premises must cease for the duration of the suspension. The effect is that during the suspension period, the licensee can generate neither sales nor profits from alcohol. To the extent that jobs related to the licensee's sale of alcohol are lost, the loss is temporary, as the licensee may resume all alcoholic beverage activity once the suspension is over.

In contrast, once a license is revoked, it ceases to exist. The loss of employment related thereto is permanent. Moreover, unlike a suspension, a revocation renders the licensee, its officers, directors and each owner of more than 10 percent of the stock of the corporate licensee ineligible to hold or receive another alcoholic beverage license for a period of two years. N.J.S.A. 33:1-31. This

consideration is particularly pertinent in this case, because at least one of the owners of MAG also holds an interest in another New Jersey alcoholic beverage license. Lastly, in certain instances, revocation can "render the licensed premises ineligible to become the [site] of any further license, of any kind or class under the [ABC Act], during a period of two years from the effective date of the revocation." Ibid.

A revocation not only affects the licensee and its employees; it also affects the municipality which issued the license. This is so because, in 1947, N.J.S.A. 33:1-12.14 was enacted, which limits the number of new licenses that may be issued by each municipality based upon its population. When N.J.S.A. 33:1-12.14 was enacted, some municipalities, particularly the older and larger cities, had more licenses than would otherwise be permissible under the new statute. Existing licenses were "grandfathered" vis-a-vis the population cap. When a license is revoked in a municipality which exceeds the population cap, the municipality is precluded by N.J.S.A. 33:1-12.14 from issuing another license to replace it. On the other hand, when a revocation reduces the number of licenses below the population cap in a municipality, it may issue a new license. Thus, regardless of whether the issuing municipality is above or below its population cap, the municipality is affected by the reduction in licenses resulting from a revocation. For this reason, the Division has sometimes, albeit rarely, permitted a licensee, prior to the commencement of litigation, to sell its license to a bona fide purchaser approved by the Division and to pay a monetary offer in compromise of a revocation when accompanied by the sale.[7]

---

[7] In these instances, the Division reduces the penalty sought from revocation to a finite number of suspension days in order to calculate the monetary offer. The formula for determining one-half of the per diem gross profits is not modified.

Division records indicate that Gloucester City currently has 21 consumption licenses. According to the 2000 census, the population of Gloucester City is 11,848. New Jersey State League of Municipalities, Municipal Directory at 26 (2008). Thus, Gloucester City is well above the population cap. This means that, if MAG's license is revoked, Gloucester City will not be able to issue another consumption license to take its place.

In this case, my Order On Reconsideration provided MAG with the opportunity to sell its license and to pay a monetary offer as a way of resolving the issues here. Consistent with the intent of the statute, the offer, which included a portion of the proceeds from the mandatory sale of the license, would have ensured that the licensee did not gain inappropriate advantage from the Monetary Offer in compromise. The benefit offered to MAG's owners was that, if such a resolution was reached, they would have been permitted to maintain their interests in other New Jersey alcoholic beverage licenses.

MAG made no offer which I considered to be reflective of the value of the license, the profits generated during the several year operation of the license during the stay of my order or the heinous nature of the events in question. On appeal, MAG argued that its license should, at most, be suspended for 15 days -- the presumptive penalty in an ordinary intoxicated patron case. This case, however, is not an ordinary case, because two people were killed and three severely injured as a direct result of MAG's over-service of alcohol. Inasmuch as the issue of revocation is now resolved, I will determine the Monetary Offer reflective of these specific considerations.

C. Determination Of The Monetary Offer

Revocation represents the maximum penalty which the Division can impose on a licensee. Thus, when considering this unique circumstance of a monetary offer in compromise of a revocation, especially after full litigation, the Division must be very circumspect in determining the amount, so as not to undermine the purposes of the ABC Act and the Division's long enforcement history and policies.

As a starting point, I must determine the applicability of the formula used to calculate a monetary offer in compromise of a suspension to a case in which a revocation has been ordered. As noted, the formula normally is one-half of the per diem gross profits times the number of suspension days. To determine one-half of the per diem gross profits, the Division applies a mathematical formula to financial information provided by the licensee.

However, determination of the applicable number of days in a revocation case is far more complex than in a suspension case. Although it is a relatively straightforward calculation to determine a monetary offer in compromise of a suspension, it is not so for a revocation, which is the case here. This is true because, by definition, a suspension is for a finite period of time; a revocation is forever. Application of the formula to a revocation would require me to determine "one-half the per diem gross profit" MAG would generate over an infinite period of time. Further, the overwhelming majority of settlements involving monetary offers are reached prior to litigation. In this case, no settlement was reached and the Division has devoted substantial resources to the prosecution of the administrative charges. It is manifest that a party will settle a case for less prior to litigation, when the outcome is uncertain, than it will after it has won the case and been affirmed

on appellate review. For these reasons, the constraints of the monetary offer formula used in suspension cases must be modified to fit the circumstances of this case.

Therefore, I have decided that the Monetary Offer in compromise in this case shall be the sum of two components. The components are: (1) application of the monetary offer in compromise of suspension formula applied to the days MAG operated under the stay, and (2) the fair market value of the license. These components are discussed in turn.

1. Component 1: Monetary Offer In Compromise Of Suspension Formula

a. Calculation Of One-half Per Diem Gross Profit

As explained above, calculation of one-half of the per diem gross profits is a mathematical formula applied to relevant financial data provided by the licensee. MAG previously submitted its tax returns for years 2000-2006 to the Division. In calculating monetary offers, the Division generally utilizes the licensee's last-filed tax return. However, when multiple tax returns are provided, the Division examines those returns to ensure that the last-filed tax return is not an aberration. The returns submitted by MAG reveal the following information:

	2006	2005	2004[8]	2003	2002	2001
Line 1 Income	$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]
Plus: Door Charges	[redacted]	[redacted]	[redacted]	-----	-----	-----
Plus: Credit Card Charges	-----	-----	[redacted]	-----	-----	-----

[8] 2004 was leap year. Thus, the 2004 annual gross profit was divided by 366, instead of 365.

Equals: Annual Gross Income	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Less: Cost of Goods Sold	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Equals: Annual Gross Profit	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Divided by 365 Equals Daily Gross Profit	2,309	2,550	2,335	3,887	3,274	3,336
Divided by 2 equals ½ per diem gross profit	1,155	1,275	1,168	1,944	1,637	1,668

Here, the one-half per diem gross profits reflected in MAG's 2006 tax return is $1,155. This amount does not appear to be an aberration, even though it is the lowest of the tax returns submitted.[9] Moreover, it is less than the average one-half per diem gross profit from 2001-2006, inclusive.[10] Therefore, $1,155 will be multiplied by the number of days determined below.

b. The Number Of Days

The determination of the number of days to which $1,155 is to be applied is not nearly as straightforward as the mathematical formula applied above. The end point of that determination is

---

[9] Although the violation in this case occurred in April 2000, testimony at trial indicated that MAG was not open for the entirety of 2000. Thus, I will not utilize its tax return for 2000.

[10] The average one-half per diem gross profit is $\frac{\$1,155 + \$1,275 + \$1,168 + \$1,944 + \$1,637 + \$1,668}{6}$ or $1,475 per day.

relatively simple. Although not explicitly stated, the Appellate Division's Decision suggests that the revocation of MAG's license should be stayed for six months after the date of this Supplemental Decision, to permit MAG to sell its license and pay the Monetary Offer. Thus, I determine that June 8, 2009, shall be the end point for the calculation of the number of days.

On December 21, 2007, I issued the Order On Reconsideration, which contained the element that is the subject of this remand. This Order made clear my unequivocal decision that MAG's license should be revoked, subject to the possibility of MAG's sale of the license and payment of a monetary offer. This Order was the first time, post-litigation, that I indicated that MAG could make a monetary offer. Moreover, the Appellate Division's remand was explicitly limited to determining the Monetary Offer amount which I should have set in my December 21, 2007 Order On Reconsideration. Although I could have selected an earlier date, I have decided that December 21, 2007, is the most appropriate starting point. There are 528 days between December 21, 2007 and June 8, 2009. Thus, using December 21, 2007, the first element of the Monetary Offer is as follows:

One-half per diem gross profit:	$1,155
Times 535 days	x 535
(December 21, 2007 to June 8, 2009)	
Equals first element of monetary offer in compromise:	$617,925

Thus, $617,925 represents the amount of the first component of the Monetary Offer.[11]

2. Component 2: The Sale Price Of The License

As noted above, MAG must submit a legally binding contract for the sale of its license to a bona fide purchaser for the fair market value of the license. With the submission of the contract of

[11] As explained below, this amount may be adjusted, based upon the exact day the license is transferred.

sale, MAG must demonstrate that the contract sale price is, in fact, the fair market value of the license. If MAG does so, then the contract sale price amount, less 10 percent to cover MAG's costs of sale, shall constitute Component 2 of the Monetary Offer. However, if MAG does not substantiate that the contract sale price reflects the fair market value of the license, the Division will set a fair market value.

3. Summary Of The Monetary Offer

I recognize that the licensee is entitled to due fairness in calculating the Monetary Offer. Consonant with the harm to the public caused by MAG and the fact that its license is revoked, the bar must be set high enough that the Monetary Offer, when viewed in any light, is not indulgent and reflects both the tragic consequences of MAG's acts and the penalty of revocation of its license. At the same time, by allowing MAG to pay a Monetary Offer combined with its sale of the license, MAG's owners will be permitted to retain their interests in other New Jersey licenses and to sell the entire business unit as a going concern, thereby resulting in a higher price than the owners would receive for the sale of the property alone.

Based on the foregoing, the Monetary Offer shall be $617,925 plus the contract sale price of the license, less 10 percent. To put the Monetary Offer into perspective, it should be noted that MAG paid $300,000 for the license and property in 1999. As a going concern, MAG generated $7,440,699 in sales and $6,457,239 in gross profits (before salaries and taxes) from 2001-2006, supra. Thus, the Monetary Offer of $617,925 is appropriate and not excessive.

I note that this calculation is based upon MAG's license being transferred on June 8, 2009. However, if MAG's license is transferred prior to June 8, 2009, the final amount may be adjusted

downward by $1,155 per day. Likewise, if MAG's license is transferred after June 8, 2009, the final amount may be adjusted upward by $1,155 per day. MAG shall pay the Monetary Offer no later than June 8, 2009, or within 10 calendar days of the transfer of the license, whichever is later. The revocation shall remain attached to MAG's license until the Monetary Offer is paid and the license is transferred, whichever occurs later. Upon the satisfaction of these terms, I will vacate the revocation, by separate order.

D. Pending Revocation Under Agency Docket Numbers S-99-22979; S-02-25092; S-03-25608; S-03-26100; and S-06-32795

Although not part of the above-captioned matter, I note that another disciplinary prosecution against MAG is currently pending before the Office of Administrative Law under Agency Docket Number S-99-22979; S-02-25092; S-03-25608; S-03-26100; and S-06-32795 (collectively the "OAL Prosecution"). In that litigation, the Division seeks revocation of MAG's license for, inter alia, 32 violations of N.J.A.C. 13:2-23.6 (lewdness) and 2 violations of N.J.A.C. 13:2-25.6 (illegal activity, viz., prostitution). The Division also seeks to de-license the premises for a period of two years, pursuant to N.J.S.A. 33:1-31.

The OAL Prosecution stands on its own merits and the penalty on conviction is completely independent of the within matter. Considered in context, I would never accept any compromise from a licensee who has placed itself in the position of so many violations for which revocation is the presumptive and sought penalty. But for the fact that one cannot revoke a license twice, I would not compromise this second set of prosecutions. Nonetheless, in the interest of a final resolution that results in the license either being revoked or transferred and to avoid further litigation, I will include

these charges as part of this offer only if this offer is accepted forthwith. In any other scenario, including any further litigation, there will be no linkage between these two matters, except that the two matters together can serve to justify a substantial aggravation of penalty. Thus, provided MAG fulfills all of the conditions set forth above and enters a plea of "non vult" to the charges alleged in the OAL Prosecution, the resolution of the above-captioned case shall resolve the OAL Prosecution as well.

E. Failure Of MAG To Sell Its License Or Pay The Monetary Offer

If MAG is unable to both sell its license to a bona fide purchaser and to pay the Monetary Offer, MAG's license shall be revoked on June 8, 2009. In that event, by operation of N.J.S.A. 33:1-31, MAG's owners must divest themselves of every direct or indirect interest they have in any New Jersey alcoholic beverage licensee. Because the revocation of MAG's license will not be effective until June 8, 2009, MAG's owners will have until December 1, 2009 to divest themselves of those interests. After December 1, 2009 and until December 8, 2011, if MAG's owners are determined to have a direct or indirect interest in any New Jersey alcoholic beverage licensee, that licensee shall be subject to disciplinary charges in which the Division will seek revocation of the subject license.

Accordingly, it is on this 8th day of December, 2008,

ORDERED THAT the revocation of MAG's license is hereby stayed until June 8, 2009, so that it can attempt to sell its license to a bona fide purchaser, subject to the conditions set forth above; and it is further

ORDERED THAT MAG shall pay a monetary offer in lieu of revocation in the amount of $617,925 plus the contract sale price, less 10 percent to the Division no later than 10 days after Gloucester City approves the aforementioned transfer of MAG's license; and it is further

ORDERED THAT Gloucester City shall place as a condition of transfer that MAG comply with the requirement of payment and that such transfer shall otherwise be void; and it is further

ORDERED THAT MAG shall have until January 2, 2009, to agree, in writing, to accept this offer in compromise for the payment of the Monetary Offer, to sell the license to a bona fide purchaser approved by the Division, to waive and/or withdraw any further appeals in this matter and to enter a plea of non vult in the OAL Prosecution. However, if MAG fails to agree to all of the above terms or if the sale and/or transfer cannot be consummated, MAG's license shall be revoked on June 8, 2009 and, MAG shall not be required to pay the Monetary Offer; it is further

ORDERED THAT, if MAG's license is revoked, all persons with a direct or indirect interest in the subject license must divest themselves by December 1, 2009 of any other interest they may have in any other liquor license; it is further

ORDERED THAT the revocation shall only be stayed beyond June 8, 2009, if MAG and the prospective purchaser have timely filed all required paper work with the Division of Alcoholic Beverage Control and have timely and fully cooperated with the Division's investigation related to the sale of MAG's license.

JERRY FISCHER
DIRECTOR

Attachment: Exhibit A

LICENSE INVESTIGATION

REQUIRED DOCUMENTS

1. Purchase Agreement/Bill of Sale, Closing Statement for the premises in question.

2. Mortgages, Assumption Agreements, Promissory Notes, and any other financing instruments used to purchase the licensed business.

3. Financing statements, security agreements, stock pledges and any other instruments used to secure the loans.

4. Records of outstanding loans to/from the business and/or owners (including loans made by owners to the business).

5. Copy of Lease Agreement for the licensed premises.

6. Records pertaining to all sources of income, including but not limited to salaries, wages, business receipts, sales of securities, rents, pensions, trusts.

7. Canceled checks, bank statements, check registers, debit memos, credit memos, and supporting documents for all checking accounts in which the subject and his/her spouse are designated signatories for the past three (3) years.

8. Passbooks and supporting documentation for all savings accounts and certificates of deposit in which the subject and/or spouse have a beneficial interest or are designated signatories.

9. Personal federal (1040) and State income tax returns including all schedules for the past three (3) years.

10. Personal income tax returns for spouse if filed separately, including all schedules for the past three (3) years.

11. Federal Business (1120) income tax returns, including all schedules for the past three (3) years.

12. Tax returns for all partnerships in which an interest is held by subject or spouse for the past three (3) years.

13. All partnership and/or stockholder agreements.

14. Corporate Kit and Record Books (Minutes, stock certificates, transfer ledger, resolutions, etc) for all corporations in which subject has an interest.

15. Canceled checks, bank statements, check registers, debit memos, credit memos, and supporting documents, of each stockholder.

16. Passbooks and supporting documents for all savings accounts and certificates of deposit of each stockholder.

17. Documentation of sources of investments into the business by each stockholder, partner, or other investors.

18. New Jersey Corporation (CBT 100/Unincorporated Business Tax Returns (UBT 120) for the past three (3) years.

19. All books, records, financial statements, etc. for all corporations in which a controlling interest is held by subject or spouse.

20. Escrow statements used by subject or spouse for all transactions entered into in which escrows were used.

21. All brokerage statements (securities, commodities, etc.) for all brokerage accounts maintained by subject or spouse.

22. All documents supporting loans and mortgages payable to which subject or spouse are a party.

23. All documents supporting loans and mortgages payable in which subject or spouse act as guarantor.

24. All documents supporting loans and mortgages receivable to which subject or spouse are a party.

25. All certificates evidencing stocks, bonds, etc., owned by subject or spouse.

26. Pleadings relative to any and all civil litigations including bankruptcies, divorce, in which subject or spouse are a party.

27. Deeds pertaining to all real estate owned by subject or spouse.

28. Lien documents relative to property owned by subject or spouse.

29. Certificates of ownership on all personal property owned by subject or spouse valued at more than $5,000.

30. Insurance policies in which subject or spouse are the beneficiaries or insured parties.

31. Records of cashier's checks purchased by subject or spouse for last three (3) years.

32. Federal income tax audit adjustments for personal, partnership, and corporate tax returns for all tax returns submitted.

33. Correspondence relative to significant financial matters to which subject and spouse are a party.

34. Appraisals of real estate purchased or sold by subject or spouse.

35. Records of all outstanding liabilities, including, but not limited to loans, financing agreements and all credit card accounts.

LIQUOR LICENSE QUESTIONNAIRE

Date_____ License #_____

Personal Information

Name:_____

Address:_____

Home Tel. #_____ Date of Birth:_____

Social Security #_____ Place of Birth_____

Driver's License_____ Marital Status_____

Employment: (Present)_____

_____

(Past) _____

_____

Business Phone:_____

Wifes First Name_____ Husbands First Name_____

Wifes Maiden Name_____(when applicable)

Wifes Occupation:_____

Husband's Occupation:_____

Employers Name & Address: Wife:_____

_____

Husband:_____

_____

Employers Tel. #: Wife:_____ Husbands:

Name and Address of Attorney:_____

_____

_____ Phone #_____

Name & Address of Accountant_____

_____

_____ Phone #_____

MILITARY:

Branch:_____ Highest Rank:_____ From_____ To_____

Service #_____ Type of Discharge:_____Disabled Vet:____%____

EDUCATION:

High School:_____Date Graduated/Degree:_____

College:_____Date Graduated/Degree:_____

Others:_____Date Graduated/Degree:_____

_____

_____

_____

Residence: Past Ten (10) Years:

Address:_____From:_____To:_____Own/Rent_____

_____From:_____To:_____Own/Rent_____

_____From:_____To:_____Own/Rent_____

Employment: Past Ten (10) Years:

Employer:_____Address:_____

Position:_____Reason left:_____

_____

_____

_____

_____

_____

_____

Have you ever been convicted of a crime or are you presently under indictment?_____NO _____YES. If "YES" state complete details.

_____

_____

Has anyone in your immediate family been convicted of a crime or is presently under indictment?_____NO _____YES. If "YES" state complete details.

_____

_____

Have you ever held an interest as a owner, stockholder or partner in any liquor license in this state or any other state?
_____NO _____YES. If "YES" explain in detail.

_____

_____

_____

Does anyone in your immediate family have any interest in any other liquor license in New Jersey or any other state?
_____NO _____YES. If "YES" explain in detail.

_____

_____

Has any member of your immediate family ever been arrested, indicted, charged with or convicted of a criminal or disorderly persons offense in this state or in any jurisdiction?
_____NO _____YES. If "YES", answer the follow:

Name:_____Charge_____Statute #:_____

Jurisdiction_____Date_____Disposition_____

Have you ever been arrested, indicted, charged with or convicted of a criminal or disorderly persons offense in this state or in any other jurisdiction?
_____NO _____YES. If "YES", answer the following:

Name:_____Charge_____Statute #:_____

Jurisdiction_____Date_____Disposition_____

Have you ever been named as an unindicted party or co-conspirator in any criminal proceeding in this state or in any other jurisdiction?
_____NO _____YES. If "YES", complete the following:

Agency:_____Type Proceeding:_____Date:_____

Have you ever received a pardon or expungement of any type for any criminal or disorderly persons offense whether in this state or in any other jurisdiction?
_____NO _____YES. If "YES", complete the following:

Agency:_____Details of Procedure:_____Date:_____

To the best of your knowledge, have you ever been the subject of an investigation conducted by a governmental investigatory agency for any reason? NO _____YES. If "YES", state the name and address of the investigatory agency or agencies, the nature of the investigation and the approximate time period during which the investigation was in progress:_____

_____

_____

Have you ever been cited or charged with or formally accused of any violation of a statute, regulation or code of any state, county, municipal, federal or national government other than a criminal, disorderly persons or motor vehicle violation?
_____NO _____YES. If "YES", complete the details of fact:_____

_____

Have you ever been a party in a Civil suit?
_____NO _____YES. If "YES", complete the details of fact:_____

_____

Have you or has any business entity in which you held an ownership, interest or served as an officer or director ever filed a petition for any type of bankruptcy or insolvency, under any bankruptcy or insolvency law:
_____NO _____YES. If "YES", complete details to include:

Date filed:_____Court:_____Name of Business:_____

Date of Discharge:_____Docket #:_____

Are you or the licensed business currently satisfying any judgments or liens? _____NO _____YES. If "YES", explain in detail.
_____

_____

_____

What percentage of this business do you own and how many shares of stock do you hold?

_____

Are there any other stockholders or partners associated with this license, if so, what percentage of the business do they own? _____NO _____YES. If "YES" state name, address, shares of stock and amount invested by each.

What was your investment into the business?

Where did you obtain the money that you invested in the business?

Do you have a personal checking account? _____NO _____YES. If "YES" give the name, address and account number of the bank and the title of the account.

Do you have a business checking account? _____NO _____YES. If "YES" give the name, address and account number of the bank and the title of the account.

Do you have a personal savings account? _____NO _____YES.
If "YES" give the name, address, and account number of the bank and the title of the account.

Do you have a business savings account? _____NO _____ YES.
If "YES" give the name, address, and account number of the bank and the title of the account.

Other than the banks previously mentioned do you currently do business with any other banks? _____NO _____YES. If "YES" state the name, address, and account number of the bank, the type of transaction and the date of the transaction. (Loans, etc.).

Does anybody in your family have an interest in any liquor license in New Jersey or any other state? _____NO _____YES. If "YES" state details.

_____

_____

_____

_____

Have you ever owned any interest in any corporation?

_____NO _____YES. If "YES", give the following information with respect thereto:

(a) Name of corporation:_____

(b) Principal place of business:_____

(c) When and where incorporated:_____

(d) Kind of business:_____

(e) Names and address of all officers:_____

_____

(f) Total number of shares of each class of stock issued and outstanding:

_____

(g) Names and address of stockholders and number of shares owned by each:

_____

_____

_____

_____

(h) What consideration did you give for the shares of capital stock owned by you?

_____

Liquor License Purchase:

How or from whom did you learn that the business was for sale?

_____

_____

What was the date the license was purchased?_____

_____

Sellers name, address & telephone number.

_____

_____

_____

When was the Liquor License purchased?_____

From whom?_____

Amount of purchase:$_____

Deposit: $_____How Paid: $_____

Note to sellers: $_____

Balance $_____How Paid: $_____

What other outstanding liabilities does the Licensee owe:_____

_____

Give the names and addresses of all Attorneys used by the Licensee:

_____

_____

Give the names and addresses of all Accountants who performed services for the Licensee:

_____

_____

Give the names and addresses of principal bookkeepers employed by the Licensee:

_____

_____

_____

Banks where business accounts were/are maintained for the Licensee:

_____

_____

_____

Do all deposits in the Licensee's accounts represent receipts from sales? _____NO _____YES. In "NO", explain:_____

Do any deposits in the Licensee's business accounts represent loans or exchanges? _____NO _____YES. Explain:_____

Are all business expenses paid by check? _____NO _____YES. If "NO", explain:_____

Were all receipts from sales, commissions, fees and other sources recorded in the books of accounts? _____NO _____YES. If "NO", explain:_____

Amount of money each stockholder invested for the purchase.

NAME	AMOUNT INVESTED	AMOUNT OF STOCK

_____

_____

_____

_____

Who negotiated for the purchase?_____

_____

Who negotiated for the seller?_____

_____

_____

Did the purchase include: Only the liquor license

The license & property

What was the full purchase price? $_____ by check
What was the amount of deposit? $_____ by cash

Did seller take back a purchase note? _____NO _____YES

If so, how much? $_____ How many years?_____
Monthly payments?_____

How much money was due at the closing? $_____

Was it paid by Check or Cash

What is the name of the Attorney(s) that represented the Buyers and Sellers at the Closing?

_____

_____

Did you assume any Liabilities from the previous owner? _____NO _____YES. If "YES" state who they were and the amount due at the time of the closing._____

_____

_____

If you don't own the property, do you have a Lease with the owners of the property?_____NO _____YES. If "YES" state the monthly rent, the years that the Lease is in effect, and the name and address of the landlord._____

_____

_____

List all stockholders, their addresses, and what percent of stock they own?

_____

_____

_____

_____

LIQUOR LICENSE OPERATION

Who is the attorney representing the business?

_____

Who is the accountant for the business?

_____

Who is the bookkeeper for the business?

_____

Who is the manager for the business? (Name & Address)

_____

_____

_____

Is there a management contract? _____NO _____YES. If "YES" state details of contract._____

_____

_____

Banks where business accounts were/are maintained for license.

_____

Does the business have any other checking accounts other than the one previously mentioned? _____NO _____YES. If "YES" state the name, address, and account number of the bank and the reason for the account._____

_____

_____

What was the date the checking account was opened?_____

Who opened the checking account?_____

Who are the authorized signatures of the checking account(s)?

_____

_____

Does the business have any other bank accounts (Savings, Checking, Money Market, etc.)? _____NO _____YES. If "YES" give complete details and signatories of these accounts.

_____

_____

_____

Who hires and fires the help?_____

Who orders the supplies including the liquor?

_____

BOOKKEEPING INFORMATION

Do you keep a Daily Receipt Book? _____NO _____YES.

Do you keep a Cash Payout Book? _____NO _____YES.

Does all bank deposits into the checking account represent the Gross receipts? _____NO _____YES.

Who supplies the information about the Daily Receipts, Cash Payouts, or Disbursements to the Bookkeeper and/or Account and what procedure is used in reporting this information?_____

_____

_____

_____

_____

_____

Are your books on a Calendar or Fiscal year?_____

What were your profits or losses for the last taxable year?

_____

How much is your payroll salaries each week?_____

How much is your managers salary each week?_____

Do you receive a salary? _____NO _____YES.
If so, how much? $_____

Do your partners or stockholders receive a salary? _____NO _____YES.
If "YES" list each with their salary.

_____

_____

_____

Does any person associated with the operation of the business receive a Bonus, Percentage of Profits or Consultant Fee? _____NO _____YES. If "YES" list each person with the monetary amount and the reason he/she received such amount.

_____

_____

_____

_____

Have you lent any money to the business? _____NO _____YES. If "YES" state how much and when also, if any money was returned from the business to you for this loan._____

_____

_____

_____

Have any of your Partners or Stockholders loaned any money to the business? _____NO _____YES. If "YES", how much and when, also if any money was returned from the business to them for this loan.

_____

_____

_____

_____

_____

****

I do hereby authorize the New Jersey Division of Alcoholic Beverage Control and their agents to receive copies of records and or any information concerning my background, character, accounts at banks and businesses, places of employment, schools, and any other source necessary, for the purpose of the obtaining a liquor license in the State of New Jersey.

Signed_____

Witness_____

Notary Seal

Date_____

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

LIC. NO. 0414-33-016-003

AGENCY NO. S-00-23296

DIVISION OF ALCOHOLIC BEVERAGE CONTROL, Petitioner, v. MAG ENTERTAINMENT, LLC, T/A CHEERLEADERS GENTLEMEN'S CLUB, Respondent.	ORDER DENYING RECONSIDERATION OF SUPPLEMENTAL DECISION ON REMAND FROM APPELLATE DIVISION

Kevin Marc Schatz, Senior Deputy Attorney General, for Petitioner
(Anne Milgram, Attorney General, attorney)

Kevin E. Raphael, Esq., for Respondent
(Pietragallo Gordon Alfano Bosick & Raspanti, LLP, attorneys)

BY THE DIRECTOR:

In its decision dated November 14, 2008, the Appellate Division remanded this matter to me "for the limited purpose of issuing a supplemental decision stating an amount that the agency would accept in lieu of revocation provided the bar can produce a legitimate buyer for the license, and for such additional settlement efforts as the parties may thereafter attempt." On December 8, 2008, I issued my Supplemental Decision on Remand from the Appellate Division.

This order contained a detailed explanation of the amount I would accept and how it was calculated, as well as who would constitute a "legitimate buyer" and how this would be demonstrated. Moreover, this order acknowledged that this offer in compromise would

incorporate additional charges pending against this license for which revocation is also sought. Finally, this order required MAG Entertainment, LLC, t/a Cheerleaders Gentlemen's Club ("MAG") to agree to the terms of this offer in compromise, in writing, no later than January 2, 2009. If MAG did not accept all of the terms of this offer in compromise, its license would be revoked on June 8, 2009. Also, if the sale and/or transfer cannot be consummated, its license would be revoked on June 8, 2009.

By letter memorandum dated December 24, 2008, MAG filed a Motion for Reconsideration of my December 8, 2008 order. As part of this motion, MAG requests that I toll the six-month stay ordered by the Appellate Division to permit it to sell its license until its motion is decided. Since I am deciding this motion within less than a week of its receipt by me, I will not extend this time. The thrust of MAG's latest motion is that my order "exceeds the Division's jurisdiction on remand" and that the monetary amount "is shocking to one's sense of fairness and unreasonably burdens MAG's rights under the State Constitution."

MAG acknowledges that the Appellate Division remanded "for the limited purpose of issuing a supplemental decision stating an amount that the agency would accept in lieu of revocation provided the bar can produce a legitimate buyer for the license, and for such additional settlement efforts as the parties may thereafter attempt." However, MAG's argument, distilled to its essentials, claims that the Appellate Division has given it the right to effectively veto the revocation by compelling negotiations forever until it is satisfied of a profitable end result. Under its interpretation, MAG seeks to operate indefinitely while "negotiations" continue. Nothing could be further from the intent of the Appellate Division. The Supplemental Decision on Remand from the Appellate Division established with great particularity the terms for the

conclusion of a settlement. This responds directly to the Appellate Division's concerns about leaving ambiguities in a settlement as being unfairly disadvantageous to the licensee. MAG's new interpretation attempts to convert the definitive ruling of the Appellate Division into a tool for the delay of the implementation of the Appellate Division's unambiguous conclusion that this license was properly revoked and should be terminated.

MAG first objects to the specifics contained in my order regarding how a determination of whether a proposed buyer is "legitimate" or bona fide is to be made. These are not additional terms placed on the sale of its license. They are simply clarifying details, so that there is no further dispute requiring judicial intervention. Moreover, these requirements are no different than those placed on other proposed transfers, to satisfy the requirement that proposed licensees are qualified to hold liquor licenses. Oddly, despite quoting the entirety of the Appellate Division's direction on remand at one point in its brief, at a later point, MAG talks only about setting an amount for a monetary penalty, ignoring the "legitimate buyer" requirement.

MAG next argues that the requirement of payment within ten days of Gloucester City's approval of the sale and that the transfer be conditioned on such payment is beyond the scope of the remand order. Like the terms regarding the establishment of who is a legitimate buyer to avoid judicial intervention, this term is to insure payment of the amount agreed upon without further litigation. As the Enforcement Bureau correctly points out in its response to MAG's motion, once the license is transferred, the Division will no longer have jurisdiction over MAG.

MAG next objects to incorporating the resolution of additional pending charges for which revocation is also sought. This term is favorable to MAG. It was included because to suggest a sale of the license encumbered by a possible future revocation would render the sale virtually

impossible. However, if MAG wishes to sever any connection between the instant matter and the pending charges, I will allow it to do so, as long as MAG waives, in writing, any possible future request for an extension of time in which to sell its license based on the fact that it cannot sell the license encumbered by a possible future revocation.

Finally, MAG objects to the amount of the proposed monetary offer in compromise that would be acceptable to the Division in lieu of revocation.[1] I have explained in detail how and why I set the monetary amount in my December 8, 2008 order. As the Enforcement Bureau aptly states in its in its response to MAG's motion, "revocation is not an adjustable penalty designed to fit the wishes or convenience of the violator. Rather, it is a penalty designed to terminate the violator's privileges which were extended to it by virtue of its ownership of a license. To suggest that ABC must specify a monetary offer which permits MAG to sell the license at a profit renders the penalty of revocation meaningless."

The revocation of MAG's license was affirmed by the Appellate Division. On remand, I was ordered to establish an amount "that the agency would accept in lieu of revocation..." and I have done so. MAG is under no obligation to pay this monetary penalty or to accept the related terms. Moreover, contrary to MAG's suggestion, the Appellate Division did not order the Division to negotiate with MAG over this amount. Rather, the remand was to encompass

---

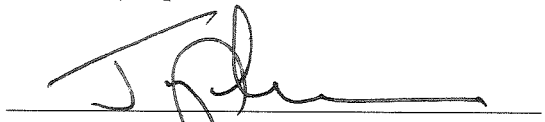
[1]MAG suggests that the monetary amount is such that "it makes no sense for MAG to pay the fine rather than simply allowing its license to be revoked." That is clearly MAG's choice. However, as I explained in my December 8, 2008 order, if MAG's license is revoked, by operation of N.J.S.A. 33:1-31, MAG's owners must divest themselves of every direct or indirect interest they have in any New Jersey alcoholic beverage license. If this matter is settled and the license is not revoked, MAG's owners will not be required to do this. Moreover, there is nothing in the Appellate Division's decision that requires that MAG like the offer in compromise for the payment of the Monetary Offer or that MAG perceive it as advantageous.

"...such additional settlement efforts as the parties may thereafter attempt." (emphasis added). Thus, the Division was not ordered to compromise the revocation the Appellate Division affirmed, compromise the amount of monetary penalty it would accept or to settle the case.

It is unclear to me how any of MAG's constitutional rights have been compromised by my order. MAG was not denied the right to appeal. It did appeal and its appeal failed. The revocation of its license was affirmed by the Appellate Division on November 14, 2008. The Appellate Division did not retain jurisdiction. Moreover, MAG is out of time to appeal the Appellate Division's final decision to the Supreme Court. R. 2:12-3(a) ; 2:12-7(b). Finally, one purpose of any settlement is to avoid future litigation. Thus, it is unreasonable for MAG to expect to be able to both accept the offer in compromise for the payment of the Monetary Offer as set forth in my December 8, 2008 and maintain the ability to appeal it.

Accordingly, it is on this 31st day of December, 2008,

ORDERED that MAG's Motion for Reconsideration of my December 8, 2008 Supplemental Decision on Remand from the Appellate Division is DENIED, except that, if MAG accepts in writing by January 2, 2008 the offer in compromise for the payment of the Monetary Offer as set forth in my December 8, 2008 order, MAG may sever any connection between the instant matter and the pending charges, if it waives, in that same writing, any possible future request for an extension of time in which to sell its license based on the fact that it cannot sell the license encumbered by a possible future revocation.



JERRY FISCHER
DIRECTOR

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2508-08T2

DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,

Petitioner-Respondent,

v.

MAG ENTERTAINMENT, L.L.C.,
t/a CHEERLEADERS GENTLEMEN'S
CLUB,

Respondent-Appellant.

Argued October 26, 2009 – Decided November 19, 2009

Before Judges Reisner and Yannotti.

On appeal from the Supplemental Decision of the Director of the Division of Alcoholic Beverage Control.

Kevin E. Raphael (Pietragallo Gordon Alfano Bosick & Raspanti) argued the cause for appellant.

Kevin Marc Schatz, Senior Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney; Lorinda Lasus, Deputy Attorney General, of counsel; Mr. Schatz, on the brief).

PER CURIAM

MAG Entertainment, L.L.C., t/a Cheerleaders Gentlemen's Club (MAG), appeals from a supplemental decision of the Director of the Division of Alcoholic Beverage Control (Division) dated December 8, 2008, following remand from this court. MAG also appeals from the Director's order of December 31, 2008, which denied its motion for reconsideration. For the reasons that follow, we affirm.

As noted in our prior opinion in this case, the Director ordered the revocation of MAG's liquor license because in April 2000, one of the bartenders at Cheerleaders served Humberto Herrera-Salas (Herrera) while he was visibly intoxicated and ejected him from the bar without taking steps to ensure that he did not drive. Div. of Alcoholic Beverage Control v. MAG Entertainment, L.L.C. t/a Cheerleaders Gentlemen's Club, No. A-2282-07 (App. Div. November 14, 2008) (slip op at 2). Herrera got into his car, drove the wrong way down a divided highway and struck an oncoming vehicle, killing two persons. Ibid.

After MAG moved for reconsideration, the Director modified his decision, giving MAG six months to sell the liquor license in lieu of revocation, provided that MAG reached a settlement with the Division to pay a monetary penalty. Id. at 2-3. We affirmed the Director's decision to revoke MAG's license. Id. at 48-50. We determined that the Director had the discretion to

reach settlements with licensees in lieu of a license revocation. Id. at 51. We concluded, however, that the Director erred by incorporating an obligation to reach an agreement on the monetary penalty "without stating an amount that the agency would accept to resolve the matter[.]" Ibid.

We remanded the matter to the Division "for the limited purpose of issuing a supplemental decision stating an amount that the agency would accept in lieu of revocation provided the bar can produce a legitimate buyer for the license, and for such additional settlement efforts as the parties may thereafter attempt." Id. at 52. We noted that the Director had stayed the revocation while the appeal was pending. Ibid. We stated that the Director should extend the stay of revocation for six months after the issuance of the supplemental decision to afford MAG an opportunity to sell the license. Ibid.

On December 8, 2008, the Director issued his supplemental decision on remand. The Director initially noted that, according to a bulletin that the Division issued in 1988, the amount of the monetary offers in suspension cases is one-half of the per diem gross profit derived from the license, times the number of days of the suspension. The Director decided to modify the formula for use in this matter. The Director stated that the:

> determination of the applicable number of days in a revocation case is far more

> complex than in a suspension case. Although it is a relatively straightforward calculation to determine a monetary offer in compromise of a suspension, it is not so for a revocation, which is the case here. This is true because, by definition, a suspension is for a finite period of time; a revocation is forever. Application of the formula to a revocation would require me to determine "one-half the per diem gross profit" MAG would generate over an indefinite period of time. Further, the overwhelming majority of settlements involving monetary offers are reached prior to litigation. In this case, no settlement was reached and the Division has devoted substantial resources to the prosecution of the administrative charges. It is manifest that a party will settle a case for less prior to litigation, when the outcome is uncertain, than it will after it has won the case and been affirmed on appellate review. For these reasons, the constraints of the monetary offer formula used in suspension cases must be modified to fit the circumstances of this case.

The Director determined that the monetary offer would have two components: (1) the application of the suspension formula times the number of days that MAG operated under a stay and (2) the fair market value of the license. The Director therefore concluded that, in lieu of revocation, MAG must pay $617,925, plus ninety percent of the contract sale price of the license, no later than ten days after the municipality approves the transfer of the license.

The Director explained the manner in which he arrived at the $617,925 penalty. He found that MAG's per diem gross profits

were $1,155, based on its 2006 tax return. He multiplied that amount by 535 days. That is the period from December 21, 2007, the date of the Director's initial decision revoking MAG's license, through June 8, 2009, which is the end of the six month stay that we said should be provided so that MAG could endeavor to sell the license.

In his supplemental decision, the Director further detailed the terms of the monetary offer. He stated that MAG must submit a legally binding contract for the sale of the license to a bona fide purchaser. MAG also must establish that the contract sale price is, in fact, the fair market value of the license, and if it fails to do so, the Division "will set a fair market value." In addition, the prospective purchaser must submit various documents and complete a questionnaire so that the Division can investigate the purchaser's fitness to hold the license.

The Director gave MAG until January 2, 2009, to accept his offer, to waive and/or withdraw any further appeals in the matter, and to enter a non vult plea in disciplinary matters then pending before the Office of Administrative Law (OAL).[1] The Director stated that, if MAG fails to agree to all of the terms

[1] In those matters, the Division was seeking the revocation or suspension of MAG's license based on alleged violations of N.J.A.C. 13:2-23.6 (lewdness) and N.J.S.A. 13:2-25.6 (illegal activity, specifically prostitution). The Director stated that settlement of this matter would resolve those matters.

set forth in his decision, or if MAG cannot consummate the sale of the license, MAG's license will be revoked on June 8, 2009, and MAG will not be required to pay the monetary offer. The Director added that, upon revocation of the license, MAG and its owners would be required to divest themselves by December 1, 2009 of "any other interest they may have in any other liquor license[.]"

On December 24, 2008, MAG filed a motion for reconsideration. MAG objected to the amount of the monetary offer. MAG asserted that it "made no sense" for it to pay the fine rather than allow the license to be revoked. In addition, MAG took issue with the terms of the offer pertaining to the investigation of the proposed purchaser. MAG also objected to the requirement that it pay the penalty and ninety percent of the contract price within ten days of the municipality's approval of the license. MAG additionally objected to inclusion of the pending OAL charges in the settlement of this matter. The Director rejected MAG's objections in a decision dated December 31, 2008, denying the motion for reconsideration.

MAG did not accept the Division's monetary offer as required by January 2, 2009. MAG filed a notice of appeal on January 21, 2009. On February 23, 2009, MAG filed a motion with the Director seeking a stay of the revocation pending

disposition of its appeal. The Director issued an order dated February 24, 2009, denying MAG's motion.

The Division moved before us for summary affirmance of the Director's supplemental decision or, alternatively, for accelerated disposition of the appeal. We entered an order on March 31, 2009, denying the Division's motion for summary disposition but granting its motion to accelerate the appeal. On May 5, 2009, MAG filed a motion for a stay of the revocation. We filed an order on June 2, 2009, staying the revocation.

In this appeal, MAG argues that the Director exceeded his jurisdiction on remand and that the penalty imposed is arbitrary, capricious and unreasonable. MAG also contends that the penalty constitutes an egregious abuse of governmental authority and a violation of its constitutional rights. MAG asks that we exercise our original jurisdiction and establish a different monetary offer to bring this matter to a conclusion.

The scope of our review in an appeal from a final decision of an administrative agency is limited. Circus Liquors, Inc. v. Twp. of Middletown, 199 N.J. 1, 9 (2009). We must sustain the agency's action in the absence of a "'clear showing' that it is arbitrary, capricious, or unreasonable" or "lacks fair support in the record[.]" Ibid. In reviewing an agency's action, we consider:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [Id. at 10 (quoting Mazza v. Bd. of Trustees, 143 N.J. 22, 25 (1995)).]

In weighing these considerations, we must acknowledge, when appropriate, an agency's "'expertise and superior knowledge of a particular field.'" Ibid. (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

Furthermore, we are required to accord "substantial deference" to a determination of the Director of the Division enforcing the State's regulation on the sale of alcoholic beverages. Ibid. The "'Director has powers of supervision and control which set him apart from any other formal appellate tribunal."' Ibid. (quoting Blanck v. Mayor of Magnolia, 38 N.J. 484, 491 (1962)). Moreover, because the State's regulation of liquor is "a subject by itself," we cannot indiscriminately apply principles we otherwise apply when we review actions of administrative agencies. Ibid. (quoting Blanck, supra, 38 N.J. at 490).

We have carefully considered MAG's arguments in light of our prior decision, the record on appeal and the aforementioned standards of appellate review. We are convinced that there is no merit in MAG's arguments and accordingly affirm substantially for the reasons stated by the Director in the supplemental decision on remand and the decision denying MAG's motion for reconsideration. R. 2:11-3(e)(1)(A) and (E). We add the following.

MAG maintains that the Director exceeded the scope of our remand. MAG argues that the Director was only permitted to establish the amount of the monetary offer and had no authority to impose additional conditions, such as the requirement that MAG pay the penalty within ten days of the municipality's approval of the sale of the license and the requirements related to the investigation of the proposed purchaser of the license. However, as the Director stated in his decision denying reconsideration, these terms are merely "clarifying details" of the offer and they "are no[t] different" from requirements typically "placed on other proposed transfers" of liquor licenses.

MAG further argues that the Director improperly required it to waive its right to appeal his supplemental decision, thereby "eviscerating" the purpose of our remand. We disagree. As the

Director pointed out in his decision denying MAG's motion for reconsideration, "one purpose of any settlement is to avoid future litigation." Indeed, an agreement to forgo further litigation is an appropriate condition of any settlement. In our judgment, it is unreasonable for MAG to expect that it could accept the offer of settlement and yet appeal the decision making the offer.

MAG additionally argues that the Division's monetary offer is arbitrary, capricious and unreasonable. MAG contends that the monetary penalty is unfair because it was calculated in part using its gross per diem profit rather than its net profits. MAG also asserts that the Director should not have used December 21, 2007, as the starting point for calculating the penalty because that would "penalize" MAG for exercising its right to appeal the Director's initial decision.

Again we disagree. The Director's use of MAG's gross profits to determine the per diem penalty amount was based upon the methodology that the Division has employed for twenty years in suspension cases. Furthermore, the use of December 21, 2007, as the starting point for the calculation of the penalty was reasonable because that was the day the Director first determined that MAG's license should be revoked. In this regard, we note that, as a result of the stays entered in this matter,

MAG has continued to operate since December 21, 2007, despite the Director's finding that its actions warranted revocation of the license, a finding we have affirmed.

MAG also argues that the Director's decision to require it to remit ninety percent of the contract sales price for the license is arbitrary, capricious, unreasonable and unfair. MAG maintains that, because the cost of selling the business is about ten percent of the sales price, it is effectively being required to tender all of the proceeds of the sale.

Even so, the Director's decision to allow MAG to pay a penalty in lieu of revocation of its license provided a substantial benefit to MAG. The Director's offer made clear that if MAG's license is revoked, its owners would be required to divest themselves of any interest they have in the subject license and any other New Jersey alcoholic beverage license. On the other hand, if MAG had accepted the offer, its owners would have been required to sell the subject license but could have maintained their interests in the other licenses.

We therefore conclude the Director's monetary offer was reasonable and does not shock "one's sense of fairness." Div. of Alcoholic Bev. Control v. Maynards, Inc., 192 N.J. 158, 184 (2007). Because MAG did not accept the Division's offer by January 2, 2009, as required by the Director's decision, MAG's

license has been revoked. As stated previously, the revocation was stayed pending disposition of this appeal.

We vacate the stay, effective ninety days from the date of this opinion so as to permit orderly closure in light of the length of time this matter has been pending and the uncertainty surrounding the penalty amount. Furthermore, consistent with our understanding of the intent of the Director's supplemental decision, MAG and its owners will have six months from the date the revocation takes effect to divest themselves of any interests they may have in other New Jersey liquor licenses.

Affirmed.