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

BULLETIN 2166 December 6, 1974

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ITEM

STATE OF NEW JERSEY
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25 Commerce Drive Cranford, N. J. 07016

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1. APPELLATE DECISIONS - CAMTON, INC. v. NUTLEY.

Camton, Inc. t/a Camelot Pub Appellant v. Board of Commissioners of the Town of Nutley, Respondent.	On Appeal CONCLUSIONS and ORDER

Raymond F. Reed, Esq., Attorney for Appellant
James M. Piro, 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 Board of Commissioners of the Town of Nutley (hereinafter Board) which on March 12, 1974 suspended appellant's plenary retail consumption license for a period of twenty days upon appellant's plea of guilty to a charge alleging that (1) it failed to maintain a list of current employees upon the licensed premises, as referred by Rule 16 (c) of State Regulation No. 20; and (2) a finding of guilt of a charge which reads as follows: "On January 2, 1974, the licensee did allow, permit and suffer upon the licensed premises acts of violence, brawling, disturbance and unnecessary noise creating a nuisance in violation of Rule 5 of State Regulation No. 20 of the Department of Law and Public Safety, Division of Alcoholic Beverage Control of the State of New Jersey."

This appeal relates solely to the Board's action with regard to the latter (2) charge. We are not herein concerned with two other charges preferred against appellant of which he was found not guilty.

The effective date of the suspension, April 1, 1974, was stayed by Order of the Director, dated March 28, 1974, pending determination of this appeal, and until the entry of a further order herein.

A de novo hearing was held at this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses. However, by stipulation of counsel, the transcript of the hearing held by the Board to consider the subject charge was made part of the record herein in lieu of testimony at the hearing, pursuant to Rule 8 of State Regulation No. 15. In addition, the parties hereto presented oral argument in summation.

The testimony in the said transcript reveals that on January 2, 1974 at approximately 12:25 a.m., Patrolman Robert Cassie of the Nutley Police Department was informed by a person, who identified himself as Ronald Casella, a bartender in appellant's establishment, that a fight had therein taken place twenty minutes prior.

Upon arrival at the licensed premises, he noticed a man lying prone on the floor and that the "interior... which was a wreck, there was bottles thrown all over, food on the floor... ." The bartender informed him that "about nine or ten guys came into the tavern, had started a fight with him and a few of his friends that were sitting in the back...came up forward to the bar to assist him. And with this, a fight erupted." The officer added that, in his opinion, Casella was intoxicated.

Nutley Police Sergeant George Gerrity testified in corroboration of the testimony of Patrolman Cassie. He stated that he observed "...some couches overturned, a wall that's approximately four or five feet back from the bar was knocked down. There was beer glasses, beer bottles on the floor, some broken, some just laying there intact..."

Officers Richard Laudadio and Robert DeBello called to testify by the appellant stated that, upon receipt of a call that there was a disturbance at the premises, they entered the premises at approximately 11 or 11:10 p.m. They observed seven or eight patrons, including Casella emerging from the premises. The bartender informed the officers that there was no problem and he was closing "early."

The president of the corporate appellant, Cameron Ratkovic, testified that he had discharged his day bartender, Ronald Casella, and instructed the night bartender to obtain the keys of the establishment from Casella, if possible. Later that evening, when he telephoned the premises in order to ascertaim what was happening in the barroom, Casella shouted at him in a rage that he would "wreck the place."

On the following morning he discovered the place was in a shambles. The premises were closed for ten days while repairs were made. He admitted, on cross-examination, that he neither called the police department, nor did he receive a call from it.

The testimony of Robert Pisano revealed that the evening of the alleged incident was his first day of employment at the licensed premises. He related the telephone conversation with Ratkovic, in consequence of which he ordered the patrons to leave, and then closed the establishment.

Later, by reason of a telephone call he received from someone, he returned to the premises, opened it, found a man lying on the floor and the interior in shambles. Simultaneously, Officer Cassie and Sergean Gerrity entered. Pisano admitted that when he was confronted by the officers he was "high", meaning thereby that he was under the influence of liquor. He offered no explanation for the man being prone on the floor when the police arrived.

In substance, the testimony of Joan Ratkovic related a telephone conversation between Casella and her husband sometime during the evening which she related as follows: "...Cameron (her husband) spoke to him, and then I could hear Cameron talking to Ronnie Casella. And Ronnie screaming and yelling. I could'nt hear everything he said, but I heard him screaming and yelling. And then Cameron spoke to Bob (Pisano) and said 'Close up. It looks like there might be trouble. So close up.' And we went to bed."

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is firmly settled that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Board acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way: Could the members of the Board, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Cf. Hudson Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Newark, 55 N.J. 292, 303 (1970).

The critical inquiry is whether the licensee or its employee, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, has exercised that degree of care consistent with such obligation in keeping the premises free from disturbances, noise and acts of violence.

It is apparent that the principal officer of the corporate appellant exercised poor judgment in entrusting the operation of the licensed premises to a person who was admittedly "high". Furthermore, although he was admittedly aware that trouble was brewing he failed to either make the police aware of the situation or to request the assistance of the police department and, instead, simply went to bed. Had he exercised proper judgment the subject incident may have been prevented.

Upon examination of the facts and applicable law, it is my view that this charge was established by a preponderance of the believable evidence. I therefore conclude, that appellant has failed to sustain the burden of establishing that the Board's action was erroneous and against the weight of evidence as required by Rule 6 of State Regulation No. 15.

Accordingly, I recommend that the action of the Board be affirmed, the appeal be dismissed, the Director's Order staying suspension be vacated, and that an order be entered reimposing the suspension heretofore imposed by the Board.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by the appellant, pursuant to Rule 14 of State Regulation No. 15. No answer to the said exceptions were filed by the respondent.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's report, and the exceptions filed thereto, find to have been satisfactorily resolved in the Hearer's report or are lacking in merit, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of September 1974,

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

ORDERED that the order entered herein on March 28, 1974 staying the suspension theretofore 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-11, issued by the Board of Commissioners of the Town of Nutley to Camton, Inc., t/a The Camelot Pub for premises 378 Centre Street, Nutley, be and the same is hereby suspended for twenty (20) days, commencing 2:00 a.m. Thursday, September 26, 1974 and terminating 2:00 a.m. Wednesday, October 16, 1974.

Leonard R. Ronco
Director

2. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 35 DAYS.

In the Matter of Disciplinary Proceedings against

Franklin House, Inc.
t/a Franklin House
N/E Corner Main & West Sts.
Glassboro, N.J.

Holder of Plenary Retail Consumption License C-2, issued by the Borough Council of the Borough of Glassboro.

S-9991
X-48,212-F

CONCLUSIONS
and
ORDER

Harris Y. Cotton, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

> On February 9, 1974, you sold, served and delivered, and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of eighteen (18) years; viz., Raymond B. C. _____age 17; in violation of Rule 1 of State Regulation No. 20.

In behalf of the Division, ABC Agent G testified that on February 9, 1974, at approximately 8:45 p.m., he entered the licensed premises (a barroom) accompanied by Agent P. Entry was made through a door which opens into a long rectangular shaped hallway which separates the barroom on the left side thereof and the packaged goods section on the right side. Sketches depicting the layout of the two rooms separated by the hallway, one prepared by the Division witnesses and the other prepared by the licensee's witnesses (neither drawn to scale) were received in evidence.

While in the barroom, Agent G observed three youthful looking males enter at approximately 9:45 p.m., linger for a few minutes, and then leave through the door which leads into the hallway. Through the glass door which leads from the hallway into

the liquor store, he observed a youth (later identified as Raymond C_____) walk towards a counter with a quart bottle of Colt 45 Malt Liquor. Raymond placed the bottle on the counter and made payment therefor to a clerk, identified as Elvira Catanese. She recorded the sale in the cash register located on the counter. Raymond then left by the front door which leads to the parking lot.

Agent G entered the liquor store from the rear entrance which opened from the hallway and left by the front door in pursuit of Raymond who was carrying the bottle of beer. He confronted Raymond in the parking lot, identified himself and ascertained that Raymond was 17 years of age.

The agent seized the bottle, reentered the liquor store with Raymond, identified himself to Mrs. Catanese and apprised her of the alleged violation. At that time her husband, Sante Catanese entered the area and Agent G informed him of the alleged violation.

On cross-examination, Agent G testified that he did not see the bottle placed in a bag nor did he see a sales slip handed to the youth. He did not look for any sales slips in the vicinity of the cash register. He denied that Raymond asserted that he had either stolen the liquor, or found it.

Further, Agent G testified that he left the bar first; Agent P followed him and both agents were at the rear entrance door of the liquor store where both made their surveilance of the alleged sale. On the sketch prepared by one of the agents, Agent G placed the rear entrance door to the liquor store toward the rear of the hallway.

Raymond C_____, who was 17 years of age on the date alleged herein, testified that he entered the barroom with two companions after being first questioned as to his identity. He displayed a fictitious identification card which purportedly represented that he was 18 years of age, to a "bouncer" stationed in the hallway. He left the barroom and proceeded into the liquor store where he removed the bottle of malt liquor from a cooler and brought it to the counter where Elvira Catanese and an unidentified clerk were on duty. He paid "in the fifty cent range" for the beer to one of the clerks, and departed through the front door leading into the parking lot where he was confronted by Agent G. He does not recall whether he was questioned by the clerk as to his age, at the time of sale.

On cross-examination, Raymond asserted that, when he was brought back into the liquor store on the night of the alleged occurrence, he stated first that he stole the bottle and thereafter that he had found it. Raymond also conceded that at the Municipal Court hearing he testified that he had paid someone for the liquor,

however, he could not specifically identify that person.

In defense of the charge, the licensee called Agent P as a witness. He testified that he did not follow Agent G from the barroom into the hallway; he remained at the bar in order to pick up the change. Upon exiting from the barroom he proceeded into the hallway and then to the rear doorway leading into the liquor store (which, he stated, was located at the front of the hallway). He looked inside and saw that Agent G was coming in the front door leading into the parking lot with the minor and the bottle of beer.

In the liquor store, he heard the minor state that he had stolen the beer. Agent G admonished the minor to be quiet because at that time Agent G was conferring with Catanese.

Elvira Catanese, employed as a sales clerk on the date alleged, testified that she saw Agent G for the first time at 9:50 p.m. at which time the agent identified himself and accused her of selling the beer to Raymond. She denied making the sale. Raymond stated that he stole the bottle. Agent G told the minor to keep quiet. She never saw Raymond prior to this confrontation, and not until Agent G brought him to the counter.

On cross-examination, the witness testified that she is usually stationed behind the sales counter near the cash register. The counter is located adjacent to the front door. The cash register is located at the end of the counter nearest to the front door which leads to the parking lot.

The sales price for a quart bottle of Colt 45 is 54 cents. A person who would walk from the direction of the rear door, through the liquor store, and exit by way of the front door adjacent to the counter, would be in her direct line of vision.

The Colt 45 is stored in a beer cooler which is located approximately 20 feet to the right of the cash register. It is customary for a patron to serve himself from the cooler. For a patron to leave the premises, he must step on a treadle which automatically opens the door leading to the parking lot. A hissing noise is made in this process. A clerk stationed at the cash register would be aware that the door is opening.

The witness denied that she admitted to the ABC Agents that she had sold the beer to Raymond, or that she had made the sale relying on the fact that his age had been checked at the door. She further denied that she had any discussion with the agents concerning the price paid by Raymond for the beer.

The gondolas used for the display of liquors which are positioned at an angle on the floor, block the view between the counter and the rear door leading from the hallway.

Carmen A. Graziano, president and a stockholder of the corporate licensee, testified that the gondolas are of such size

and are so positioned that it would be impossible for anyone standing at the door leading from the hallway to see any part of the counter.

Philip A. Graneto, a patron of the subject liquor store, testified that, on the date alleged herein, at approximately 9:50 p.m., he was at the beer cooler when he heard a commotion at the counter. Upon proceeding to the counter to pay for his purchase he saw Agent G and Raymond. Mrs. Catanese was behind the cash register. She repeatedly denied to Agent G that she sold the beer to Raymond. Raymond stated that he had stolen the beer. Agent G told Raymond to be quiet or he would be in more "trouble".

On cross-examination, Graneto asserted that he did not hear all of the dialogue between Agent G and Mrs. Catanese. They were still engaged in conversation when he departed from the premises.

Stanley Martin Mossbrucker, who is employed by the licensee to check cards and to bag goods in the package store, asserted that a person standing at the doorway leading from the hallway into the liquor store could not see the counter. On the night alleged, herein, Raymond admitted to Mr. Catanese that he had stolen the beer. The agent told Raymond to shut up or he would get in trouble.

Agent G also said that "he was out to get the place". The first time he saw Agent G was when the agent went up to the counter with Raymond and informed Mrs. Catanese that she had served Raymond. She denied that she had served Raymond.

Sante Catanese, employed as the manager of the licensed premises and husband of the sales clerk, Mrs. Catanese, testified that, when he entered the liquor store, Agent G was already in the liquor store. While in the rear room to get the license, Agent G suggested to him that "I should tell my wife that the boy came in through the back door, so it would be easy on her". Catanese informed Agent G that they were going to tell the truth and that the youth admitted that he had stolen the beer.

On cross-examination, the witness testified that, when he first entered the liquor store he saw Agents G and P, his wife and Mossbrucker behind the counter and a "few" other individuals therein. He heard no mention made as to which door the minor entered until Agent G spoke with him in the back room. After returning from the back room, no mention was made concerning the minors point of entry into the liquor store.

In rebuttal, Agent P testified that, after he identified himself to Mrs. Catanese, he asked her how much the juvenile paid for the beer. She responded "54 cents".

His investigation of the licensed premises was made pursuant to specific assignment. Neither he, nor Agent G in his presence, asserted that he was "out to get" the licensee. At no time did Catanese inform him that Agent G advised him (Catanese) that his wife should say that the minor entered by way of the rear door.

On cross-examination, the agent stated he did not, at any time that night, hear Mrs. Catanese deny that she sold the beer. He did hear Raymond say on one occasion that he stole the beer, and, on another occasion, that he found it.

Agent G denied in his rebuttal testimony that he advised Catanese that it would be better for his wife to state that the minor had entered through the back door.

The agent asserted that he had the following colloquy with Catanese and wife in the liquor store:

"She [Elvira Catanese] asked me what was going to happen. She said 'The kid showed false identification.' I said, 'That's right.' I said 'I cannot promise you anything.' I said 'The only thing I can tell you, that the kid did show false identification.' I said 'You tell this to the judge in Municipal Court. He may lean in your favor.' I said 'That is all I can tell you.'"

That is exactly what I told both of them together in the liquor store. At no time did he state that he was out to get the place, nor did he hear it said by his fellow agent.

On cross-examination, Agent G testified that he made his first observation of Raymond walking towards the counter while he was at the rear doorway. He then entered the liquor store while Raymond was at the cash register and, thereafter, intercepted him 20 feet outside the door.

The issue presented for determination is strictly factual and, therefore, the issue of credibility of witnesses is of paramount importance. In evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature, and not criminal, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis 64 N.J. Super 242 (App. Div. 1960).

Evidence to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet 16 N.J. 546 (1954).

No testimony need be believed, but rather, so much or so little may be believed as the trier finds reliable. 7 Wigmore Evidence, sec. 2100 (1940).

I have noted that the minor stated that he had stolen the beer and, also, that he had found it. However, both of these statements were unsworn. In his sworn testimony, the minor stated that he had purchased the beer in the licensed premises and paid for the beer to a clerk he could not identify. That the minor had the bottle of beer in his possession upon leaving the licensed premises has been established. I find it unreasonable to infer that the minor would attempt to pilfer an unbagged quart size bottle of beer and exit through the automatic doorway which is located practically alongside the cash register and which emits a sound upon activation.

Although on cross-examination, the minor did concede that he made statements that he stole the beer and also found it, he, consisently asserted at the hearing under vigorous cross-examination by competent counsel for the licensee, that he had in fact, purchased the beer. Although I do not condone the minor's behavior, I feel imperatively persuaded that his sworn testimony had a substantial ring of truth with respect to the alleged purchase.

I am mindful of the discrepancies in the testimony of the agents concerning the exact location of the rear door and the actual location of both agents in the licensed premises. However, the discrepancies which I have carefully analyzed and considered, do not relate to the substance of the charge.

Accordingly, after considering the entire record herein and the various precedents cited, I am convinced that the charge has been sustained by a fair preponderance of the credible evidence. I, therefore, recommend that the licensee be found guilty of the said charge.

Licensee has a prior record of suspension of license wherein upon order of the Director dated February 2, 1972, licensee paid a fine of $750.00 in lieu of a ten day suspension of license for sale to a minor. Re Franklin House, Inc., Bulletin 2033, Item 7.

It is, further, recommended that an order be entered suspending the license for twenty-five days, to which should be added ten days by reason of a record of suspension for a similar violation within the past five years, or a total of thirty-five (35) days.

Conclusions and Order

Written Exceptions to the Hearer's report, with supportive argument, were filed by the attorney for the licensee, and Answer to the said Exceptions, with supportive argument, was filed by the attorney for the Division, pursuant to Rule 6 of State Regulation No. 16.

Licensee argues that the conclusions of the Hearer was not supported by a preponderance of the credible evidence.

Licensee, in furtherance of that contention, maintains that Agent G's testimony that he stood in the licensed premises and observed the minor purchase the bottle of beer in question is incredible and should not be accepted because, in fact, this witness waited in the parking lot while the minor obtained the beer. I have carefully analyzed and evaluated the entire record herein, and am convinced that he was actually in the licensed premises and observed the minor proceed to the sales counter while carrying a quart bottle of beer, place the bottle on the counter, hand the female clerk money and leave the premises with the beer. There is, indeed, no evidence in the record to support the licensee's assertion that Agent G was in the parking lot while the alleged purchase took place, and, therefore, he was unable to observe it.

Moreover, I perceive no discrepancy in the minor's sworn testimony at this hearing. In his sworn testimony, the minor asserted that he purchased the beer in the licensed premises. At no time did he testify, under oath, either at the Division hearing or in the proceedings in the local Municipal Court, that he had found the beer or had stolen it.

I find that the testimony of Agent G is substantially consonant with that of the minor. Thus, the Hearer correctly found that the charge herein has been established by a fair preponderance of the credible evidence.

Licensee also contends that the Hearer's recommended penalty of suspension of license for thirty-five days is excessive. I find that the recommended penalty is not inharmonious with precedential Division penalties imposed for similar violations, and is fully warranted by the facts herein.

I have examined the other Exceptions advanced on behalf of the licensee, and find that they have either been satisfactorily considered and resolved in the Hearer's report, or are lacking in merit.

In sum, having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report, the Exceptions filed with respect thereto, and the Answer to the said Exceptions, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of August 1974,

ORDERED that Plenary Retail Consumption License C-2, issued by the Borough Council of the Borough of Glassboro to Franklin House, Inc., t/a Franklin House, for premises N/E Corner Main and West Streets, Glassboro, be and the same is hereby suspended for thirty-five (35) days, commencing at 2:00 a.m. Tuesday, September 10, 1974 and terminating at 2:00 a.m. Tuesday, October 15, 1974.

Leonard D. Ronco
Director

3. DISCIPLINARY PROCEEDINGS - IMMORAL ACTIVITY - LEWD ENTERTAINMENT - LICENSE SUSPENDED FOR 50 DAYS.

In the Matter of Disciplinary Proceedings against

Bill's Barge, Inc.
t/a Bill's Barge
184-186-188 Doremus Avenue
Newark, N.J.

Holder of Plenary Retail Consumption License C-625, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS and ORDER

Louis Zemel, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads not guilty to the following charge:

> "On April 2, 1974, 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 licensed premises for the 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 and to commit and engage in acts, gestures and movements of and with her hands, legs and other parts of her body by herself and in associateion with patrons and customers, in a manner and form having lewd, indecent and immorally suggestive import and meaning; in violation of Rule 5 of State Regulation No. 20."

Testifying on behalf of the Division, ABC Agent B gave the following account: On April 2, 1974,at approximately twelve-thirty p.m., he and ABC agent C entered the licensed premises and observed a female dancing on the bar. The female was later identified as Esther Estrella, hired as a dancer in the premises. She was clothed in a two-piece bathing suit, the top portion of

sec. 1042. "...Every fact or circumstance tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence." State v. Spruill, 16 N.J. 73, 78 (1954). It is fundamental that the interest or bias of a witness is relevant in evaluating his testimony. In re Hamilton State Bank, 106 N.J. Super. 285 (App. Div. 1969).

I have carefully evaluated the testimony herein, and have had the opportunity to observe the demeanor of the witnesses as they testified. A study of the entire record gives rise to the inescapable conclusion and I find that the charge has been amply supported by the credible and forthright testimony of the agents.

The agents' version of what occurred on the date in question is a factual and believable account. On the contrary, I was unimpressed with the credibility of the licensee's main witness, Meyer Krieger. It should be borne in mind that the agents investigated activities on these premises pursuant to a specific assignment and there has been no showing, nor was it even alleged, that they had any improper motivation in testifying as they did.

The blanket denial of the incidents relating to the charge is entirely unconvincing in view of the minutely detailed account of the performances presented by the agents.

In its memorandum, submitted in summation licensee argued that (1) the agents' testimony was not credible because they did not confront the licensee's employees immediately upon witnessing the allegedly lewd performance and, instead, waited until the performer had completed her act and performed a second time; and (2) nudity, in itself, is not lewdness.

I find licensee's first contention to be frivolous. There is no requirement that law enforcement officers act immediately upon viewing a violation of this kind. They may, in the exercise of sound judgment, wait to observe and determine whether the proscribed acts are repeated and are carried on as a general course of conduct in a licensed premises.

The second contention is equally without merit. The question of lewdness must be evaluated according to the legal and decisional precedents followed by the Division . See Re Club "D" Lane, Inc. Bulletin 1900, Item 3; aff. 112 N.J. Super. 577 (App. Div. 1971) wherein the court reaffirmed the long established principle that "we are not here concerned with the censorship of a book, nor with the alleged obscenity of a theatrical performance. 'Our immediate interest and attention is confined to the disciplinary action taken against the licensee of a public tavern, whose privileges may lawfully be tightly restricted to limit to the utmost the evils of the trade.' McFadden's Lounge, Inc. v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 61, 68 (App. Div. 1954). Lewdness or immorality for the purpose of alcoholic beverage control may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally. Davis v. New Town Tavern, 37 N.J. Super. 376, 378 (App. Div. 1955); Jeanne's Enterprises, Inc. v. New Jersey, etc., 93 N.J. Super. 230 (App. Div. 1966), aff'd o.b. 48 N.J. 359 (1966)."

which had been lowered about her body so that both breasts were exposed. Twenty-five male patrons were watching her performance.

Encouraged by the laughter and applause of the patrons, and at the urging of one of the barmaids, Helen Fornicola, who said, "Go ahead, get him", Esther bent down toward a patron and "pulled his head into her chest. Her bare breasts were in his face."

Thereafter, as the dance continued, a male patron placed a dollar bill in the lower portion of her costume. Covering her breasts, Esther moved to another portion of the bar where she lowered one side of her bra, and then the other, so that her breasts were alternately exposed. Following this, Esther lay on the stage, and invited a male pool player to place a pool cue between her legs, which she rubbed against her pubic area. This action was later repeated with Esther who was in a stooped position. After further exposure of her breasts during her performance, Esther concluded her dance.

In addition to Fornicola, Agent B observed two other females employed in the tavern, one of whom he identified as Mona Schuessler who was engaged as a barmaid, and the other as Rita Fokas, who was also engaged as a barmaid and in the preparation of sandwiches.

It was stipulated that the testimony of ABC Agent C would be corroborative of the testimony adduced from Agent B.

In defense of the charge, Myer Krieger the secretary-treasurer of the corporate licensee, testified that on the day in question, he had been in the premises from about eleven o'clock in the morning until two o'clock in the afternoon. He had observed Esther's dance and emphatically denied that she had, at any time, exposed her breasts, lay on the bar or made any of the other gestures described by the agents.

It is apparent that a purely factual question has been presented for determination.

Preliminarily, I observe that, in evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and, thus, require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observations of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence,

Further, the court emphasized that "all licensees are charged with knowledge of the admonition of former Director Lordi, set forth in Bulletin 1778, Item 1, as follows:

> "In passing, however, I wish emphatically to advise all licensees, that so called 'topless' female employees, whether entertainers or otherwise, and whether with pasties described by the Division agents or the larger ones described by the licensee's witnesses, will not be tolerated on licensed premises in this State."

Accordingly, after considering and evaluating the entire record herein, I conclude that the Division has met its burden of establishing the truth of the charge by a fair preponderance of the credible evidence, indeed, by clear and convincing evidence.

I, therefore, recommend that the licensee be found guilty of the charge.

Absent prior record, I further recommend that the license be suspended for fifty days. Re Iodice Corporation, Bulletin 2122, Item 1.

Conclusions and Order

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

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

Accordingly, it is, on this 13th day of September 1974,

ORDERED that Plenary Retail Consumption License C-625, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Bill's Barge, Inc., t/a Bill's Barge for premises 184-188 Doremus Avenue, Newark, be and the same is hereby suspended for fifty (50) days, commencing at 2:00 a.m. on Thursday, September 26, 1974, and terminating at 2:00 a.m. on Friday, November 15, 1974.

Leonard D. Ronco
Director