

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
NEWARK INTERNATIONAL PLAZA  
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2374

November 5, 1980

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ITEM

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Finally, the Administrative Law Judge has fallen into the common error of using as a standard, in appeals from actions of local issuing authorities in disciplinary proceedings, the "discretion" exercised by the said authority. Thus, he states "in an appeal from the action of the local issuing authority such as the present matter the appellant must show an unreasonable action on the part of the issuing authority which constitutes a clear abuse of discretion", citing Fanwood v. Rocco, 33 NJ 404 (1960). However, Fanwood is an appeal from a denial of a place-to-place transfer

where the matter of discretion of the local issuing authority was the issue. The matter sub judice, however, is an appeal from the action in a disciplinary proceeding, in which discretion plays no part.

As the Court pointed out in Fanwood, 59 NJ Super. 306 at page 317 (App. Div. 1959): "in such cases (disciplinary and similar proceedings) the Director's 'discretion' has nothing to do with his findings of the underlying facts if the evidence is not there, no amount of 'discretion' can supply the deficiency". This is, of course, similarly applicable to local issuing authorities in disciplinary proceedings instituted at the local level.

However, the ultimate conclusion of the Administrative Law Judge was based upon his findings of the facts. Moreover, it was proper for him to conclude that, with respect to the extent of penalty, the Board reasonably exercised its discretion. I shall, therefore, affirm the action of the respondent and reimpose the said penalty.

Accordingly, it is, on this 28th day of January, 1980,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control for the City of Paterson is hereby affirmed and the appeal herein is hereby dismissed; and it is further

ORDERED that my Order dated July 17, 1979 staying the respondent's Order of suspension pending the determination of this appeal be, and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 1608-33-157-001 issued by the Municipal Board of Alcoholic Beverage Control for the City of Paterson to J.T. Key Club, Inc., t/a J. T. Key Club for premises 295 Union Avenue, Paterson be and is hereby suspended for twenty-five (25) days commencing at 3:00 a.m. on Thursday, February 7, 1980 and terminating at 3:00 a.m. on Monday, March 3, 1980.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

IN RE:

INITIAL DECISION

J.T. KEY CLUB, INC.,  
t/a same v. Board of  
A.B.C., City of Paterson

OAL Dkt. No. ABC 4253-79

## APPEARANCES:

Ralph L. De Luccia, Jr., Esq., Assistant Corporation Counsel  
for the Respondent City of Paterson

Sylvan G. Rothenberg, Esq., attorney for the Appellant  
J.T. Key Club, Inc.

BEFORE THE HONORABLE JOSEPH ROSA, JR., A.L.J.:

This is an appeal from an action of the Board of Alcoholic Beverage Control of the City of Paterson, (hereinafter Respondent), which by Resolution and Order dated July 12, 1979 suspended the plenary retail consumption license (No. 1608-33-157-001) of the J.T. Key Club, Inc. (hereinafter Appellant), a New Jersey corporation, t/a J.T. Key Club, 295 Union Avenue, Paterson and which arose out of an incident which occurred on June 11, 1979. Specifically the charges were as follows:

1. On Monday, June 11, 1979, between the hours of 3:00 A.M., and 4:30 A.M., it failed to have its entire premises closed; in violation of Section 2:4-2, Title 2, Chapter 4, of the Revised Ordinances of the City of Paterson.
2. On Monday, June 11, 1979, it allowed, permitted and suffered its place of business to become a nuisance in that it allowed, permitted and suffered a brawl, act of violence or other disturbance and otherwise conducted its licensed place of business in a manner offensive to common decency and public morals; in violation of N.J.A.C. 13:2-23.6.
3. On Monday, June 11, 1979, at approximately 4:30 A.M., its corporate president, one, Joan M. Tobias and a patron of the licensed premises, did hinder or delay or caused the hindrance or delay of a police officer in the performance of his duty; in violation of N.J.A.C. 13:2-23.30.

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4. On Monday, June 11, 1979, between the hours of 3:00 A.M., and 4:30 A.M., it sold, served and delivered and allowed, permitted and suffered the sale, service, delivery and consumption of alcoholic beverages in and upon its licensed premises; in violation of Section 2:4-1 of Title 2, Chapter 4, of the Revised Ordinances of the City of Paterson.

A disciplinary hearing was held before the Respondent Board on July 11, 1979. As a result of that hearing, it was ruled that the Appellant was guilty on all the aforesaid charges with the exception of Charge No. 3 which was dismissed, and as a result thereof, Respondent ordered that the Appellant's plenary retail consumption license be suspended for a net period of 25 days. The sentencing was as follows:

For violation of Charge No. 1, ten days' suspension; for violation of Charge No. 2, five days' suspension; for violation of Charge No. 4, five days' suspension; five additional days' suspension were added for the licensee's prior record of similar nature.

On July 17, 1979, Appellant filed a Notice of Appeal with the Division of Alcoholic Beverage Control appealing the decision of the Board of Alcoholic Beverage Control of the City of Paterson. Appellant contended that: The actions of Respondent were arbitrary and capricious, the finding of the Respondent was against the weight of the evidence, there were insufficient grounds factually and legally to support the findings of the Respondent, the Respondent failed to prove its claims by the preponderance of the credible evidence, and that the sentence imposed was excessive and unjust under the circumstances. After the filing of the Appeal, Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control, issued an Order, dated July 17, 1979, staying the suspension pending the determination of the Board. The matter was set down for a de novo appeal pursuant to N.J.S.A. 33:1-22 and N.J.A.C. 13:2-17.6, and was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Hearing was scheduled for November 20, 1979, before Administrative Law Judge Joseph Rosa, Jr.

Prior to the hearing date, by letter dated October 23, 1979, Respondent, pursuant to the provisions of N.J.A.C. 13:2-17.8, submitted the transcript of the proceedings and stated that it intended to rely upon the transcript at the hearing of the Appeal. Respondent also reserved the right to produce additional evidence both oral and documentary at said Appeal.

At the hearing both the attorney for the Respondent and the attorney for the Appellant indicated that both sides would rest on the transcript below pursuant to N.J.A.C. 13:2-17.8. At the request of the Administrative Law Judge, Respondent submitted, as a post-hearing exhibit, a copy of the Disciplinary History of the Appellant licensee, J.T. Key Club. Both the Resolution of the Respondent dated July 12, 1979, and the prior Disciplinary History are attached hereto.

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The relevant testimony contained in the transcript is as follows:

Testifying initially on behalf of the Respondent Board was Officer Michael Gentile, a member of the Paterson Police Department. He testified that: On Monday, June 11, 1979, at approximately 4:30 A.M. he was on routine patrol in the City of Paterson in a patrol car when he was detailed to 295 Union Avenue, the location of the J.T. Key Club. Upon his arrival at the aforementioned address, he knocked on the door and it was answered by a Cathy De Carlo and a Freeman D. Simpson. The owner of the premises, Joan Tobias, was not present. Upon entering the tavern he noticed that the barroom was in "shambles", there being broken glass, money, and chairs strewn about the floor. The Officer began an inquiry of the two people who were present, both of whom he felt were under the influence of intoxicating liquor. He also noted that there were two freshly opened bottles of beer on the bar. After a short period of time, Joan Tobias, the owner, entered the tavern and began a conversation with Officer Gentile. Mrs. Tobias stated there had been a disturbance in the bar created by a Puerto Rican male by the name of Jose. She told the Officer that she had just walked him home. She further stated that the two people speaking to Officer Gentile were not employees of hers, but were watching the premises while she escorted Jose home. Officer Gentile also testified that Mrs. Tobias would say nothing about the altercation that had happened. All she would say was that there was a disturbance involving a man named Jose. He characterized her attitude as generally "uncooperative" and couldn't get any information as to where the person who had begun the disturbance was or who else was involved. He felt that Mrs. Tobias also had been drinking, but felt she was still in control of her capacities.

Under cross-examination, Officer Gentile admitted at no time did he actually see Mr. Freeman or Miss De Carlo drinking intoxicating beverages at the J.T. Key Club. He also admitted that he did not see any money on the bar, and the only money that he saw was lying on the floor among the other debris.

Under redirect examination by the Respondent Board, the Officer stated that he had asked Mrs. Tobias for the last name of the man named Jose but she would not give him an answer.

The Officer also stated that Miss Tobias had blood on her face but she would not give him an explanation as to how it got there.

Joan Tobias, the licensee, testified on her own behalf. She stated that she had closed her premises at 2:35 A.M. on the morning in question. She claimed that Mr. Simpson and Miss De Carlo had been at the tavern for the purpose of taking her home. She claimed that Mr. Freeman was outside the bar in a car while Miss De Carlo was waiting inside for her. She then asked Miss De Carlo to bring Mr. Freeman inside the premises to help with the cleaning up when the man by the name of Jose came in and asked for a drink. In response to his request, Miss Tobias said, "I am closing." She claims that he insisted on having a drink and after she again told

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him that she was closed he started "swinging his arms around and knocked over some bottles". Upon hearing the noise, Mr. Freeman and Miss De Carlo came in and Miss Tobias told them to leave everything alone, and that she would take care of it with Jose. She then claims she told Jose she was going to take him home, even though she did not know where he lived, and walked with him to the "Dunkin Donuts". She stated that her nose had been bleeding from the incident. She never did ascertain where Jose lived, but left him at the "Dunkin Donuts" after buying him coffee. When she returned to the bar, the Paterson Police had already arrived. She claims that she was very cooperative and answered all their questions. She said that none of the officers accused her of being uncooperative at the time of the investigation. She also said she never offered Mr. Simpson any consideration for helping her to clean up nor did she ever offer him a drink. She concluded by saying that there were no alcoholic beverages served at her tavern at 2:30 on the morning in question.

Under cross-examination, she testified that her nose became bloody as a result of the incident, but claims it was done by Jose inadvertently when he knocked over the glasses which were on the bar. Jose had been in her tavern before and she had served him on previous occasions, but not that evening. She claimed the entire incident took about ten minutes. She stated she never needed help to get Jose out but he walked out of his own volition when she asked him to. She walked with him to the "Dunkin Donuts" and when she got him there, she bought him coffee. She remained at the "Dunkin Donuts" between twenty minutes and a half hour and then returned to her tavern. Jose remained at the "Dunkin Donuts". Tobias testified that she told Officer Gentile everything that happened that evening and told him about Jose. She did not give him Jose's last name because she did not know it and told Officer Gentile that she would give him the name if she knew it. Miss Tobias feels she answered all Officer Gentile's questions plus any other questions that the other police officers investigating the incident asked to the best of her knowledge.

The next witness on behalf of the licensee was a Stella Crabtree. Miss Crabtree testified that: She lives at 293 Union Avenue which is the apartment next door to the J.T. Key Club. Her bedroom window is right next to it, and when she heard a noise coming from the club that morning, she called the Paterson Police Department. They did not respond the first time she called and she had to call a second time. After the second call, she went outside where she saw Miss Tobias and told her that she called the Police because she had heard noise in the tavern. About an hour elapsed between the two phone calls. She did not notice any blood or bruises on Miss Tobias' face when she was speaking to her.

The final witness testifying on behalf of the licensee was a Raymond Simpson. Mr. Simpson stated that: He lives at 455 Paulison Avenue in Passaic. At three o'clock on the afternoon before the incident he had gone to the J.T. Key Club and had a few drinks.

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He walked out of the bar and went to sleep in his car which was parked across the street from the bar for about two or three hours. He was awoken by Miss Tobias who told him to come in and give her a hand cleaning up the establishment. He went in and while he was there, a Puerto Rican male entered and said he wanted a drink. He offered to assist Miss Tobias with the gentleman, but she told him that she could handle it herself and she would get him out of the place. He did not mention any disturbance. After Miss Tobias left with the Puerto Rican male, he put a stool against the door to prevent anyone from coming in. He heard someone banging on the door and it turned out to be the Paterson Police. He never had anything to drink between the period of time when Miss Tobias left the premises and when the Police arrived, nor did he see Miss De Carlo have anything to drink in this interim. He told the Police that the owner had left and she would be right back. The Police told him to get out of the bar and he went out and waited in the street until Miss Tobias came back. He did not see the actual incident when Jose broke the bottles and bloodied Miss Tobias' nose.

After carefully reviewing all of the evidence and testimony contained in the transcript, I FIND:

1. Appellant is the holder of plenary retail consumption license No. 1608-33-157-001, for premises located at 295 Union Avenue, Paterson, New Jersey.
2. On June 11, 1979, at approximately 4:30 A.M. members of the Paterson Police Department were called to investigate an alleged disturbance at the aforesaid licensed premises.
3. Upon arrival at the premises known as the J.T. Key Club, the Paterson Police discovered that the Tavern was still open in violation of Section 2:4-2, Title 2, Chapter 4 of the Revised Ordinances of the City of Paterson.
4. Further investigation revealed that an altercation and/or disturbance of some type had recently occurred at the premises.
5. The evidence of the altercation and/or disturbance consisted of the inside of the premises being partially damaged, with glasses, bottles and furniture strewn on the floor.
6. The owner of the premises was not present at the time of the entry of the Paterson Police.
7. The owner of the premises and the holder of the license, a Joan Tobias, returned to the Tavern a short period of time later.
8. Miss Tobias claimed the damage had been done by a patron who refused to leave the premises after he was told that he would not be served an alcoholic beverage.
9. Also present at the premises prior to the return of the owner were two alleged patrons and acquaintances of the owner who



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were apparently intoxicated.

10. During the investigation the Paterson Police noted freshly opened bottles of beer on the bar.
11. The owner of the premises denied knowing the full name of the patron who had caused the damage in the premises.
12. The patron who did the damage, although known to the owner, did not testify at either the local hearing or the appeal.
13. Amidst the debris on the floor was an uncertain amount of money.
14. The Tavern owner was injured as a result of the incident which took place on the date in question.
15. The door to the premises was not locked when the Paterson Police arrived.
16. The owner was only partially cooperative with the Paterson Police.

In view of the foregoing, I CONCLUDE that Respondent has proven its case by a preponderance of the believable evidence. Violations of Alcoholic Beverage Control Law may be criminally prosecuted but disciplinary proceedings are civil in nature. Guilt, therefore, need not be proved beyond a reasonable doubt but only by a preponderance of the believable evidence. Mazza v. Cavicchia, 28 N.J. Super. 280 (App. Div. 1953), rev'd on the grounds 50 N.J. 498 (1954).

The primary responsibility for the enforcement of Alcoholic Beverage Control Law pertaining to retail licenses rests with the local municipalities. N.J.S.A. 33:1-24, which have the power to conduct disciplinary proceedings and to suspend or to revoke retail licenses, N.J.S.A. 33:1-31. The local authorities are vested with a high responsibility and wide discretion and are to have as their principal guide the public interest. N.J.S.A. 33:1-19,24. See also Rajha Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955), and Blank v. Borough Council of Magnolia, 38 N.J. 44 (1962). In an appeal from the actions of the local authority, such as the present matter, the Appellant must show an unreasonable action on the part of the issuing authority which constitutes a clear abuse of discretion. The burden of proof in establishing that the action was erroneous rests with the Appellant, N.J.A.C. 13:2-17.6, and the decision of the local issuing authority will stand so long as its exercise and judgment was reasonable. Fanwood v. Rocco, 33 N.J. 404 (1960). Their decision ought to be accepted absent a clear abuse or unreasonable or arbitrary exercise of their discretion. Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark, 55 N.J. 292 (1970), Nordco Inc., v. State, 43 N.J. Super. 277 (App. Div. 1977). In reference to the charges

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brought in the present matter:

As to Charge No. 1 - Having premises open after hours, I CONCLUDE that the Appellant has not met the burden of establishing that the action of the issuing authority was erroneous and should be reversed, as required by N.J.A.C. 13:2-17.6. In appraising the factual picture presented here, the credibility of the witnesses must be weighed. The choice of accepting or rejecting the testimony of the witnesses rests with the local authority and where that choice is reasonably made, it is conclusive on appeal. c.f. Palon v. Board of A.B.C. of the City of Paterson, 112 N.J. Super. 436 (App. Div. 1970). The testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnulo v. Bonnet, 60 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (1961). Using this principle as a guide, I have evaluated the testimony produced both on behalf of the Respondent and the Appellant. The Appellant and its witnesses gave one presentation of the incident and the investigating officer of the Paterson Police gives one entirely different. The decision therefore in this matter rests entirely on the acceptance or rejection of either the Appellant's or the Respondent's testimony. The key inquiry is as to which relevant evidence a reasonable mind might accept as adequate in support of a conclusion. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, (1951). I am persuaded that the testimony of the Paterson Police Officer was forthright, concise, credible, and fully supportive of the charges. In contrast I FIND the testimony of the witnesses for the licensee, including that of the licensee herself, to be vague, inconsistent, and at times incredible. This is readily understandable because the licensee's witnesses, did not engage in the activities testified to on the morning in question, with any foreknowledge that they would be required to testify with respect thereto, and it further appears that they all to one degree or another had been drinking intoxicating beverages, which would tend to cloud their recollections of the events which transpired. The Paterson Police Officer, on the other hand, was assigned to an investigation, and it was only natural that his observations should be specifically directed to the full scope of the investigation which occurred on the date in question. Consequently, the testimony of the Police Officer was positive in nature, clear, and credible. I CONCLUDE that the testimony of Joan Tobias as to what exactly happened in her premises on the date in question to be totally beyond belief. That a licensee would stand by while a patron made a shambles of her premises, and then escort him home, leaving her premises virtually unattended at 3:00 A.M. in the morning, in a modern urban environment strains credulity. I similarly CONCLUDE that the testimony of Ralph Simpson is also beyond belief. His testimony is unclear as to where he was during the incident and what exactly happened at the time of the incident. When the Police arrived the entrance door was not completely locked and he, along with Miss De Carlo, both of them appeared to be under the influence of intoxicating liquor, were inside the premises. Both gave the explanation

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of watching the premises while Miss Tobias escorted the unruly patron to his home. The only defense of the premises against possible invaders appears to have been the placing of a barstool against the door. I therefore CONCLUDE that the Respondent Board was correct in accepting the disinterested testimony of Officer Michael Gentile. Therefore, with reference to the Charge No. 1 brought in this matter - Having premises open after hours: I CONCLUDE that the Appellant has not met the burden of establishing that the action of the issuing authority was erroneous and should be reversed as required by N.J.A.C. 13:2-17.6.

As to Charge No. 2 - Allowance of the premises to become a nuisance: I CONCLUDE that the Appellant did allow its place of business to become a nuisance in violation of N.J.A.C. 13:2-12.6. There is ample testimony that the premises were in a shambles when the Paterson Police entered, and that the licensee herself was bloody from whatever event took place in the premises. While there was no direct observation of the brawl and/or altercation that took place by the Paterson Police, the evidence thereof was ample. There were glasses, bottles, change, and other miscellaneous items strewn throughout the premises and the licensee herself bore visible evidence of the physical violence that took place in the premises. There was no indication of what exactly happened because the only eyewitnesses thereto, who was produced was the licensee herself who denied that it was much of an event. However, the damage speaks for itself. It should be further noted that the licensee never called the man named "Jose" to the stand to testify as to the alleged incident. Failure to call witnesses who may have relevant testimony and who are available to testify creates an adverse inference; that is, if they are called they could not have truthfully contradicted the testimony of the opposing party's witnesses and their testimony would have been unfavorable to the licensee. Yacker v. Weiner, 109 N.J. Super. 351, Aff'd 114 N.J. Super. 526 (App. Div. 1970); Hickman v. Pace, 82 N.J. Super. 43 (App. Div. 1966); and O'Neil v. Bilotta, 18 N.J. Super. 82, aff'd 10 N.J. 308 (1952). See also State v. Clawans, 38 N.J. 162 (1962). In the present matter, the best witness available as to what happened would have been Jose, however, he was never produced at either the local or this de novo hearing. I CONCLUDE the licensee's assertion that she did not know his last name, yet she knew he lived in the neighborhood and knew who he was to be incredible. I THEREFORE CONCLUDE that the action of the local issuing authority as to the second charge is AFFIRMED.

As to Charge No. 3, the Charge was dismissed by the Respondent at the local level. In regard to this charge, the Paterson Police conducted a routine questioning of the licensee in order to determine the cause of an alleged brawl which took place at her establishment. This sole issue is whether or not the licensee hindered the investigation conducted by the Paterson Police Department. c.f. In Re Parnelli's Hotel and Tavern, Inc., Bulletin 2185, Page 7. In the present case, it appears that the Respondent felt that the licensee did not actively hinder the investigation, but her conduct was one of "non-facilitation". I CONCLUDE that the Respondent was correct in this regard and the decision of the local authority is

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therefore AFFIRMED as to Charge No. 3.

As to Charge No. 4, I similarly CONCLUDE that the Appellant has not met her burden as required by N.J.A.C. 13:2-17.6. The testimony of the Paterson Police indicates that there was a manner of service and delivery for consumption of alcoholic beverages at the time and date in question which was in violation of the local ordinance. The decision of the local board as to Charge No. 4 is therefore AFFIRMED.

The issue remains as to the extent of the punishment or penalties meted out by the local board. The decision of the local issuing authority will stand so long as its exercise or judgment and discretion was reasonable. Fanwood v. Rocco, 33 N.J. 404 (1960). I CONCLUDE that the penalties assessed by the local board in this case were reasonable and therefore will be allowed to stand, to wit: A total suspension of twenty-five (25) days.

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

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, my Initial Decision in this matter and the record in these proceedings.

## 2. APPELLATE DECISIONS - ELJIM, INC. v. BUENA.

#4254  
Eljim, Inc.,  
t/a Eljim's,

Appellant,

v.

Borough Council of the  
Borough of Buena,

Respondent.

ON APPEAL

CONCLUSIONS

AND

ORDER

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Lipman, Antonelli, Batt & Dunlap, Esqs., by Philip L. Lipman, Esq.,  
Attorneys for Appellant.  
Rocco Tedesco, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Borough Council of the Borough of Buena (Council) which, by Resolution dated June 12, 1978, found appellant guilty of four violations, viz., (1) permitting brawls and allowing the licensed premise to be conducted as a nuisance; (2) permitting the service of alcoholic beverages beyond permitted hours, in violation of the local hour's regulation; (3) hindering an investigation; and (4) failing to provide for an employee to be registered on required employee identification form. With the exception of the alleged ordinance violation, the remaining charges were alleged to be violation of Rules 5, 7, 35 and 16 of State Regulation No. 20 (now N.J.A.C. 13:2-23.6, 13:2-23.30 & 13:2-23.13).

In consequence of the guilty finding, the appellant's Plenary Retail Consumption License No. 0104-33-005-001 for premises at Brewster and Harding Highway, Buena, was suspended for thirty-one days, the effective dates of the suspension were stayed by Order of the Director of this Division on July 7, 1978, pending determination of this appeal.

A de novo hearing in the Division was scheduled pursuant to N.J.A.C. 13:2-17.6, wherein the parties could introduce evidence and cross-examine witnesses. However,

in lieu of such hearing, the parties stipulated that the transcripts of the several hearings before the Council were to be the substance of the evidence introduced by both parties, in accordance with N.J.A.C. 13:2-17.8.

Although of no moment to this appeal, the three transcripts submitted embraced three hundred and seventy pages. They dealt with eight charges only four of which resulted in "guilty" findings. Thus, the testimony related to the guilty findings here appealed are interlaced with testimony relevant to the "not guilty" findings.

- I -

The first charge upon which appellant was found guilty i.e., "permitting or suffering brawls, acts of violence, disturbances, unnecessary noise upon the licensed premises and allowing or suffering the licensed premises to be conducted in such manner as to become a nuisance, in violation of Rule 5 of State Regulation No. 20"(now N.J.A.C. 13:2-23.6) was predicated upon testimony relating to incidents which occurred on February 11, March 5, March 12, October 16 and November 6, 1977. On these dates, the record merely indicated that an incident occurred. The testimony was insufficient to support that portion of the charges concerning brawls or acts of violence. The record is devoid of proof that any acts of violence resulted from failure of the licensee or its agents to prevent them.

However, on the nuisance aspect of the charges, the testimony of Sgt. Frank A. Grasso of the Buena Police Department, as well as officers of the Vineland Police Department, Morgan, Montelone and DiBiase, establish that a noisy occurrence did take place sometime about the closing hour (3:00 a.m.) at appellant's premises on February 11, 1978.

The testimony of Patrolman Botbyl of the Buena Police Department recounted car activity adjacent to the appellant's premises on or about four o'clock in the morning of March 5th. Officer Panichelli corroborated Officer Botbyl's testimony.

On March 12th, Patrolman Barry Ballurio of the Buena Police Department arrived at the appellant's premises about three o'clock in the morning, and found numerous cars in the

parking lot and persons within the licensed premises. Although there was insufficient evicence upon which to support the charge that after-hours service of drinks occurred, the degree of activity within the premises was certainly in excess of what should have been.

Buena Chief of Police Joseph Santagata testified concerning his investigation of the licensed premises on October 16 when he observed a male exiting the premises carrying a bottle of beer and also noted that twenty people were sitting at the bar. He recounted that, on November 6, the police responded to a call that a fight was in progress; however, upon their arrival the participants had departed.

Two neighbors who lived in a house adjoining the licensed premises, Julie and Louis Marchesano, testified at length concerning the disruptive effect by the patrons of appellant's establishment. Excessive noise in the early morning hours, constant litter, destruction of their property by thoughtless patrons and problems of this nature had been related both to the appellant, as well as the police. The appellant did little to cure the alleged constant problems.

In defense of the charges, one of the officers of the appellant corporation, Christian Jiminez, Jr., testified that, on none of the occasions recounted by the police did anything occur which could have been prevented by the licensee. As to the noise, parking infractions and litter, he is constantly warning his patrons to be quiet. He notices them to park their cars correctly, and is building a fence to prevent destruction and litter. Michael DiGiorgio, a former employee admitted that littering is a problem and that management must be on constant guard to prevent patrons from leaving with glasses.

I find that the proofs amply support the charge that appellant maintained a nuisance as encompassed in that charge and, that the ten day penalty imposed was reasonable, and, indeed, quite modest.

- II -

The second charge upon which appellant was found guilty was "permitting service of alcoholic beverages, after hours,

in violation of Ordinance No. 7." The applicable Ordinance provides only that "no licensee shall sell, serve, deliver or allow, permit or suffer the sale, service of delivery of any alcoholic beverage, or allow consumption of any alcoholic beverage on the licensed premises . . . between the hours of 3:00 a.m. and 7:00 a.m.

There is no requirement within the Ordinance that the licensed premises must be closed or cleared of patrons during the prohibited hours. In consequence of the absence of such Ordinance provision, the proofs required to substantiate charges as made, must show that the appellant has sold, served, delivered or permitted consumption of alcoholic beverages after hours.

The testimony of ABC Agent W., who was assigned to conduct an investigation by the Division, established only that he sensed the odor of alcohol in a glass previously emptied by a patron. There was no sale or consumption of alcoholic beverage observed by the ABC Agent, which in accordance with investigatory procedure, would have resulted in the confiscation of the glass or bottle for laboratory analysis.

None of the additional evidence supplied by police officers or the other witnesses affirmed any actual sale or consumption of specific alcoholic beverages. Emphasis has been laid upon the ample evidence of numerous persons about the licensed premises after the required closing hour; however, such conjecture has been successfully rebutted by testimony of Jiminez and DiGiorgio who related the clean-up procedures following closing hour.

I find, as to this charge, that appellant has sustained its burden of establishing that the charge was not proven with a preponderance of the credible evidence. Therefore, the licensee should be found not guilty of this charge, which I recommend.

- III -

The charge relating to hindering an investigation resulted from a visit to the premises by Buena Police Officer Officers Botbyl and Panchelli on March 5, 1978 about 3:40 a.m. Despite their observation of numerous cars parked in the



parking lot adjacent to the licensed establishment, they were unable to obtain entrance and their attempts to enter were frustrated. They had observed someone inside who laughed at them and later observed several people enter the premises.

One of the corporate stockholders of appellant, Jiminez, testified that on that date and time, he was not on the premises and had no record as to who was there, if anyone. He could not refute the testimony of the officers, but assured that had he been there, he would have opened the doors for the police officers without hesitation.

Thus, absent any proof to the contrary, law enforcement officers were denied access by parties present within licensed premises and such constitutes "hindering." The officers have an absolute right of access to inspect or investigate licensed premises. N.J.S.A. 33:1-35. I recommend a finding of guilty of the charge.

- IV -

Relative to the charge of failure to list an employee's name on the required E141 Form, said employee readily admitted the absence of his name on that form, hence the finding of guilt was presumptive. The suspension of one day was sufficiently minimal.

It is well established that a licensee is responsible for conditions and incidents that exist both inside and outside the premises which are caused by its patrons. McFadden's Lounge, v. Div. of Accoholic Beverage Control, 33 N.J. Super. 61, 62 (App. Div. 1954); Mitchell's Cafe, Inc. v. Lambertville, Bulletin 1928, Item 1; Conte v. Princeton, Bulletin 139, Item 8.

Despite the vigorous argument of the Council, the activities recited in the very lengthy hearings did not clearly result in the specific violations alleged. Certainly the tonnage of annoyances which the police and the neighbors were subjected to, did obviously constitute a continual nuisance. However, the investigations on each of the incidents was incomplete; testimony was manifestly absent respecting the specifics needed to enforce a charge. Only the nuisance

and hindering charges were proven. The balance of the charges were not supported by sufficient credible evidence, and, by necessity, must be reversed.

The attorney for the Council has urged a finding by the Director that the appellant be found guilty of permitting gambling upon the licensed premises, although the Council made no such finding. The de novo character of an appeal has been misconstrued. The appeal is a review of specific acts of the issuing authority. Here the Council found the appellant not guilty in respect to the initial charge of permitting gambling. The Director will not adjudicate an issue not appealed in this matter and subject to claims of collateral estoppel or res judicata.

The penalties assessed against the appellant are extremely modest and I recommend that the actions of the Council in respect to charges (1) nuisance, (3) hindering and (4) failure to have E141 form complete, be affirmed and that charge (2) "hours" be dismissed. In consequence, I further recommend that the Order of the Director staying the imposition of the suspensions pending this appeal be vacated and that the license herein be suspended for a period of twenty-one (21) days. I further recommend that the appellant not be permitted to pay a fine in lieu of such suspension.

It is finally suggested to appellant that it should take no solace from the findings herein of not guilty to one of the charges. The conduct of appellant amply justified disciplinary proceedings. In the future the Council may be less lenient concerning the negative conduct and attitude of the licensee, when the subject license comes up for renewal.

#### CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the respondent pursuant to N.J.A.C. 13:2-17.14.

In its Exceptions, the respondent argues that sufficient credible evidence exists in the record before the Borough Council to support a finding of guilt to a charge that the appellant violated the municipal hours regulation. The record, which was submitted pursuant to N.J.A.C. 13:2-17.8, clearly supports the factual finding that persons other than the appellant's employees were on the licensed premises after the permissible hours of sale. The Hearer so found.

However, the Hearer incorrectly applied the Divisional policy to these facts. "Hours" ordinances have been uniformly interpreted to mean that if there is anyone (of the public) found on said premises after the permissible hours of sale, a violation exists. The closing-of-premises provisions means that all members of the public must be excluded. See Jay Bee's Pub, Inc. v. Irvington, Bulletin 2277, Item 1; Re Lahuta, Inc., Bulletin 2277, Item 2; Middle Earth, Inc. v. Clifton, Bulletin 2276, Item 2.

Therefore, I find respondent's Exception to be meritorious and I reject the recommendation of the Hearer. I shall affirm the Borough Council's finding therein.

Respondent also takes Exception to the Hearer's failure to reconsider, at the de novo hearing, the Borough Council's finding of "not guilty" to a charge it brought alleging a violation by appellant of N.J.A.C. 13:2-23.7 (gambling).

It is a novel, but inherently inconsistent theory, that the respondent can now seek to impugn on appeal its own actions in finding the appellant "not guilty" because the appeal in the Division is de novo. Respondent misconceives the nature of my appellate jurisdiction and a de novo appeal.

A de novo appeal does not constitute a relitigation of the entire matter. Rather, it permits the expansion of the record below; cures procedural and technical defects when required; and provides the Director with the opportunity to review the factual findings, and the reasonable inferences which may be drawn therefrom, to ascertain if sufficient evidence exists to justify the decision of the local issuing authority. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957). Cino v. Driscoll, 130 N.J.L. 535 (E. & A. 1943). The de novo nature of an appeal is a tool to assist in a full, fair and complete adjudication. It is not a standard of review.

In appeals from the action of the local issuing authority pursuant to N.J.S.A. 33:1-31, the standard of review is whether sufficient competent evidence exists and a proper application of the law has been made, as judged from the record before the Director, to support the finding that a licensee is guilty of the charged offense by a preponderance of the credible evidence. Fanwood v. Rocco.

59 N.J. Super. 306, 317 (App. Div.) aff'd 33 N.J. 404 (1960). The only issues on this appeal are those raised by the appellant in its Petition of Appeal. "Not Guilty" findings are not subject to relitigation in an appeal. Therefore, I reject this Exception as without basis in law.

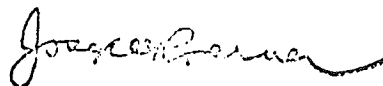
Having carefully considered the entire record herein, including the transcripts of the testimony, the Exhibits, the legal memoranda of the parties, the Hearer's Report and the written Exceptions filed thereto by the respondent, I concur in the findings and recommendations of the Hearer, except as heretofore noted, and adopt them as my conclusions herein. Thus, the entire action of the Borough Council, including the thirty-one (31) days suspension, shall be affirmed,

Accordingly, it is, on this 5th day of February, 1980,

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

ORDERED that my Order of July 7, 1978, staying the subject suspension pending determination of the appeal, be and is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0104-33-005-001 issued by the Borough Council of the Borough of Buena for premises Harding Highway and Brewster Road, R.D. 1, Vineland be and the same is hereby suspended for thirty-one (31) days commencing 3:00 a.m., Tuesday, February 12, 1980 and terminating 3:00 a.m., Friday, March 14, 1980.



JOSEPH H. LERNER  
DIRECTOR