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

BULLETIN 2199 September 24, 1975

TABLE OF CONTENTS

ITEM

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

BULLETIN 2199

1. DISCIPLINARY PROCEEDINGS - LEWDNESS - INDECENT SHOW - LICENSE SUSPENDED FOR 60 DAYS.

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.,

Holder of Plenary Retail Consumption License C-1074, issued by the Director of the Division of Alcoholic Beverage Control (for the 1974-75 license period), and Holder of Plenary Retail Consumption License C-3, issued by the Borough Council of the Borough of Seaside Park (for the 1975-76 license period) for the same premises.

CONCLUSIONS and ORDER

W. Eugene San Filippo, Esq., by Robert B. Blackman, 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 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."

I

At the outset, and during the course of the hearing on the said charge, several motions were made to dismiss the charge on procedural and substantive legal grounds. The attorney for the licensee contended that the licensee was deprived of due process both under the United States and the New Jersey Constitutions, because the Hearer is "an employee of the Director ... who will make a recommendation to the Director." Also, that the agents who testified on behalf of the Division are employees of the Director and, that, since the "investigatory, decisional, judicial, fact-finding process

is all in one body" the licensee cannot receive a "fair and impartial hearing." A similar contention was rejected in In re Larsen, 17 N.J. Super. 564 (App. Div. 1952), where the court stated:

> "...in the evolution of governmental administrative and supervisory agencies, the Congress and the state legislatures have constitutionally and quite uniformly delegated to such agencies the power to adjudicate controversies arising within the area of the particular administrative field."

The court cited Brinkley v. Hassig, 83 Fed. 2d 351,356 (C.C.A. 10, 1936):

> "The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years. The Board of Tax Appeals is an outstanding example of one such successful effort. But it has never been held that such procedure denies constitutional right. On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and state Public Service Commissions may prefer complaints to be tried before themselves."

Added the court, in resolution of this contention:

> "The wisdom and prudence of the legislative delegation of such a broad variety of functions to an administrative executive or board are not justiciable subjects."

It is pertinent to note that the prosecution of the licensee was conducted by a deputy attorney general who is not subject to the Director of this Division.

Thus, I find that the licensee has not been deprived of due process. See concurring opinion of Judge (now Justice) Brennan in In re Larsen, supra at p.575. In accord, In re Blum, 109 N.J. Super. 125, 129 (App. Div. 1970).

Therefore, this contention is devoid of merit.

II

The licensee next argues that Rule 5 of State Regulation No. 20 lacks specificity and there are no definite standards established. Thus, the licensee did not know by what standard it could determine whether the actions of the "go-go" dancer were, in fact, lewd and immoral; citing Boller Beverages, Inc. v. Davis, 38 N.J. 138.

in the State courts in numerous cases. See McFadden's Lounge, Inc. v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 66 and 67 (App. Div. 1954). In re Club "D" Lane, Inc., 112 N.J. Super. 577 (App. Div. 1971).

In Club "D" Lane, the court stated, at p. 579:

> "A license to sell intoxicating liquor is not a contract nor is it a property right. Rather it is a temporary permit or privilege to pursue an occupation which is otherwise illegal. Since it is a business attended with danger to the community, it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. Mazza v. Cavicchia, 15 N.J. 489, 505 (1954).
>
> "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 Beverage 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 or 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)."

Finally, it should be pointed out that although statutes penal in character normally must be strictly construed, the Legislature enjoined the courts otherwise in N.J.S.A. 33:1-73 which provides:

> "Intention and construction of law. This chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed."

See Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947); Kravis v. Hock, 135 N.J.L. 259 (Sup. Ct. 1947); Re Starshock, Inc., Bulletins 2101, Item 2 and 2111, Item 1. Therefore, this contention is without merit.

III

Pursuant to a specific assignment to investigate alleged lewd performances at the subject premises, ABC agents C, Mc and D visited the said premises on February 7, 1975. Agent Mc, accompanied by agent C, entered the premises at about 12:50 p.m. and remained there until 5:35 p.m. Upon entering the said premises they seated themselves at the bar.

My reading of Boller Beverages does not find any relevant support for the licensee's contentions. In 1608 New York Avenue Corp. v. Division of Alcoholic Beverage Control (App. Div. A-2099-71) decided on August 23, 1973, which involved an appeal from the conviction of the appellant of the charge that it permitted an entertainer to perform in the licensed premises in a lewd, indecent and immoral manner, the court considered the same contention, namely, that the said regulation does not contain a precise standard. Said the court:

> "We conclude that the language of the regulation in question, when measured by common understanding and practice, conveys sufficiently definite warnings as to the proscribed conduct, and that it is sufficiently precise so that the regulation can be administered fairly and not arbitrarily. Roth v. United States, 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511 (1957)."

Statutes and regulations of this Division may be deemed of sufficient certainty by the application of several criteria, the most pertinent of which in the instant matter is that there is "on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing the statute." Cox v. State of Louisiana, 379 U.S. 559, 569, 85 S. Ct. 476, 483. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Winters v. New York, 333 U.S. 507, 515, 68 S. Ct. 665, 670. Although many statutes "might be extended to circumstances so extreme as to make their application unconstitutional ... a close construction will often save an act from vagueness that is fatal." Williams v. United States, 341 U.S. 97, 101, 71 S. Ct. 576, 579. And "If the statute should be construed as going no further than it is necessary to go in order to bring defendant within it, there is no trouble with it for want of definiteness." Fox v. Washington, 236 U.S. 273, 277, 35 S. Ct. 383, 348. With respect to words such as "obscene, lewd, lascivious, filthy and indecent;" see Roth v. United States, 354, U.S. 476, 77 C. Ct. 1304.

Rule 5 of State Regulation No. 20 reads as follows:

> "RULE 5. No licensee shall engage in or allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy, indecent or obscene language or conduct, or unnecessary noise; nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance."

It is noted that violation of the rule constitutes a civil offense, not a criminal one. Kravis v. Hock, 137 N.J.L. 252. Punishment thereof is by suspension or revocation of a liquor license. And the conduct interdicted is only that which takes place on the liquor licensed premises. Rule 5 has been construed

The following is a summary of the testimony of agents C and Mc: William Connolly and Carl Osterburg were on duty as bartenders; Joseph Cella, the principal officer and manager of these premises was present, as was a waitress, identified as Segne Petrillo, and a "go-go" dancer later identified as Rosalie Lastvogel, who operated under the professional name of Serena.

The agents ordered beer and lunch, and shortly after they were served, Serena wearing a black two-piece outfit, walked on to the stage and began her dance. The agents were seated about four feet from the stage and had an unobstructed view of the dancer.

During the course of this dance, at 1:20 p.m. she unfastened the strap going around the left side of the bra portion of her costume, which allowed her nipples to be exposed. At the end of each record during this routine, she bent over toward the patrons, and lowered the bottom portion of her costume, exposing the crack between her buttocks. The patrons responded by cheers and shouting.

At 2:15 p.m. at the start of her second performance she asked agent Mc for his hat, which she then used as part of her act. During this set, she opened the strap on her costume again, and on five occasions exposed her nipples to the patrons and employees. She then took the hat from her head, covered her breast, putting both breasts into the hat after removing them from her bra.

She resumed her performance again at 3:00 p.m. and again, on five occasions during this performance, exposed her nipples to the patrons and employees. In addition, she bent over, lowering the bottom part of her anatomy and exposed her buttocks to the patrons on four occasions. This performance ended at 3:20 p.m.

At 3:35 p.m. she resumed her dancing and, this time, she wore a blue outfit, the top part of which fit more loosely on her large breasts. She then walked onto the bar and squatted before the patrons who were seated around the bar. She permitted the patrons to place dollar bills inside both the top and lower portions of her costume. Some patrons squeezed her breasts and pushed the bills down in front of the lower portion of her costume and into her vagina.

She then continued to dance on the bar for about ten minutes, got off the bar and continued her dance on the floor on the bartender's side of the bar.

The agents observed two males who kissed her nipples, after giving her dollar bills; another male kissed her buttocks as she was standing next to him; and several placed dollar bills inside her bra and inside the lower portion of her costume in the pubic area.

While she was standing at the side of the bar on this occasion, Cella walked by her, took one of the dollar bills from her bra and placed it on or in her vagina under the lower part of

her costume, to the laughing accompaniment of several male patrons. The agents noted that, during all of the above described activity, the licensee's employees observed her and never tried to stop her.

She resumed her next performance at 4:10 p.m., at which time, she exposed her breasts while patrons were shouting at her to "take it off". Several of the patrons loudly called to Cella to lock the door so that she could take all her clothes off. This performance ended at 4:30 p.m. and she started a new performance at 4:45 p.m.

While she was performing at this time the bartender, Carl, who held a white bucket approached each patron seated at the bar and collected a dollar from them, which money was dropped into the bucket. When agent Mc asked him what the money was for he replied "For the girl to put on a little show." However, after collecting the money, Carl had a conversation with Cella, after which he returned the dollar bills to each of the patrons. The agents heard Carl tell several of the patrons that the manager was not sure whether the agents were "cops or not."

At 5:15 p.m. agent Mc placed a call to the local police, after which one of the patrons came up to agent Mc and asked him: "Why don't you tell Cella that you guys are alright, so the girl will put on a show". Cella, however, apparently did not believe them and by this time the police had responded.

Agent D entered the premises at 11:30 a.m. on that date and remained there until 2:15 p.m. When the other two agents entered the premises they saw agent D, but made no sign of recognition.

He gave the following account: At the height of the activity, the patronage consisted of fifty males. At approximately 12:20 p.m. Serena began her first performance and during this performance she undid the top portion of her costume and allowed the front part of it to hang loose. During the course of her dance, the top part of her costume dropped to a position where her nipples were exposed, and she permitted her nipples to remain exposed during her dance. Also, on numerous occasions she would bend forward and pull the bottom part of her costume down, thereby exposing the crack of her buttocks. He also observed the dance as described by agent C, during which she had the agent's hat and performed as hereinabove described. He departed the premises at about 2:15 p.m.

Testifying on behalf of the licensee, Allen G. Cree, a County employee, stated that he entered the premises on the date charged herein, at about 1:00 p.m. and left about 6:30 p.m. or 7:00 p.m. He witnessed Serena dancing, but he did not see her expose her nipples or the crack of her buttocks. He did see patrons stuff dollar bills into her costume on two occasions and also saw her dance on the side of the bar; but he did not see anyone kiss her breasts or buttocks.

He had entered the premises alone but shortly thereafter, was greeted by two of his friends who engaged him in conversation during his stay. He paid less attention to Serena while talking to his friends. On only two occasion did he notice dollar bills being put inside her bikini shorts.

Finally, he admitted that, during the course of his stay he imbibed about six or seven drinks of alcoholic beverages.

Donald Dario, a building contractor, entered the premises shortly before 3:00 p.m. and left about 6:00 p.m. He, too, stated he never saw this dancer expose her breasts, nor did he watch to see if anyone stuffed any dollar bills in her costume. He admitted that he didn't watch her all the time because a friend of his came in to these premises and discussed business with him. He was then asked:

"Q Did you see anybody stuff a dollar bill in the vaginal area?
A To tell you the truth, no, because I was at that end of the bar. If it did happen I was not interested watching it.
Q You weren't interested?
A No."

He did, however, admit that he saw a dollar bill stuffed inside the bra of this dancer. He had approximately five drinks of alcoholic beverages during his stay in the premises.

John J. Delaney, a mason contractor, also testified that he never saw the dancer's breast or buttocks exposed. However, he admitted that he spent a considerable amount of time, during his stay at the premises, playing pool, and didn't pay too much attention to her. He didn't see her dance on top of the bar; in fact, she was just "walking around" to the music. However, he did not see anyone put any dollar bills into her costume.

Robert White, a young "helper" employed by Delaney, entered the premises sometime between 12:00 p.m. and 12:30 p.m. and remained there until after 6:00 p.m. He never saw the dancer expose her nipples or the crack of her buttocks. He did, however, see people put dollar bills inside her costume both in the top part and in the pubic area. During the course of his stay, he consumed six or seven drinks of alcoholic beverages.

He also admitted that he did not watch the dancer on all of the occasions and that she "could have bent down and done something I didn't see in the course of the afternoon."

He was then asked:

"Q Also in the course of the afternoon would you say she could have lowered her bra and exposed her breasts without you seeing it?

A She could have done it."

And also:

"Q For all you know, patrons could have put money in her costume without you seeing it?
A Yes.
Q Did you see any patron put money in her costume?
A I saw a couple."

He was then asked:

"Q Isn't it a fact as she danced her body moved, including her breasts moved, and that the bra slipped down to expose part of her nipples?
A No, because when I saw her dance she always kept her hand across like this to keep up the bra.
Q She was holding the bra up with her hand when she danced?
A When I saw her she had her hand across her bra.
Q She danced like that?
A When I saw her, yes."

Finally, he added that he was not erotically aroused by her dancing.

Robert B. West, a sales executive, who sells his company's products to the licensee, arrived at the premises at 1:00 p.m. and left about 2:30 p.m. During the period he had two drinks of scotch and water. He insisted that he saw no illicit exposure by Serena during the hour and a quarter he was there.

John Diehl, an electrical contractor, arrived at the premises on this date about 1:30 p.m. and left about 2:15 p.m. During the course of his stay, he consumed about five glasses of scotch and soda. He denied seeing any exposure on the part of the dancer, and doesn't recall seeing her dance on the floor. However, he admitted that, during the course of his stay he met another contractor and was engaged in conversation with him on business matters. He paid attention to the dancer only when she was actually in front of him. He did, however, see a dollar bill sticking out on one side of the lower part of her costume.

Joseph L. Cella, the principal officer and manager of the corporate licensee denied that Serena exposed her nipples and the crack of her buttocks. He also denied that anyone kissed her on the breasts and buttocks, or that he stuffed any dollar bills into her costume. He was asked this question:

"Q Did you see anybody stuff any dollar bills down her bikini brief where her genital area is?
A No, absolutely not."

He was then asked about the testimony of the agents to the effect that he took a dollar bill out of her brassiere and stuck it under the lower part of her bikini shorts into her genital area. He denied that, and explained that she had a dollar bill which was hanging on the side of her hip, and he took it out, handed it to her and said "Now put this away."

He explained that the reason why he directed his bartender to return the money collected in the bucket was because he felt that because of the depressed economic situation, the patrons should not be required to give tips to the dancer.

On cross examination, he admitted seeing Serena kneel down twice in front of the patrons and the patrons hand her dollar bills which she placed inside her costume. Moreover, he did see, on two occasions, patrons place dollar bills inside her costume. He asserted that he pulled out a dollar bill from the side of her costume and, "As a joking matter as she went by me, I pulled it out to make her think I am taking it. I said 'Here' and gave it back to her." However, he denied that he took the dollar bill and put it under her costume and into her pubic area.

IV

We are dealing here with a purely disciplinary matter and its alleged infraction. Such measures are civil in nature, and not criminal. Kravis v. Hock, supra. Thus, the Division need establish its case only by a fair preponderance of the believable evidence. 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). In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

Using the said principle as a guide I have carefully evaluated the extensive testimony produced both on behalf of the Division and the licensee and have had the opportunity to observe their demeanor as they testified. I am persuaded that the testimony of the ABC agents was forthright, concise, credible and fully supportive of the charges.

There was no showing of any improper motivation on their part and no bias against the licensee. They were assigned to pursue an investigation and it was natural that their observance should be directed at the full activities during their visit. Consequently, their testimony was of a positive nature, clear and entirely corroborative.

On the other hand, I find the testimony of the witnesses for the licensee to be negative, vague, indefinite, imprecise and inconsistent and, indeed, incredible. This is readily understandable because although some of the witnesses were friends of Cella and tried to help him, it is obvious that in these circumstances, they did not enter the premises on the date herein alleged for the purpose of making these special observations.

I am particularly unimpressed with the testimony of Cella. The statement that he did not see any of the patrons put dollar bills inside the costume taxes credulity. This is contradicted not only by the positive testimony by the agents who observed seventeen patrons place dollar bills inside the bra covering the breasts of the dancer and inside the dancer's brief, in the pubic and vaginal area but even by the licensee's own witnesses. It should be noted also that the agents testified that there was actual fondling by patrons of the breasts and private parts of the dancer when the money was received by her. This indicates a direct sexual contact between the dancer and the patrons.

In addition, there was the testimony that two male patrons were permitted to pull the dancer's bra from her breasts and kissed her breasts, while another kissed her buttocks. Another bit of testimony by the licensee which is totally incredible and seriously beclouds his entire testimony, is his explanation of why the money collected by his bartender in the bucket from patrons was returned to them.

Cella explains that he suddenly decided that because of the difficult economic situation, the money collected by his employee as tips for the dancer should be returned to the patrons. This is an explanation made out of whole cloth.

Furthermore, as pointed out hereinabove, most of the testimony of the witnesses for the licensee was to the effect that "I did not see it occur" not that it did not, in fact, occur. On the other hand the testimony of the agents was of a positive nature. The fact that a patron did not see an occurrence does not mean that it did not take place and the positive testimony of the agents whose express purpose in being in the licensed premises expressly to make observations of the "go-go" dancer's performance has a much stronger impact.

In State v. Jones, 105 N.J. Super. 493 (App. Div. 1960) the court in commenting upon such testimony cites 4 Jones on Evidence (5th ed. 1958), § 985, pp. 1856-1857, as follows:

> "Testimony is affirmative or positive if it consists of statements as to what witness has heard or seen; it is negative if the witness states that he did not hear or did not see the phenomenon in question. This being the distinction between testimony which is affirmative and testimony which is negative, it is an

established rule that, where the one form of statement is opposed to the other, the affirmative testimony must be deemed to outweigh that which is merely negative.

In other words, 'the testimony of a credible witness, that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place.' The reason for this rule is that the witness who testifies to a negative may have forgotten which actually occurred while it is impossible to remember what never existed.

Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively....".

Vide, Rapp v. Public Service Coord. Transport, Inc., 15 N.J. Super. 305, 311 (App. Div. 1951), affirmed 9 N.J. 11 (1952); Honey v. Brown, 22 N.J. 433 (1956).

The licensee argues that the Division must show that there was erotic excitation or passions aroused by the dancer in order to establish that her performance was lewd and immoral. This contention lacks merit. The fact that the Division agents or the witnesses for the licensee were not sexually aroused, as they testified is not determinative, provided that, as here, "the predominant object and natural effect upon the observers - patrons of one portion of the performance was erotic excitation." Davis v. New Town Tavern, 37 N.J. Super. 376 (App. Div. 1955).

Furthermore, the testimony clearly establishes that there was actual audience participation by the fondling of the dancer and the placing of dollar bills inside her costume both at the breasts and in the pubic area.

Finally, with respect to the issue of credibility we have here a situation where four employees of the licensee who were actually present during the alleged occurrences have not been produced. It would appear reasonable and natural for the licensee to have produced the dancer to testify as to what actually took place with respect to her performance that day. There is nothing to show that she was unavailable and could not be produced. Similarly, Cella testified that both of his bartenders who were on duty on that date were available to testify at the time of the hearing; but neither was produced. This similarly applies to the waitress. In fact, she was working for the licensee at these premises on the date of the hearing, and as noted, was on duty in the licensed premises during the performance of this "go-go" dancer. No explanation was offered why she

or any of these witnesses were not produced. Therefore a permissible inference may be drawn that, had these witnesses been produced they could not have truthfully contradicted the testimony of the Division's witnesses, and their testimony would have been unfavorable to the licensee. Re Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1966); Wild v. Roman, 91 N.J. Super. 410 (App. Div. 1966); O'Neill v. Bilotta, 18 N.J. Super. 82, Affd. 10 N.J. 308 (1952); Grandview Cafe v. Jersey City, Bulletin 2124, Item 1.

After a careful consideration of the entire record herein, I find that the charge herein has been established by a fair preponderance of the credible evidence, indeed, by substantial evidence. I, therefore, recommend that an order be entered finding the licensee guilty of the said charge.

Licensee has no prior adjudicated record. It is, further, recommended that the license be suspended for sixty days.

Conclusions and Order

Written exceptions to the Hearer's report were filed on behalf of the licensee, and written answering argument was filed on behalf of the Division pursuant to Rule 6 of State Regulation No. 16. A reply by the attorney for the licensee to the Division's answering argument, was submitted, and although such reply is not authorized by Rule 6 of State Regulation No. 16, it has, nevertheless, been considered by me.

In his exceptions, the licensee contends that the Hearer disregarded the testimony of the licensee's witnesses, by finding that the testimony of the Division's witnesses is credible. It should be pointed out that the Hearer has had the opportunity to observe the demeanor of the witnesses as they testified and he found that their testimony was "forthright, concise, credible and fully supportive of the charges". Moreover, the record does not indicate any improper motivation on their part, or any bias against the licensee. He found that their testimony was of a positive nature and entirely corroborative.

The Hearer moreover found, and the record supports that finding, that the activity which included the insertion of dollar bills inside the bra and lower front portion of the bikini costume worn by the "go-go" dancer, by patrons was lewd and immoral activity. In his exceptions, the licensee denies that such activity constitutes lewd and immoral conduct and argues that "this procedure is, in fact, the custom of "go-go" taverns throughout the State which fact we are sure the Director must concede."

It is clear as crystal that this statement is not supported by the record. This Division has consistently held that

audience participation which includes the insertion of money inside a "go-go" dancer's costume, both inside the bra portion and in the pubic area by patrons is clearly lewd immoral conduct. There is evidence to the effect that patrons were permitted to pull the dancer's bra from her breasts and kiss the bare breasts; and that there was actual fondling by patrons of the breast and the private parts of the dancer, when the money from patrons was received by her. I, thus, find this contention to be devoid of merit.

The licensee then argues that the Hearer erred in stating that a permissible inference may be drawn, from the failure of the licensee to produce four employees, including the "go-go" dancer; that had these witnesses been produced, they could not have truthfully contradicted the testimony of the Division's witnesses; and their testimony would have been unfavorable to the licensee.

The licensee maintains that these employees were "equally available" as witnesses to both the Division and the licensee, citing Hickman v. Pace, 82 N.J. Super. 483, 490 (App. Div. 1964). The attorney for the licensee, apparently, misreads Hickman and fails to comprehend its rationale.

In Hickman the court held that "an inference adverse to a party because of his 'unexplained' failure to produce a certain witness, when it would be 'natural' for him to produce the witness, is generally permitted", 82 N.J. Super. 490. An exception to the rule is where the prospective witness is "equally available to both parties" ibid. However, the court expressly stated that this latter phrase referred not to the physical availability of the prospective witness, but to the fact that such witness "would be as likely to be favorable to one party as to the other", 82 N.J. Super. 492. Thus, this exception to the general rule permitting an adverse inference is limited to neutral, disinterested witnesses. Obviously, the four employees of the licensee could hardly be deemed neutral, disinterested witnesses; thus, this concept is inapplicable in the factual context herein.

The licensee nevertheless, asserts that their testimony would have been cumulative and inferior to the testimony of the "independent" witnesses who were not employees. This argument does not pass muster. Who else, but the performer, would be better able to testify as to what she did during her performance? And as to the two bartenders and the waitress, they, as employees of the licensee, on duty during the performance, were under a duty to take appropriate action to prevent any lewd or indecent activity by the performer. Such failure by the employees to take appropriate action, if they knew or should have known of such activity, is the violation, by law, of the licensee. Rule 33 of State Regulation No. 20; Mazza v. Cavicchia, 15 N.J. 498, 509 (1954); F & A Distrib. Co. v. Div. of Alcoholic Bev. Control, 36 N.J. 34, 37 (1961). Consequently, their knowledge of the performance is a material issue, and their failure to testify permits the inference to be drawn that, if called to testify as a witness, they would not deny such knowledge.

The licensee takes further exception to the Hearer's finding that the licensee was not deprived of due process because of the alleged merger of functions. I find that this contention was correctly resolved in the Hearer's report. Additionally, it was recently fully considered and disposed of in Kelly v. Sterr, 119 N.J. Super. 272, 274-275 (App. Div. 1972), aff'd 62 N.J. 105 (1973), cert. den. 414 U.S. 822 (1973).

In Kelly v. Sterr, which involved an appeal by a State Police officer from a conviction after a departmental trial presided over by a State Police captain, the appellant complained that the hearing "did not comport to due process".

This contention was rejected by the court which held that where rules allegedly violated by State policemen were promulgated in accordance with legislative authority, policeman had been notified of charges, had been represented by counsel, had opportunity to be heard at a departmental hearing, and to be confronted with witnesses, and to cross-examine witnesses, and a factual determination was made, policeman had been accorded procedural due process, notwithstanding that officers who investigated the case as well as the officer who heard and decided the case, but who was not the investigating officer, were members of the State Police.

The court pointed out that "the hearing officer was appointed pursuant to legislative authority, and his findings reviewed and concurred in by the appropriate reviewing authority. Except where the Legislature has otherwise provided, such has traditionally been the accepted practice in administrative hearings, and we see no infirmity therein. See Inre Bernaducci, 85 N.J. Super. 152 (App. Div. 1964), cert. den. 41 N.J. 402 (1965), and cases cited therein. The contention of licensee with respect thereto lacks merit.

Finally, the licensee contends that the recommended penalty of suspension of license for sixty days is excessive. I do not agree. The activity here involved was patently lewd and indecent, included audience participation in sexual contact with the performer and was engaged in over a protracted period of time. The recommended sanction is not disproportionate to Division precedent. Cf Re Bill's Barge, Inc., Bulletin 2166, Item 3.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Hearer's report, the exceptions filed with respect thereto, the answering argument and the reply by the licensee, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 23rd day of July 1975,

ORDERED that Plenary Retail Consumption License C-3, issued by the Borough Council of the Borough of Seaside Park

to Cella Realty Co., Inc. t/a Cella's Ship's Bar, for premises 1001 N.W. Central Avenue, Seaside Park, be and the same is hereby suspended for sixty (60) days, commencing at 2:00 a.m. on Monday, August 18, 1975 and terminating at 2:00 a.m. on Friday, October 17, 1975.

LEONARD D. RONCO
DIRECTOR

2. STATE LICENSES - NEW APPLICATIONS FILED.

Velardi & Son Wine Imports, Inc.
40 Whelan Road
East Rutherford, New Jersey
Application filed September 18, 1975
for person-to-person and place-to-place
transfer of Wine Wholesale License WW-18
from International Commerce Corporation,
t/a Europa Wine Import Co., 475 High
Mountain Road, Haledon, New Jersey

Braceras Inc.
13 Birkendene Road
Caldwell, New Jersey
Application filed September 23, 1975
for wine wholesale license.

Leonard D. Ronco
Director