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

BULLETIN 2209

December 16, 1975

TABLE OF CONTENTS

ITEM

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

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1. NEW LEGISLATION - AMENDMENT TO N.J.S.A. 33:1-25 - PUBLICATION OF NOTICES FOR LICENSE RENEWAL.

On May 21, 1975 Senate No. 808 was approved and thereupon became Chapter 99 of the Laws of 1975, effective July 1, 1975. The act, in pertinent part, amended R.S. 33:1-25 to read as follows (underscoring new):

"Every applicant for a license that is not a renewal of an annual license shall cause a notice of the making of such application to be published in a form prescribed by rules and regulations, once a week for 2 weeks successively in a newspaper printed in the English language, published and circulated in the municipality in which the licensed premises are located; but if there shall be no such newspaper, then such notice shall be published in a newspaper, printed in the English language, published and circulated in the county in which the licensed premises are located. No publication shall be required with respect to applications for transportation or public warehouse licenses or with respect to applications for renewal of licenses.

"The Division of Alcoholic Beverage Control shall cause a general notice of the making of annual renewal applications and the manner in which members of the public may object to the approving of such applications to be published in a form prescribed by rules and regulations, once a week from the week of April 1 through the week of June 1 in a newspaper printed in the English language published and circulated in the counties in which the premises of applicants for renewals of annual licenses are located. Any application for the renewal of an annual license shall be made by May 1, and none shall be approved before May 1."

Leonard D. Ronco
Director

Dated: November 14, 1975

2. NOTICE TO ALL LICENSEES - ADOPTION OF REVISED RULE CONCERNING WHOLESALE PRICES - RULE 12 OF STATE REGULATION NO. 34.

TO ALL LICENSEES:

Since the revision of Rule 12 of State Regulation No. 34, the Division found that it greatly underestimated the anticipated number of deliveries resulting in the return of merchandise not ordered. The situation has imposed a burden on retailers who have been unable to return mistakenly delivered merchandise for unduly long periods and, accordingly, could not replace this merchandise for availability to the public.

The revision herein (as underlined in the attached rule revision), would correct the problem by permitting returns of most mistakenly delivered alcoholic beverages, under certain conditions, without the Director's permission. Accordingly, this rule revision is adopted immediately as an emergency Rule without prior notice, pursuant to the applicable provisions of the New Jersey Administrative Procedure Act (N.J.S.A. 52:14B-4(c)).

LEONARD D. RONCO
DIRECTOR

Dated: November 26, 1975

Leonard D. Ronco, Director of the Division of Alcoholic Beverage Control, pursuant to authority of N.J.S.A. 33:1-39, does hereby adopt a revised rule concerning wholesale prices of alcoholic beverages as follows (additions indicated in bold face thus):

REGULATION NO. 34

Wholesale Prices and Maximum Rebates, Free Goods, Allowances and other Inducements

N.J.A.C. 13:2-34.14

Rule 12. No manufacturer or wholesaler shall deliver or transport, directly or indirectly, any alcoholic beverage to any retail licensee unless such beverage is accompanied by a bona fide, authentic and accurate delivery slip, invoice, manifest, waybill or similar document stating the name and address of the retail licensee, the brand, size of container and quantity of each kind of alcoholic beverage being delivered or transported, and the price and terms of sale.

Two copies of such delivery slip, invoice, manifest, waybill or similar document shall be truly dated and signed by the retail licensee or his agent at the time and on the date of actual delivery of any alcoholic beverages, one of which copies shall be retained for a period of one year from the date thereof by the manufacturer or wholesaler and the other by the retail licensee for a like period at their respective licensed premises, available for inspection by agents of the Director, unless the Director shall have granted written permission to the manufacturer, wholesaler or retailer to keep his copies at another designated place.

If alcoholic beverages are picked up at the licensed premises of a

manufacturer or wholesaler by a retail licensee or by a solicitor for ultimate delivery to a retail licensee, proper invoices shall accompany the order and the manufacturer or wholesaler must, within forty-eight hours of pickup, mail a copy of the invoice to the retailer. Such copy of the invoice must have prominently printed or stamped thereon the following legend: "To the retailer--If you have not already received the merchandise herein, you must immediately give written notice to the Division of Alcoholic Beverage Control of such fact." Every retail licensee receiving such copy of the invoice shall immediately give written notice to the Division of Alcoholic Beverage Control if he shall not have already received such merchandise.

N.J.A.C. 13:2-34.14(d)

No retailer shall return any alcoholic beverages other than malt alcoholic beverages for credit or replacement and no manufacturer or wholesaler of alcoholic beverages other than malt alcoholic beverages shall accept from any retailer any return of alcoholic beverages for credit or replacement unless such alcoholic beverages were originally delivered to the retailer by the manufacturer or wholesaler and unless permission is granted by the Director upon petition by manufacturer or wholesaler setting forth good cause, as shown on the following form signed by the retail licensee or his agent.

X Y Z Distributing Co.
123 Blank Street
Anytown, N. J. 01234

Please pick up for _____ the following
(credit or replacement)
alcoholic beverages purchased from you on _____,
Invoice No._____ for the following reason.

_____

_____

Items _____

_____

Name of Licensee_____
Address_____
Town_____
Signature of Licensee or agent_____

Notwithstanding the provisions of the preceding paragraph, a retailer may return to a manufacturer or wholesaler, and a manufacturer or wholesaler may accept from a retailer the return of alcoholic beverages for credit or replacement, without prior permission of the Director, provided such alcoholic beverages were delivered by mistake to a retailer not more than two business days prior to the date of actual return to the manufacturer or wholesaler from whom the alcoholic beverages were purchased, and such alcoholic beverages were not delivered on either of the last two business days of any month, and further provided that not later than 24 hours after such return such manufacturer or wholesaler shall mail to the Director a copy of both the original invoice to the retailer and the credit memorandum or invoice showing the return in question, together with a statement specifying the reason for the return.

LEONARD D. RONCO
DIRECTOR

Dated: November 26, 1975

3. DISCIPLINARY PROCEEDINGS - SALE OF CONTROLLED DANGEROUS SUBSTANCE ON LICENSED PREMISES - PRIOR RECORD OF SUSPENSIONS FOR DISSIMILAR OFFENSE - LICENSE SUSPENDED FOR 35 DAYS UPON MODIFICATION OF HEARER'S RECOMMENDATION.

In the Matter of Disciplinary Proceedings against

160 Ocean Avenue Corp.
t/a Price's Motel & Restaurant)
160 Ocean Avenue
Long Branch, N.J.,)

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-66, issued by the City Council of the City of Long Branch.

Bernard F. Boglioli, Esq., Attorney for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee entered a plea of "not guilty" to a charge alleging that on June 13, 14, 20 and 27, 1974, it permitted the licensed premises to operate as a nuisance, in that it permitted persons employed thereon to make offers and arrangements to sell a controlled dangerous substance, as defined by the Controlled Dangerous Substances Act (N.J.S.A. 24:21-1 et sec) to a patron of the licensed premises, in violation of Rule 5 of State Regulation No. 20.

At the outset of the hearing, counsel for the licensee requested that any hearing on the charge preferred be deferred until the conclusion of a trial pending against its principal witness who, on grounds of self-incrimination, refused to testify.

These proceedings are proceedings in rem against the license, and not in personam, against the licensee, and, thus, an acquittal of a licensee or its employee on criminal charges is immaterial to a determination of these proceedings. Disciplinary proceedings against a licensee are civil in nature, and not criminal. Kravis v. Hock, 137 N.J.L. 252 (1948); In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). The two proceedings, criminal and disciplinary involve different issues, quantum of proof and types of penalty. See Re De Pree, Bulletin 108, Item 8; Re Bond, Bulletin 1925, Item 4. The motion made by the attorney for the licensee was denied and the matter was heard on its merits.

ABC Agent P testified that she, in the company of a fellow agent, visited the licensed premises and, while seated at the bar, was engaged into conversation with an employee of the licensee. She learned that he volunteered to sell her controlled dangerous substances, i.e., marijuanna, and she agreed to return the following day with sufficient funds to consummate the sale. She recounted a lengthy series of contacts with several employees of the licensee which culminated with a meeting with an employee, identified as David Katz, on June 20, 1975.

On that day, Katz met the Agent at the licensed premises but insisted that she accompany her to a residence in Long Branch where the drugs could be obtained. This was done and the Agent purchased a plastic bag containing marijuanna for which she paid $30.00 in "marked" money.

On June 26, 1974, Agent P spoke to Katz over the telephone upon a call placed to the licensed premises; she indicated a desire to make a further purchase of marijuanna; in consequence of which further arrangements were made for another purchase to occur on the following evening.

The next day the Agent, with "marked" money, returned to the licensed premises, accompanied by several agents of this Division and two County detectives. Upon arrival she observed David tending bar and servicing patrons. Upon cue, Katz emerged from behind the bar and conversed with Agent P in the middle of the barroom, under direct observation of the other Agents. He advised agent P that the drugs were in his car outside the front doorway and she should accompany him to it to complete the transaction. He advised that the cost of the drugs would be $65.00.

Minutes thereafter, Katz went to his car and Agent P followed bringing with her the $65 in "marked" money. She paid for the drugs which awaited her and returned to the interior with Katz following. Thereupon, Katz was arrested and the "marked" money recovered.

Monmouth County Detective Robert Freeman testified in corroboration of the testimony of Agent P as it related to the purchase and receipt of the drugs from Katz.

ABC Agent G testified in corroboration of the testimony of Agent P as it related to a conversation between her and Katz which he could only observe, not overhear, He confirmed that Katz worked behind the bar as a bartender. He participated in the overall observations of Detective Freeman

and the other Agents; corroborated the possession by Agent P of the "marked" money; her visit to Katz's car; and her return with the seized drugs.

Apart from the testimony of Agent P, Agent G testified as to a conversation he had overheard between Katz and another employee in which Katz acknowledged that he did not know the "girl" (Agent P) but had "sold stuff" to her.

No witnesses were introduced or evidence offered in defense to the charge by the licensee.

The licensee advanced the sole contention that, as the admitted sale of the drugs occurred in the parking lot adjacent to the licensed premises, there was not a violation within it, hence the charge should not stand. This contention is patently frivolous, in view of the specific charge that

> "...Katz...made offers to and arrangements with a customer or patron on the licensed premises to obtain and procure...a controlled dangerous substance...."

The Division proofs are uncontroverted. Arrangements were made within the licensed premises by Katz, an employee who was observed tending bar, with the Agent. Those arrangements immediately culminated with the payment for and acceptance of the drugs. The actual delivery and payment being immediately outside of the entranceway of the licensed premises in Katz's car, they were merely part and parcel of the transaction and were supportive of the validity of the illegal arrangements.

I find that the charge alleged was amply proven by the Division and recommended that the licensee be found guilty thereof.

The licensee has a record of suspension of license for fifteen days by the municipal issuing authority, effective May 29, 1974, in consequence of a charge alleging a sale to minors. The license was also subject to a fine in lieu of suspension, on March 25, 1974 in consequence of a charge alleging possession of contaminated liquor.

It is further, recommended that the license be suspended on the charge herein for thirty days to which should be added ten days by reason of the record of two dissimilar violations which occurred during the past five years, making a total of forty days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the licensee and answers to the said exceptions were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

Licensee asserts that there was no proof that established that Lehman was an employee of the licensee on the dates charged herein. The proofs, however, amply establish that fact, and a proper inference was drawn that when he was present at the licensed premises he was so employed. No contrary evidence was presented by the licensee. I find this contention to be devoid of merit.

It is also contended that Agent P was not a patron, but was, in fact a "plant". This agent was in the premises on an undercover assignment and had the statutory right to be present. In any event, this contention is irrelevant and does not reach the primary issue of the guilt or innocence of the licensee.

The licensee next contends that it was prejudiced because its request for an adjournment "due to the unavailability of David Katz because of a pending indictment against him" were denied. In this matter, two dates in the charge specifically relate to the activities of Lehman, so that Katz could certainly not be considered as essential to the defense with respect thereto.

Furthermore, this is an action in rem, against the licensee; the fact that Katz is awaiting trial in a criminal matter is not a circumstance which would justify a continuance on the grounds of his alleged unavailability as a witness. See United States v. Crawley, 481 F.2d 702 (5th Cir. 1973); U.S. v. Pollack, 427 F.2d 1169 (Cert. den. 400 U.S. 831 (1970); State v. Lamb, 125 N.J. Super. 209 (App. Div. 1973).

The Director has the discretion, in applications for a continuance because of the absence or unavailability of a witness. The licensee's contention that the right against self-incrimination of a potential witness is a valid ground for a continuance finds no statutory or judicial support. The licensee has not laid any foundation or made any proffer of proof of what use would be made of Katz as a witness. Moreover, it is clear that the non-appearance of Katz was not used against the licensee.

I have examined and evaluated the other exceptions and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit.

Finally, the licensee takes exception to the Hearer's recommendation that ten days should be added to the thirty days suspension because of the two prior dissimilar violations which occurred within the past five years. It asserts that one of these matters is presently on appeal in the Appellate Division of the Superior Court and has been stayed by the court.

The extent of the penalty to be imposed is within the sound discretion of the Director, Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, and may properly include consideration of the adjudicated record of prior violations. However, in view of the fact that one of the aforesaid matters is presently on appeal in the Superior Court, Appellate Division, I shall modify the said suspension as follows: A suspension of license for thirty days, to which shall be added five days for a dissimilar violation which occurred within the past five years, or a total of thirty-five days.

Having carefully considered the entire record herein, including the transcript of testimony, the Hearer's report, the exceptions filed on behalf of the licensee, and the answering argument thereto, I concur in the findings and conclusions herein, as modifed as to the extent of the penalty.

Accordingly, it is, on this 26th day of September 1975,

ORDERED that Plenary Retail Consumption License C-66, issued by the City Council of the City of Long Branch to 160 Ocean Avenue Corp., t/a Price's Motel & Restaurant for premises 160 Ocean Avenue, Long Branch, be and the same is hereby suspended for thirty-five (35) days, commencing at 3:00 a.m. on Monday, October 13, 1975 and terminating at 2:00 a.m. on Monday, November 17, 1975.

Leonard D. Ronco
Director

4. DISCIPLINARY PROCEEDINGS - IMMORAL ACTIVITY - INDECENT ENTERTAINMENT - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against)

James J. Lyons & David F. Eide t/a Chit Chat Lounge 1218 South Clinton Avenue Trenton, N.J.,)

Holder of Plenary Retail Consumption License C-39, issued by the City Council of the City of Trenton.)

CONCLUSIONS AND ORDER

Dennis M. Brew, Esq., Attorney for Licensees
David S. Piltzer, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensees pleaded "not guilty" to the following charge:

"On December 17, 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 to perform on your licensed premises for the entertainment of your customers and patrons in a lewd, indecent and immoral manner; in violation of Rule 5 of State Regulation No. 20.

ABC agent D testified, in substantiation of the charge, that, accompanied by ABC Agent G he entered the licensed premises on December 17, 1974 about 10:20 p.m. Positioning themselves at the far end of the bar, he observed the performance of a 'go-go' dancer, later identified as Jennifer B---.

During the dance, Agent D observed Jennifer to have pulled an undershirt she was wearing over to one side "thus letting her breast be fully exposed". Such exposure continued for approximately ten seconds. Some of the males, among the seventy-five patrons present, called and shouted to the dancer in appreciation of such exposure.

Jennifer was followed in her performance by another "go-go' dancer, identified as Miss K--- who was then followed by another "go-go" dancer identified as Miss Y. K and Y danced in the usual "go-go" style.

Thereafter Jennifer returned to the stage, commenced dancing and

> "...she would take the 'T' shirt she was wearing. At one point she rolled the 'T' shirt up and placed it over her breasts, thus allowing her breasts to be exposed to the audience." "...The entire breasts were exposed...."

Agent D described the conclusion of Jennifer's dance as follows:

> "Upon completion of the two acts I previously stated (Jennifer) then laid on the stage on her back and would extend her feet out to the bar, per se, and in this manner simulated sexual intercourse....She did this by moving the pelvic section of her body in upward and downward manner and also in rotating motion....She had her breasts in her hands and was rotating them in circular motion....This continued for approximately 2 1/2 to 3 minutes...."

The bartender, later identified as David F. Eide, a co-licensee, and a barmaid identified as Virginia Kirvay, were attentive to Jennifer's performance. Upon the later arrival of members of the local police department, the Agents identified themselves and, in a conversation with Jennifer, she admitted having exposed her breasts. She refused to recant that admission, although requested to do so by the bartender. ABC Agent G testified in substantial corroboration of the testimony of Agent D.

David F. Eide, a co-licensee who was acting as bartender at the time and date of the charge, testified that he was in a position to observe the dances of Jennifer, Miss K and Miss Y. He described Jennifer as being well built and amply endowed. He denied that, at any time, she had, removed any of her garments or had reclined on the stage. He, further, denied having requested Jennifer to make any mis-statements to the agents.

Virginia Kirvay, a barmaid, testified that she was on duty on the evening in question; there were about a hundred patrons present; and she was busy. Although she observed the dancing of Jennifer and the other two dancers, her observation was limited to those two or three minutes during the entire course of a girl's dance, when there was a pause between orders. She denied seeing any exposure of breasts by any of the dancers, but admitted that Jennifer's dance did involve a "squirming" position in which she did appear to be close to the floor.

A patron, Walter E. Tartar, testified that he is a Correction Officer employed by the State of New Jersey and was prompted to visit the licensed premises by an advertisement in a local paper which described Jennifer as weighing 110 pounds "but had a 40-inch breast, which is something you don't see very often...."

Tartar denied observing any exposure by Jennifer or that she had reclined on the stage. He explained that he patronized the licensed premises three times monthly.

One of the dancers who performed on that evening, Miss Y, testified that her dance was a normal one without any lewd or suggestive acts interposed. During the periods when she was not dancing, she did not observe Jennifer's dance.

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 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 licensees' witnesses. The testimony of Tartar, who patronized the licensed premises regularly was over-balanced by the specificity of the

agents' testimony. The denial of the licensee lacked the ring of credibility. Additionally, the probability of the credibility of the agents' description of Jennifer's performance is supported by the advertisement which attracted Tartar to the premises wherein the physical endowments of the dancer were specified.

In adjudicating matters of this kind, I observe that 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 48 N.J. 359 (1966)."

Further, the court in Re Club "D" Lane, supra, (pp. 580, 581) 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 withesses, 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 licensee be suspended for thirty days. Re Iodice Corporation, Bulletin 2122, Item 1.

Conclusions and Order

Written Exceptions to the Hearer's report with supportive argument, were filed on behalf of the licensees, and written Answer thereto was submitted on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

The licensees take exception to the Hearer's finding that "the testimony of the agents is a believable account of what occurred on the date in question", and that "the charge has been amply supported by the credible and forthright testimony of the agents.

The Hearer found more credible the agents' account of certain lewd acts by the licensees' go-go dancer than the versions presented by the licensees' witnesses that these acts did not take place, or at least they did not see them.

The Hearer was in the best position to observe the demeanor of the witnesses as they testified. Cf. State v. Convers, 58 N.J. 124 (1971) and to evaluate their testimony. The Hearer may accept all of a witness' testimony, may reject it all, or may accept part and reject part, in accordance with the facts and circumstances bearing on the credibility of the witness. 90 C.J.S. Witnesses, see 458, p. 320.

The demeanor of a witness may be as revealing as his words. Reynolds v. United States, 98 U.S. 145, 156-157, 25 L. Ed. 244, 247 (1879).

Thus, the Hearer's evaluation of the demeanor of the witnesses and the probabilities of their testimony should be given great weight; and I would not disturb his findings unless I find that they are substantially, if not completely at variance with the natural probabilities reflected from my reading of the testimony. See 98 C.J.S. Witnesses, Sec. 466 et seq.

I have carefully examined the transcript and agree with the Hearer that the agents' version was a "factual and believable account" of what transpired. They testified that they saw the dancer expose her entire breasts to the patrons "for ten or fifteen seconds" on numerous occasions, and that they saw her lie down on the stage and, for about three minutes, move her lower portion in a "rotating motion as well as an upward and downward motion", so as to simulate sexual intercourse. During the act, she rotated her breasts with her hands.

Contrasted with this account, was the testimony of David Eide, one of the partners, whose testimony was, in the

judgment of the Hearer, incredible and lacked the ring of truth. From my examination of the transcript, I find serious contradictions in Eide's testimony. One example will suffice.

On direct examination, the following appears:

"Q. Did you have any conversation with Agent G or Agent D'A in which the agents stated to you that Jennifer had admitted exposing her breasts?

A. No, I did not.

However, on cross-examination, the following appears:

Q. When was the first time you were informed that there were allegations concerning Jennifer Butler exposing herself?

A. I don't know whether I took it for granted that is what she done or they mentioned it to me that night. They told me she was involved in lewdness. I took it maybe she exposed her breasts. Maybe they said something about her exposing her breasts. Again I can't be exactly sure whether they told me that night or I learned it by calling."

* * *

"Q. After the agents identified themselves you said there was an allegation of lewd activity on the premises. Didn't you make any inquiry as to what was alleged to be lewd.

A. They might have said something about seeing her breasts.

Q. Did the agents tell you that they were alleging that Jennifer Butler exposed her breasts while dancing, regardless whether any formal charge to that effect was instituted?

A. Maybe they did. I would say yes, they did tell me because I know she was the one being charged."

In addition to the contradictions in his testimony, the ecomonic interest of Eide must also be considered as a factor bearing upon his credibility. His desire to protect his interests has a legitimate bearing on the matter of his testimonial truthfulness or accuracy.

On the other hand, there has been no contention, or even suggestion that the agents were imporperly motivated. They

visited the premises pursuant to a specific assignment to investigate allegedly lewd activity, and they made affirmative findings based on their observations.

Furthermore, with respect to the testimony of the other witnesses for the licensees, which was to the effect that they did not see the acts in question, rather than that the acts did not occur, such testimony is negative, and is generally considered less reliable than affirmative testimony. See State v. Jones, 105 N.J. Super 493, 503-504 (Cty. Ct. 1969) for a discussion of the relative value of affirmation and negative testimony. See also 4 Jones Evidence (5th ed 1958), § 985, pp. 1856-1857; Cf. Rapp. v. Public Service Coord. Transport, Inc., 15 N.J. Super 305, 311 (App. Div. 1951), aff. 9 N.J. 11; Honey v. Brown, 22 N.J. 433 (1956). I, therefore, find that the record supports the Hearer's findings with respect to the credibility issue.

Licensees assert that Agent D'A was under the influence of alcohol during his visit in the premises. I find nothing in the record to establish such contention, or to suggest that his actions demonstrated any of the well-known indicia of such influence. This contention is devoid of merit.

Another exception to the report is to the effect that an unfavorably inference should be drawn by reason of the non-production, as witnesses, of the local police officers. The fact is that the officers did not observe any part of the dancer's performance, which is the central issue. Their testimony would have been limited to peripheral issues. Moreover, the licensees could have produced these witnesses, but did not do so. Thus, it was not incumbent upon the Hearer to comment, as requested by the licensee, with respect thereto.

In this connection, I wish to note that the statement in the Exceptions by the attorney for the licensees, that drawing inferences from the failure to produce witnesses has, in the past, only been drawn against licensees and "never has such inference been allowed against the Division" is gratuitous and surely not substantiated in the records.

I have examined and evaluated the other Exceptions and find that they have either been considered and correctly resolved in the Hearer's report, or are lacking in merit.

Thus, having carefully considered the entire matter herein, including the transcripts 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 recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of September 1975,

ORDERED that Plenary Retail Consumption License C-39, issued by the City Council of the City of Trenton to James J. Lyons and David F. Eide, t/a Chit Chat Lounge, for premises 1218 South Clinton Avenue, Trenton, be and the same is hereby suspended for thirty(30) days commencing 2:00 a.m. on Monday, October 13, 1975 and terminating 2:00 a.m. on Wednesday, November 12, 1975.

Leonard D. Ronco
Director

5. STATE LICENSES - NEW APPLICATIONS FILED.

Adriatico Import Corporation
Suite 120, Provincial Exec. Bldg.
2201 Route 38
Cherry Hill, New Jersey
Application filed December 9, 1975
for plenary wholesale license.

The American Distilling Company
245 Park Avenue
New York, New York
Application filed December 15, 1975
for place-to-place transfer of
warehouse location from 99 Hook Road,
Bayonne, New Jersey, to 501 Schuyler
Avenue, Lyndhurst, New Jersey, operated
under Plenary Wholesale License W-39.

Leonard D. Ronco
Director