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

BULLETIN 2213 January 27, 1976

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
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1. APPELLATE DECISIONS - RIVERA v. JERSEY CITY.

Wilfredo Rivera, t/a Willie's Tavern, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent.	On Appeal CONCLUSIONS AND ORDER

Jesse Moskowitz, Esq., Attorney for Appellant
Dennis L. McGill, Esq., by Bernard Abrams, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action of the Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which, by Resolution of March 17, 1975, imposed a suspension of appellant's plenary retail consumption license, for premises 138 Wayne Street, Jersey City, for fifteen days effective April 24, 1975, in consequence of finding the appellant guilty of a charge alleging that the licensee, on December 11, 1974, permitted persons other than employees or agents, upon the licensed premises during prohibited hours, in violation of Chapter 4, Section 4-13, of the Municipal Code of Jersey City.

Upon the filing of the appeal, an order was entered by the Director of this Division on April 23, 1975, staying the Board's order of suspension pending the determination of this appeal.

Appellant alleges that the action of the Board was erroneous because its decision was contrary to the weight of the evidence, and that no legal evidence was adduced in support of the charge. The Board, in its answer, denies that its action was erroneous or contrary to the weight of the evidence, and that there was adequate evidence to substantiate the charge herein.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to present evidence and to cross-examine witnesses.

In support of the action of the Board, Police Officers John R. Ragauckas and Eugene W. Halligan, of the Jersey City Police Department testified concerning their visit to appellant's premises on the early morning hours of December 11, 1974.

While on patrol duty near to appellant's premises, Officer Halligan noticed the time to be after two o'clock in the morning. As they were in front of the premises, they observed activity within, stopped their vehicle opposite the front door, got out therefrom and observed the interior through a front window. They saw about a dozen persons within, some at the bar and others milling about. Officer Halligan continued observation while Officer Ragauckas made radio contact with Police Headquarters and obtained a time-check. They were orally informed the time to be 2:25 a.m. As an apparent "hours" violation was in progress, assistance of a superior officer was requested.

Obtaining entrance, Officer Halligan announces to the patrons that they must depart, which they began doing. He requested of the bartender (later identified as appellant, Wilfredo Rivera) the production of the liquor license. Officer Ragauckas was on the sidewalk near the front door as the patrons filed out. Lieutenant George Andrews arrived and joined Halligan.

As Rivera, who was at the end of the line of departing patrons, was about to exit premises, Officer Halligan reminded him that he was directed to produce the license, whereupon Rivera returned to the bar and exhibited the license. Thereafter, both the officer and the appellant departed and the appellant locked the front door.

The dozen patrons who had emerged remained in front of the establishment and Officer Ragauckas, who emerged after checking the interior of the premises, attempted to get the patrons to move along and not remain congregated in front.

Appellant testified that he was behind the bar on the evening in question and, as was the custom, began preparation for closing about one-thirty a.m. Very shortly before two o'clock, he was standing by the front door awaiting his patrons to depart, as some were doing, when Officer Halligan approached him. There were about ten patrons on the exterior at that time and only one remained, a drunken patron attempting to operate the cigarette machine. When that patron left, he locked the front door and locked the iron gate just as another officer appeared (presumably the superior officer summoned by the officer's prior call), and he was required to reopen the gate and front door. He reentered with the officers and displayed his liquor license.

Officer Ragauckas who remained on the outside became involved in an argument with patrons so that, when the police finally left the area, some of the patrons were still present on the sidewalk.

Lourdes Lugo, the barmaid, testified that she was employed in appellant's premises on the evening of the date herein, and she recalled that at 1:30 a.m. she flicked the lights to alert the patrons of "last call", indicating that only one more drink would be served. At 1:45 a.m. she began cleaning up and by then had most of the bar cleaned. At 1:55 a.m. the appellant was alongside the front door ushering patrons out; there were no more than two or three persons in the premises, including herself, when Officer Halligan arrived at the door.

As she emerged from the premises followed by the appellant, who locked the door and gate, the officer made him reopen it and reenter. The officers ordered her to move which infuriated her because the appellant was to have driven her to her home, and she was waiting for him to do so.

Two patrons of appellant's establishment, William Delgado and Felix Martinez testified that they had departed therefrom at 1:45 and 1:50 a.m., respectively, and both were across the street when the police car arrived at the premises at 1:55 a.m. Delgado recollected that the second police car arrived at about 2:10 or 2:15 a.m. Martinez corroborated the time sequence as outlined by Delgado.

At the conclusion of rebuttal testimony by the aforenamed police officers, their report made to their commanding officer following the incident was admitted into evidence. That report, copied from the files of the Jersey City Police Department indicated that on December 11, 1974 at 0225 hours (2:25 a.m.) the officers found twelve patrons:

> "...at the bar most of whom were still imbibing. Above bar being tended to at time by one Wilfredo Rivera license #C-98 trading as Willies Tavern. Premises emptied at this time in presence of LT. Andrew (Car 211) and above information secured by U/S...."

Having observed the testimony and demeanor of the witnesses during their testimony, I am persuaded that the account given by police officers was forthright, believable and truly reflected the situation that existed at the time. Despite vigorous cross examination, the officers' testimony remained unshaken. Obviously they had reason to note the exact time before entering the tavern, and that time was noted by call for time verification to the police headquarters.

On the other hand, I do not believe the testimony of the appellant or his witnesses because it is against the logic of the presented facts. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1946); Gallo v. Gallo, 66 N.J. Super 1 (App. Div. 1961).

By the terms of the local ordinance, it is mandated that anyone within the premises (of the public) after closing hours gives rise to a violation. As used in this ordinance, the closing of premises provisions means that all members of the public must be excluded. Cf. Mama Ventura, Inc. v. Voorhees, Bulletin 1498, Item 1; Town House, Inc. v. Montclair, Bulletin 792, Item 3.

Appellant argues that, because he had had a recent license suspension prior to this incident, on a similar charge, he was particularly alert to have his premises closed and locked by the closing hour. Thus, he says that he was locking the front door and gate, when the police officer was alongside of him and who thereupon required him to reopen both gate and lock.

From the time he began herding the patrons to the door, he made no effort to check the lavatories and see that the premises were secured after the last patrons departed. He simply followed the last customer out the door and locked it behind him; all this just at 2:00 a.m. While all of this was occurring, the patrons were congregating outside, some in an admittedly drunken condition; and they were arguing with the police.

Appellant admitted that there were between twenty and twenty-five patrons within the premises at 1:30 a.m. He further admits that it takes between twenty-five minutes or one-half hour to "get everybody out". Lastly he admitted that nine patrons emerged from his premises at two a.m.

My examination of the facts and the applicable law generates no doubt whatsoever that the charge was established by a preponderance of the believable evidence. These proceedings are civil in nature, not criminal, and require that the charge be established by a fair preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Kravis v. Hock, 137 N.J.L. 252 (1948).

I conclude, therefore, that the appellant has failed to sustain the burden of establishing that the Board's action was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15. Cf. Gach v. Irvington, Bulletin 2058, Item 1.

It is, accordingly, recommended that an order be entered affirming the Board's action, dismissing the appeal, vacating the Director's order staying the Board's order of suspension pending the determination of this appeal, and fixing the effective dates for the suspension of license heretofore imposed by the Board, and stayed by the said order.

Conclusions and Order

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

Having carefully considered the entire reocrd herein, including the transcript of the testimony, the exhibits and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of November 1975,

ORDERED that the action of respondent, Board of Alcoholic Beverage Control of the City of Jersey City, 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 dated April 23, 1975, staying the suspension imposed by the Board pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-98, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Wilfredo Rivera, t/a Willie's Tavern, for premises 138 Wayne Street, Jersey City, be and the same is hereby suspended for fifteen (15) days commencing at 2:00 a.m. on Wednesday, November 26, 1975 and terminating at 2:00 a.m. on Thursday, December 11, 1975.

Leonard D. Ronco
Director

2. APPELLATE DECISIONS - KEEGAN'S PLEASANT VALLEY INN v. FRANKLIN.

Keegan's Pleasant Valley Inn, t/a J & B Bar,	)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS and ORDER
Township Committee of the Township of Franklin,	)	
Respondent.	)	

Novack & Trobman, Esqs., by David Novack, Esq., Attorneys for Appellant
Albertson & Walker, Esqs., by Jeffrey G. Albertson, Esq., Attorneys 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 Township Committee of the Township of Franklin (hereinafter Committee) which by resolution dated July 21, 1975, denied appellant's application for renewal of its Plenary Retail Consumption License C-3, for the 1975-76 licensing period for premises located on Southwest Delsea Drive, Franklin Township. Previous thereto, by resolution adopted on June 21, 1975, the Committee had granted renewal of all liquor licenses except that of appellant.

In its petition of appeal, appellant alleged that the Committee's action was erroneous, unreasonable and arbitrary.

The Committee, in its answer, denied the substantive allegations contained in appellant's petition of appeal and defends that its action was justified for the reasons stated by the Committee after it adopted a resolution of denial at its meeting of July 21, 1975. The reasons for denial for the 1975-76 renewal were as follows:

1. The many objections by the residents of the area.
2. No building on the premises.
3. Many problems occurred at the time of the last operation year.
4. The application not properly filed as the building plans were not complete.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

During the course of the hearing, a copy of the minutes of the meetings held by the Committee on June 16, 1975, July 7, and July 21, were admitted into evidence, together with a copy of appellant's application for the renewal of its license. Additionally, a copy of the Committee's resolution renewing all licenses in that municipality except for appellant's, a petition signed by fifty-six persons registering objection to the renewal of appellant's license, a copy of letter of appellant's counsel to the Township Clerk, with elevation sketch of proposed building attached, twenty "form-letters" sent in by individuals objecting to the proposed building, thirteen color snapshots of appellant's property and of the adjacent premises were also admitted into evidence.

In behalf of the Committee, the municipal clerk identified the relevant minutes of meetings held by the Committee and the petitions and letters protesting the renewal of the license. A distillation of the testimony of the Director of Public Safety and the Mayor of the Township reveals that appellant operated a tavern until its premises were destroyed by fire in October 1973. For a period of time immediately preceding the fire, the premises were operated by the then-owner of the corporate stock, in a manner highly criticized by the Director of Public Safety and by the Mayor.

They asserted that they had received complaints of improper parking, loud noises and general rowdyism. Nevertheless, the Committee did not institute disciplinary proceedings against appellant and did renew its liquor license for the 1974-75 licensing period.

Bette D. Fisher testified that her residence adjoins the subject premises. She purchased the property in May 1974, which was subsequent to the time that the tavern was destroyed by fire. It was her impression that the premises would no longer be used as a liquor outlet. On the one occasion that she observed the tavern operating, approximately one year prior to purchasing her present residence, the witness asserted that it [the tavern] was "literally a dive", "noisy", "doors were open" and cars were parked "along the highway".

The witness explained that she prepared the petition opposing the renewal of the subject license and contacted the signatories thereof.

In behalf of appellant, Wanda Glezerman, testified that she held a security lien on the corporate stock as trustee for her children. Following the destruction of the licensed premises by fire in October 1973, the sole corporate stockholder and operator of the licensed premises defaulted in payments and Glezerman was

obliged to take over the ownership of the capital stock of the corporate appellant in order to protect her security interest. Parenthetically, I observe that the Township Clerk and the Mayor both testified that the change of corporate stockholders was properly recorded in November 1973.

Glezerman had nothing to do with the operation of the tavern business prior to its cessation by reason of the fire. She has no criminal record. She is presently a licensed real estate person and is engaged as such. She attempted to sell the plot of land and transfer the liquor license. Failing that, she has had plans drawn for a proposed building to carry on the licensed business which she filed with the Township clerk. She would oversee the operation of the business. She has the financial capacity necessary to enable her to rebuild.

From all of the evidence adduced herein, I find that the general area of the subject situs contains a mixture of residential and commercial properties. The situs is zoned commercial.

The dispositive issue in this matter is whether the Committee, in denying renewal of appellant's license, acted unreasonably and erroneously. The burden of establishing that the action of the respondent was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15.

If the application for renewal were now being made by the identical operator of the licensed premises whose conduct thereof was the cause of great distress and consternation to the residents of the area, the Committee's action may well be considered reasonable, even if no disciplinary proceedings were instituted against the licensee.

However, although it may be said that the corporate entity is the same, the composition thereof is as different as night from day. Since fairness is the touchstone of administrative process, it appears reasonable that, in this case, we should pierce the corporate veil to determine who is the real party in interest. The real party in interest is identified as the one hundred percent holder of the capital stock of the corporate appellant, Wanda Glezerman. No challenge has been made concerning her reputation or character.

In arriving at a determination herein, I am mindful of certain relevant legal principles.

Preliminarily, it should be observed that the holder of a license or privilege acquires through his investment an interest which is entitled to some measure of protection in connection with a transfer. Lakewood v. Brandt, 38 N.J. Super. 462 (App. Div. 1955). This also applies to a licensee seeking renewal of the license. Furthermore, in the Brandt case it was ruled that under the law a case is heard de novo by the Director (Cino v. Driscoll,

130 N.J.L. 535 (Sup. Ct. 1943)) and he may properly rely on additional evidence brought out in the Division. See Florence Methodist Church v. Twp. Committee, Florence Tp., 38 N.J. Super. 85 (App. Div. 1955).

It is also a settled principle that a mere non-user will not of itself void a license. See Re Tarantola, Bulletin 570, Item 5. In Lethe, Inc. v. North Bergen, Bulletin 1537, Item 2, this Division reversed a municipality's refusal to renew a license after a period of non-use for three years. See also Cook v. Hope, Bulletin 2096, Item 4, wherein this Division reversed a municipality's refusal to renew a license after a period of non-use for nine years.

It should also be emphasized that the fact that appellant's property was vacant land would not, in itself, prevent the Committee from transferring a license conditioned upon a building being erected on the site as approved by the local officials. Passarella v. Bd. of Commissioners of Atlantic City, 1 N.J. Super. 313 (App. Div. 1949); Stockton Hotel Operating Co. v. Sea Girt, Bulletin 1709, Item 1, wherein a hotel was completely destroyed by fire; Clover Leaf Cafe, Inc. v. Gloucester, Bulletin 2062, Item 1, wherein the premises were also destroyed by fire.

Upon reviewing the entire record herein, I find that the subject applicant is not unfit to engage in the liquor industry and that it will make a bona fide attempt to expeditiously complete and put the facility in operation under the recommended conditions which I have set forth below. Stockton Hotel Operating Co. v. Sea Girt, supra; Hudson-Bergen Package Stores Ass'n v. North Bergen, Bulletin 1981, Item 1; Clover Leaf Cafe, Inc. v. Gloucester, supra.

For the reasons above stated, I conclude that appellant has sustained the burden imposed upon it under Rule 6 of State Regulation No. 15. It is, therefore, recommended that an order be entered reversing the action of the Committee and directing it to approve the application for the renewal of the said license for the 1975-76 licensing period nunc pro tunc, which said license shall be retained by the Committee and not actually issued to appellant until and unless the following conditions are met:

(a) That appellant shall, within thirty days from the date of final order entered herein, submit an application for a place-to-place transfer together with approved plans, as required under Rule 1 of State Regulation No. 2.

(b) That within six months from the date of approval of said transfer by the Committee (which approval shall not be unreasonably withheld) a building shall be completed in conformance with the approved plans.

(c) If said building is not completed and suitable for operation within the above stated period of time, or any extension of time thereof granted by the Committee or the Director of this Division, the said license shall be cancelled.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of November 1975,

ORDERED that the action of the respondent Township Committee of the Township of Franklin be and the same is hereby reversed; and it is further

ORDERED that the said respondent be and the same is hereby directed to approve appellant's application for renewal of the subject license for the 1975-76 licensing period nunc pro tunc, which said license shall be retained by the respondent, and not actually issued to the appellant until and unless the following conditions are met:

(a) That appellant shall, within thirty days from the date of final order entered herein, submit an application for a place-to-place transfer together with approved plans, as required under Rule 1 of State Regulation No. 2.

(b) That within six months from the date of approval of said transfer by the Committee (which approval shall not be unreasonably withheld) a building shall be completed in conformance with the approved plans; and it is further

ORDERED that in the event that the said building is not completed and suitable for operation within the above stated period of time, or any extension of time thereof granted by the respondent or the Director of this Division, the said license shall be cancelled.

LEONARD D. RONCO
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - FRONT - FAILURE TO KEEP PROPER BOOKS - LICENSE SUSPENDED FOR BALANCE OF TERM WITH LEAVE TO CORRECT AFTER 80 DAYS.

In the Matter of Disciplinary Proceedings against

Lajas Tavern, Inc.
t/a Lajas Tavern
198 Monroe Street
Passaic, N.J.,

Holder of Plenary Retail Consumption License C-128, issued by the Municipal Board of Alcoholic Beverage Control of the City of Passaic.

CONCLUSIONS and ORDER

No appearance on behalf of Licensee

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee entered a plea of "not guilty" to charges alleging that, in its long form application, filed November 21, 1973, it failed to disclose that one Juan Irizarry, who was criminally disqualified from connection with the alcoholic beverage industry, did have a beneficial interest in the licensed business, retained the profits therefrom and enjoyed the rights and privileges of the license, which the licensee aided, in violation of N.J.S.A. 33:1-25, 52 and 26; and, further, the licensee failed to keep proper books of account of its licensed business, in violation of Rule 36 of State Regulation No. 20.

A hearing on the matter was scheduled in this Division with due notice thereof provided to the licensee. On the date of said hearing, no one appeared on behalf of the licensee and about the time scheduled for the hearing, by telephone information, counsel for the licensee indicated neither he nor anyone would appear in defense of the charges. In consequence, the matter proceeded ex parte.

The file of the Division was admitted into evidence in support of the charges. Such file disclosed statements of the agents of this Division and copies of depositions by one David Vasquez. Based thereon, the said charges against the licensee have been amptly proven. I recommend that an order be entered finding the licensee guilty as charged.

The licensee has a prior record of suspension of license for three days, effective May 20, 1974, by the local issuing

authority for failing to maintain a list of employees on the premises; for thirty-five days, by the local issuing authority, effective January 2, 1975, in consequence of a gambling charge; and for twenty days, effective January 8, 1975, by the local issuing authority, for permitting the employment of an unqualified person on the licensed premises.

It is recommended that the license be suspended on the charges herein, relating to the failure to disclose a criminally disqualified person had a beneficial interest in the premises, and so permitting that interest to exist, for forty-five days; and in consequence of the charge of failing to keep proper books of account, for twenty days. In addition, there should be added fifteen days by reason of the three prior dissimilar violations, making a total suspension of eighty days.

However, as the illegal situation has not been corrected, it is recommended that the license be suspended for the balance of its term, i.e., midnight, June 30, 1976, with leave to the licensee or any bona fide transferee of the license, to apply, by verified petition to the Director for the lifting of the said suspension establishing that the unlawful situation has been corrected, but, in no event sooner than eighty days from the commencement of the said suspension.

Conclusions and Order

No Exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having examined the entire record herein, including the transcript of the testimony, the exhibits and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of November 1975,

ORDERED that Plenary Retail Consumption License C-128, issued by the Municipal Board of Alcoholic Beverage Control of the City of Passaic to Lajas Tavern, Inc., t/a Lajas Tavern, for premises 198 Monroe Street, Passaic be and the same is hereby suspended for the balance of its term, i.e., midnight, June 30, 1976, commencing at 3:00 a.m. on Wednesday, November 26, 1975, with leave given to the licensee or any bona fide transferee of the license to apply, by verified petition to the Director for the lifting of the suspension, establishing that the unlawful situation has been corrected, but, in no event, sooner that eighty (80) days from the date of the commencement of the said suspension.

Leonard D. Ronco
Director

4. DISCIPLINARY PROCEEDINGS - ORDER DENYING PETITION TO GRANT NEW HEARING.

In the Matter of Disciplinary Proceedings against Cella Realty Co., Inc. t/a Cella's Ship's Bar 1001 N. W. Central Avenue Seaside Park, N.J.	ORDER DENYING PETITION TO GRANT NEW HEARING

W. Eugene San Filippo, Esq., by Robert B. Blackman, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee has filed a motion with the Director for a new hearing and a "reopening of the old hearing" in the above matter, which is presently on appeal before the Appellate Division of the Superior Court.

By Conclusions and Order dated July 23, 1975, the licensee was found guilty of the following charge:

> "On February 7, 1975, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you allowed, permitted and suffered a female person, while performing on your premises for entertainment of your customers and patrons, to engage in conduct, by herself and in association with patrons and customers on your licensed premises, of a lewd, indecent and immoral manner; in violation of Rule 5 of State Regulation No. 20."

The licensee was, thereupon, suspended for 60 days commencing August 18, 1975. Re Cella Realty Co., Inc., Bulletin 2199, Item 1. Said suspension was stayed pending the determination of the aforementioned appeal.

In support of its motion licensee relies upon an affidavit executed September 16, 1975 by Martin B. Krebs, a patrolman of the Borough of Seaside Park, in which, among other things, Krebs alleges that one of the Division agents stated to him on the day of violation in question, "We did not see a damn thing." This, licensee contends, would negate the contrary testimony of this agent at the hearing herein.

In State v. Puchalski, 45 N.J. at p. 107, the court stated:

"The guidelines for the consideration of such an application are stated in State v. Artis, 36 N.J. 538, at p. 541 (1962), as follows:

'A motion for a new trial is addressed to the sound discretion of the trial court, and its determination will not be reversed on appeal unless there has been a clear abuse of that discretion. State v. Smith, 29 N.J. 561, 573 (1959). To entitle a party to a new trial on the ground of newly discovered evidence, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the original trial and not discoverable by reasonable diligence prior thereto; and (3) of the sort which would probably change the jury's verdict if a new trial was granted. State v. Johnson, 34 N.J. 212, 222 (1961); State v. Bunk, 4 N.J. 482, 486 (1950). To sustain a motion for a new trial the proffered evidence must meet all three aspects of the test. State v. Johnson, supra, 34 N.J., at p. 223.'

See also State v. Sullivan, 43 N.J. 209, 232-233 (1964)." See also Christie v. Petrullo, 101 N.J.L. 492 (Sup.Ct. 1925); Wilkotz v. Ziss, 137 N.J.L. 3 (Sup.Ct. 1948). The same rule or tests apply in both criminal and civil cases. State v. Bunk, 4 N.J. 482, 487 (Sup.Ct. 1950) Cf Hackensack Motel Corporation v. Little Ferry, Bulletin 1648, Item 1.

In the instant matter, the licensee has submitted nothing to establish that, by due diligence, it could not have discovered this so-called new evidence prior to the two hearings in this case, or that this evidence would probably alter my findings herein. See Ginnelly v. Continental Paper Co., 57 N.J.Super. 480 (App.Div. 1959)

The transcript of the testimony shows that two Seaside Park police officers entered the licensed premises and assisted the Division agents during the investigation in question on February 7, 1975, and that Joseph Cella, the licensee's principal officer, was then aware of this fact. Thus, Patrolman Krebs, one of the officers, was known by Cella to have participated in the investigation and was available for an interview by the licensee prior to the two hearing dates in this case.

Apparently he was not interviewed, or at least, no affidavit was submitted by the licensee, or its agents, setting forth whether it did, in fact, interview this officer. Nor has it submitted any affidavit as to what it did to attempt to discover these alleged facts, or when it did, in fact, discover them. Even the affidavit of Patrolman Krebs does not state when he communicated this information to the licensee.

Furthermore, it is apparent that this information would not materially alter the findings in this case. The agents here testified that they identified themselves to Mr. Cella and advised him that they had just observed a lewd performance by the "go-go dancer"; that they detained her costume as evidence; that they filed reports detailing the performance and testified, under oath, as to these details.

It is completely unreasonable to believe that their positive testimony would be deemed impeached so as to discount such details upon the basis of the tendered allegation that one of the agents stated, immediately after the investigation, "We did not see a damn thing".

In the light of the agent's sworn detailed testimony, I find that the allegation of Krebs does violence to human experience, and is incredible.

A new trial should not be granted on the ground of newly discovered evidence if such evidence would be improbable and untrustworthy. See Allegretti v. Sensi, 2 N.J. Misc. 992 (Sup.Ct. 1924) Great Notch Villa v. Clifton, Bulletin 92, Item 14 and cases cited therein.

For the foregoing reasons, I shall deny the said motion to reopen the above matter.

Accordingly, it is on this 17th day of October, 1975

ORDERED that the motion to reopen the matter herein and grant a new hearing be and the same is hereby denied.

Leonard D. Ronco,
Director