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

BULLETIN 2260 July 26, 1977

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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. APPELLATE DECISIONS - ANDY'S CORNER, INC. v. BOGOTA.

Andy's Corner, Inc., t/a Andy's Corner	:	
Appellant,	:	On Appeal
v.	:	CONCLUSIONS and ORDER
Borough Council of the Borough of Bogota,	:	
Respondent.	:	

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Appellant
Robert A. Baron, Esq., Attorney for the Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Appellant, Andy's Corner, Inc., appeals from the sixty day suspension of its license by the Borough Council of the Borough of Bogota (hereinafter Council) following its plea of non vult to the following amended charge:

> "That you have violated State Regulation No. 20, Rule 1 by selling, serving, delivering an alcoholic beverage to a person under the age of eighteen (18) years on April 20, 1976 e.g. a minor born November 8, 1958 named 'Kenny'."

In its petition of appeal, appellant alleges that the Council's action was arbitrary and capricious, violative of appellant's constitutional rights and an unreasonable exercise of its discretion; and that the extent of the penalty was not justified by any competent proof or findings of fact.

In its answer, the Council denied the substantive allegations contained in the petition of appeal.

Upon filing of the appeal, an order dated June 4, 1976 was entered by the Director staying the Council's order of suspension pending the determination of this appeal.

The stenographic transcript of the hearing below was submitted into evidence supplemented by the testimony of the sole stockholder-manager of the corporate appellant at this de novo hearing, in accordance with Rules 6 and 8 of State Regulation No. 15.

The charge alleges the sale of an alcoholic beverage on April 26, 1976 to two minors, aged sixteen and seventeen and one half years of age. Prior to the hearing, the charge against the sixteen year old was dismissed for lack of evidence. At the Council hearing, the charge was amended to reflect this change, and a plea of non vult was entered as to the remaining charge.

The Council, thereupon, engaged in discussion relative to licensee's record. Councilman Penna, despite the Council's attorney's advice that it was unnecessary in a non vult plea, asked to review any complaints that the police may have received relative to licensee, and to obtain a description of the sixteen year old against whom the charge had been dismissed.

The Council recessed in order to enable the arresting police officer an opportunity to attend the hearing and testify, after being summoned from patrol duty. The police officer gave testimony and was cross-examined relative to the physical appearance of both youths.

The Council was advised, pursuant to Councilman Penna's request, that the police were summoned on two other occasions to the premises to investigate allegations of drinking by minors. They were informed that"... the cases were dropped because of no proof." They were also told about a call relative to a fight in progress; but no other details were available as to what, if anything, was found by the police upon arrival at the tavern.

The Council then recessed to deliberate and decide upon a penalty. After the recess, the Council voted to suspend appellant's license for sixty days.

It is a firmly settled principle 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 2073, Item 2, and cases cited therein.

The burden of establishing that the Council 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 Council. Or, to put it another way: Could the members of the Council, as reasonable men, acting reasonably have come to their determination based upon the evidence presented? 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. Mun. Bd. of Alc. Bev. Newark, 55 N.J. 292, 303 (1970).

I find that it was inappropriate and prejudicial to appellant for the Council to request and take testimony relative to the physical description of the sixteen year old after being advised that the allegation could not be proved, resulting in the charge relative to the said minor being dismissed.

Similarly prejudicial was the airing of unsubstantiated complaints relative to other and unproven instances of minors who were allegedly served alcoholic beverages in the licensed premises, and of an unsubstantiated claim that a fight allegedly occurred in the tavern.

Testimony of this nature has no probative value, and there is that ever present danger that it may be misinterpreted by the Council in a manner detrimental to the rights of the appellant, as the record indicates occurred in subject case. It is fundamental that rumor, unsubstantiated statements, and anonymous accusations have no place in this tribunal.

The application of fairness has long been a hallmark in the administration of this Division. "As with all administrative tribunals the spirit of the Alcoholic Beverage Law and its administration must be read into the regulation. The law must be applied rationally and with 'fair recognition of the fact that justice to the litigant is always the polestar'." Berelman v. Camden, Bulletin 1940, Item 1; Cf Barbire v. Wry 75 N.J. Super. 327 (App. Div. 1962); Martindell V. Martindell 21 N.J. 341 at 349 (1956).

I find, as a fact, that the appellant has sustained the burden of establishing that respondent's action was erroneous and should be modified.

I recommend that the appellant's license be suspended for fifteen days for the sale of alcoholic beverage to a seventeen and one half year old minor to which should be added five days for a prior dissimilar violation which occurred within the past five years, making a total twenty days suspension.

It is, therefore, recommended that an order be entered modifying the action of the Borough Council of Bogota, reducing the sixty day suspension of license imposed upon appellant, to twenty days.

CONCLUSIONS AND ORDER

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

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

Accordingly, it is, on this 29th day of March, 1977,

ORDERED that the action of the Council be and the same is hereby modified reducing the sixty (60) days suspension of license to twenty (20) days; and it is further

ORDERED that my Order dated June 4, 1976 staying the Council's action pending the determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-4, issued by the Borough Council of the Borough of Bogota to Andy's Corner, Inc., t/a Andy's Corner, for premises at 265 Queen Anne Road, Bogota, New Jersey, be and the same is hereby suspended for twenty (20) days commencing at 2:00 a.m. on Friday, April 8, 1977 and terminating at 2:00 a.m. on Thursday, April 28, 1977.

JOSEPH H. LERNER
DIRECTOR

2. APPELLATE DECISIONS - FACES, INC. v. WEST ORANGE.

Faces, Inc. t/a Creations, Appellant, v. Municipal Board of Alcoholic Beverage Control of the Town of West Orange, Respondent.	On Appeal CONCLUSIONS AND ORDER

Maurer and Maurer, Esqs., by Barry D. Maurer, Esq., Attorneys for Appellant
James A. Ospenson, 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 respondent, Municipal Board of Alcoholic Beverage Control of the Town of West Orange (hereinafter Board) which, on September 7, 1976, suspended appellant's Plenary Retail Consumption License C-45, for forty-four days, upon a series of charges to which appellant had entered a plea of non vult before the Board.

Further, in addition to the imposition of the suspension, the Board attached certain conditions to the continuance of the license, which, appellant maintains in its petition of appeal, is beyond the Board's powers under the applicable statutes (N.J.S.A. 33:1-1 et seq.). The appellant further contends that the suspension of license for forty-four days was, under the circumstances, an excessive penalty.

The Board denied these contentions averring that the power to condition a license reposes in the Board; and that the penalty imposed was fair and reasonable.

By the Director's Order, dated September 9, 1976, the action of the Board was stayed pending the determination of this appeal.

A de novo appeal was heard in this Division, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses pursuant to Rule 6 of State Regulation No. 15. However, as the basis for the appeal centered about the respective legal positions of the parties without substantial factual differences, other than the introduction of some documentary evidence, the hearing consisted in the attorneys' argument in support of their respective positions.

The factual situation, from which their respective legal arguments derive, revolve about specification of charges against appellant, to which it entered a non vult plea. Four incidents resulting in brawls or acts of violence, during the period of February 16 through June 14 of 1976 were alleged. Additionally, the frequent instances when appellant's patrons parked improperly gave rise to a further charge that appellant maintained a nuisance in the operation of its establishment.

Upon the plea entered as aforesaid, the Board imposed a suspension of license for fifty-five days, giving a remission of eleven days for the plea, leaving a net suspension of forty-four days. The order also imposed a condition that the operation of the licensed premises as a discotheque be continued "upon probation, however, only until transfer of the license or until expiration of the present term of the license on June 30, 1977, whichever shall occur first. The condition of such probationary continuance is that such operation shall be without violation of the alcoholic beverage control laws of New Jersey, rules and regulations of the Director of the Division of Alcoholic Beverage Control, or municipal ordinances of West Orange. For any such violation, the order shall stand revoked, and the matter of continued operation as a discotheque set down for such further proceedings as are consistent with the law and the rulings of the Board."

I.

The penalty imposed by the Board was the result of its specifications of charges against appellant to which the plea of non vult had been entered. From the oral description of the hearing before the Board, copies of certain police records were exhibited which are part of the record herein. These records confirm a series of fights, including one brawl that required the entire mobile force of the police department to respond to the premises.

In a recent appeal to the Director of this Division, appellant therein contended that a ninety day suspension on a finding of guilty to permitting a brawl, was reduced by the Director to sixty days. The Bacet Corporation v. Cliffside Park, Bulletin 2195, Item 2.

> "It has generally been held by this Division that a suspension or revocation imposed in a local disciplinary proceeding rests in the first instance within the sound discretion of the municipal issuing authority, and the power of the Director to reduce

or modify it will be sparingly exercised and only with the greatest caution. Harrison Wine & Liquor Co. v. Harrison, Bulletin 1296, Item 2."

The penalty imposed herein based upon four reported incidents was far less than a comparable penalty as affirmed by the Director of this Division. Cf. Brogel v. Trenton, Bulletin 2116, Item 3; Pavia v. Harrison, Bulletin 2134, Item 2; Baldwin v. Elizabeth, Bulletin 2150, Item 1. In these matters a penalty of thirty or thirty-five days was imposed for single incidents.

Additionally, it is noted that the guide of penalties imposed in disciplinary proceedings initiated in this Division carries a thirty day suspension where a brawl or act of violence is proven.

In consequence, I find that the penalty imposed by the Board was not unreasonable and should not be disturbed.

II.

Appellant's contention that the Board may not impose conditions on its license during the licensing year has firm support by precedent in this Division. The Director of this Division held that Atlantic City could not impose a condition to a license already renewed for that year. Alanwood Holding Co. v. Atlantic City, Bulletin 1963, Item 1. In that matter, the statutory words "first approved," as found in N.J.S.A. 33:1-32 was interpreted as meaning the time of issuance or renewal of the license.

Additionally, it is noted that the incidents giving rise to the Board's imposition of conditions all occurred sufficiently prior to the renewal date for the license to have permitted its charges to have been brought and heard. Whatever determination the Board arrived at could have resulted in the attachment of special conditions to the renewal of appellant's license and the imposition of such special conditions, if any, could not have been successfully challenged on the ground of being untimely imposed.

It is, further, observed that, had the conditions herein been imposed at renewal of license, an appeal based upon vagueness or lack of specificity might well have been lodged. It is assumed from argument of counsel that these conditions were intended merely as a warning that the licensed premises could not be operated by appellant in the same manner as it had been. The Board's intentions to eliminate the problems caused by appellant's management is certainly highly commendable. Thus, the appellant should take heed that the Board may well give great weight to appellant's record when its license comes up for renewal.

The burden of establishing that the Board's action is erroneous and should be reversed rests entirely upon appellant, pursuant to Rule 6 of State Regulation No. 15. The appellant has failed to show that the penalty imposed by the Board is unreasonably severe, as hereinabove indicated. However, appellant has met the burden of showing that the Board's action in imposing conditions is improper and should be reversed, as required by above regulation.

It is, therefore, recommended that the action of the Board be affirmed in the matter of the penalty imposed, and the stay thereto granted by the Director be vacated and the suspension be reimposed.

It is, further, recommended that the action of the Board in imposing special conditions to appellant's license after the renewal of the said license, be reversed.

Conclusions and Order

Written Exceptions to the Hearer's report were filed by the parties hereto, pursuant to Rule 14 of State Regulation No. 15.

In its Exceptions, the appellant argues that the acts of violence happened outside the control of the licensee, which, at best, could constitute "suffering" under Rule 5 of State Regulation No. 20.

The well established principal is that a licensee is responsible for conditions both inside and outside the licensed premises. Tyrone's Haven, Inc. v. South River, Bulletin 2214, Item 1; Gueche, Inc. v. Union City, Bulletin 2072, Item 5. No distinction is warranted for the type of offenses herein in considering penalty. Similar exceptions advanced against application of guidelines per se, violence, without injury incidents, and concepts of fundamental purposes of the law, while cogent factors, do not warrant reduction of penalty imposed by the municipal issuing authority as unduly excessive or manifestly unreasonable. In re Larsen, 17 N.J. Super. 564 (App. Div. 1952).

Finally, the exception that the municipality retained charges to the detriment of appellant is without merit since appellant was aware of the incidents which required police intervention. Simonsen, Inc., t/a Drift Inn v. Asbury Park, Bulletin 2217, Item 1.

My review of the nature and type of offenses, the time periods involved, the plea of non vult and the impact which one of the incidents had on the community's police force, fails to indicate an abuse of discretion by respondent in the imposition of a forty-four days suspension.

In its exceptions, the respondent objects to what it asserts in the Hearer's report is an applied "enforcement estoppel" or "untimely" issuing authority action. My review of the record finds no credible evidence of improper application by the Hearer. No support is found for an "estoppel" concept or penalty for "untimely" action. Rather, it was noted that the charges predated the last renewal and, at that time, could have been considered along with conditions to be imposed. The imposition of conditions in the subject disciplinary hearing is prohibited after renewal. N.J.S.A. 33:1-32; Alanwood Holding Co. v. Atlantic City, supra.

Respondent's reliance upon Lyons Farm Tavern v. Mun. Bd. of A. B. C., 68 N.J. 44 (1975) and a further expansion of the intent of the statutory power to impose conditions is unfounded. The Lyons case dealt with a transfer of license which the Court held to be within the ambit of the use of the term "issuance" in N.J.S.A. 33:1-32. The issue herein is a disciplinary proceeding under the guidelines of N.J.S.A. 33:1-31.

Finally, a careful review of the record including the excerpts of the hearing before the issuing authority, does not warrant a finding that there is an enforceable consent agreement by respondent to the probationary conditions. Bd. of Com'rs. of Bayonne v. B & L Tavern, Inc., 42 N.J. 131 (1964). Appropriate recourse is available to the issuing authority under N.J.S.A. 33:1-31 and State Regulation No. 20 to protect against violation of any State or local Alcoholic Beverage Law or regulation.

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

Accordingly, it is, on this 24th day of March 1977,

ORDERED that the action of the respondent Board in suspending appellant's plenary retail consumption license for forty-four days, be and the same is hereby affirmed; and it is further

ORDERED that the action of the respondent Board in attaching to appellant's plenary retail consumption license the conditions outlined in its resolution be and the same is hereby reversed; and such conditions be and the same are hereby removed from said license; and it is further

ORDERED that my order of September 9, 1976, staying the suspension imposed by the Board pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-45, issued by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange to Faces, Inc. t/a Creations, for premises 410-414 Eagle Rock Avenue, West Orange, be and the same is hereby suspended for forty-four (44) days commencing at 2:00 a.m. on Wednesday, April 6, 1977 and terminating 2:00 a.m. on Friday, May 20, 1977.

JOSEPH H. LERNER
DIRECTOR

3. SEIZURE - FORFEITURE PROCEEDINGS - ILLICIT SALES OF ALCOHOLIC BEVERAGES IN AMUSEMENT ARCADE BY PATRON WITHOUT KNOWLEDGE OF OWNER - SUM POSTED AS BOND RETURNED.

In the Matter of the Seizure on August 28, 1975 of a quantity of alcoholic beverages and personal property at unlicensed premises designated as "The Arcade" located on Sumner Road & Commonwealth Ave., in the Borough of Strathmere in the County of Cape May and State of New Jersey.	On Hearing CONCLUSIONS and ORDER

Gibson, Previti & Todd, Esqs., by L. Anthony Gibson, Esq., Attorneys for Claimant, Richard J. Alliger
Carl A. Wyhopen, Esq., Deputy Attorney-General, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This matter came on for hearing pursuant to the provisions of N.J.S.A. 33:1-66 and State Regulation No. 28, to determine whether certain property, described in Schedule "A" annexed hereto and made part hereof, constitutes unlawful property and should be forfeited; and, whether the sum of $1,400.00 deposited with the Director, under protest, pursuant to a stipulation entered into by Richard Alliger, representing the appraised retail value of the personalty as set forth in Schedule "A" aforesaid, which personalty was returned to him, should be forfeited or returned.

From the testimony given at the hearing in this Division by Wilma Rosa, an undercover agent attached to the Office of the Prosecutor of Cape May County, and by Detective Sgt. William Hunter of the New Jersey State Police the following factual complex was developed.

Based upon information received from an informant, the Office of the Prosecutor of Cape May County assigned an undercover agent, Wilma Rosa, to investigate sales to apparent minors at unlicensed premises, designated as "Arcade" in the Borough of Strathmere. She and the informant visited the "Arcade" on several occasions, and found it to be a collection of pin-ball and similar machines in a large two story building frequented principally by young people.

On her visits, she observed alcoholic beverages given to children by one Chuck Herr, an alleged employee of the owner, claimant Richard Alliger. In consequence, she and her companion, the informant, requested of Herr bottles of beer, for which they paid a dollar.

The use of beer by minors in the establishment was condoned by the owner who was in a position, on several occasions, to observe the said consumption when Herr gave beer to minors. Detective Hunter described the condition of some of the minors as "inebriated." The informant was not produced at the hearing.

The claimant, Richard Alliger, and his then-manager, Sue Anne Stein, testified that Chuck Herr was not an employee. No beer was permitted to be on the premises in the custody of minors and beer drinking generally was not encouraged there. The three bottles of beer discovered at the time of the raid was located in Alliger's office, and was either for his use or for the use of his manager.

In order to constitute a valid seizure, there must be an investigation and, upon appropriate warrant, search and seizure. N.J.S.A. 33:1-66 a. In the instant matter, the officers were under the reasonable belief that Herr, as an employee of Alliger, was selling alcoholic beverages without permit or license.

I find that Herr was making unlawful sales of beer; whether the sales were for convenience or profit was unclear. However, there was no proof offered whatsoever that Herr was in any way employed by Alliger. Attempts in testimony to link Alliger with He in the production of beer were particularly aborted by the subsequent admission that Alliger, throughout the investigation, had little, if anything to do with Herr, an admitted hanger-on within the claimant's premises.

The efforts of the law enforcement officials to rid that community of a trouble spot caused by the congregation of youngsters, some of whom undoubtedly became intoxicated, is particularly commendable. The effort apparently was successful, for the "Arcade" is now gone. However, the total absence of any proof whatever that Alliger participated or aided in the sale of the beer leaves the Director with no other choice but to return the sum posted by him.

It is, accordingly, recommended that the claim of Richard Alliger for, the return of the sum of $1,400.00 posted by him be recognized, and that the said sum be returned to him.

Conclusions and Order

No written exceptions to the Hearer's Report were filed pursuant to Rule 4 of State Regulation No. 28.

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

Accordingly, it is, on this 1st day of April, 1977

DETERMINED and ORDERED that the claim of Richard Alliger for the return of the sum of $1,400.00, posted by him as aforesaid, be and the same is hereby recognized, and that the said sum be returned to him; and it is further

DETERMINED and ORDERED that the balance of the seized property including the alcoholic beverages, as more fully set forth in Schedule "A", attached hereto, constitute unlawful property, and the same be and are hereby forfeited in accordance with the provisions of N.J.S.A. 33:1-66; and the said alcoholic beverages be and the same shall be retained for the use of hospitals, and State, county or municipal institutions, or destroyed, in whole or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

JOSEPH H. LERNER
DIRECTOR

SCHEDULE "A"

3 - containers of alcoholic beverages
10 - pinball machines; 1 - air hockey game;
1 - pool table; 1 - cigarette machine;
1 - juke box; 1 - rifle game

4. DISCIPLINARY PROCEEDINGS - LEWDNESS - INDECENT PERFORMANCE - PRIOR SIMILAR VIOLATION - LICENSE SUSPENDED FOR 70 DAYS.

In the Matter of Disciplinary Proceedings against B & M Lounge, Inc. 317 Trumbell Street Elizabeth, New Jersey Holder of Plenary Retail Consumption License C-195, issued by the City Council of the City of Elizabeth.	CONCLUSIONS AND ORDER

Daniel Richards, Esq. Attorney for Licensee
Carl J. Wyhopen, 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 June 8, 1976, 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 entertainment of your customers and patrons, to engage in conduct 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, in a manner and form having lewd, indecent and immorally suggestive import and meaning; in violation of Rule 5 of State Regulation No. 20."

In support of the charge, the Division presented the testimony of two ABC agents.

Agent S testified that, pursuant to a specific assignment, and accompanied by Agent G, he visited licensee's Lounge on June 8, 1976. He entered alone at approximately 1:10 P.M.

He described the premises as containing a long rectangular bar the length of the main room. To the left of it, is situated a raised stage approximately four feet high, and level with the bar. The rear area contains tables and chairs, a pool table and a ladies room. At the rear there is a kitchen and a telephone. He took a seat at the center of the bar. The patronage consisted of approximately 25 males.

A male, identified as John F. Burke, was tending bar. It was later disclosed that Burke was a fifty per centum stockholder and manager of the corporate licensee. A female, Ms. Nancy Loxley was also tending bar. Another bartender, Joseph Campisi was tending bar at the time of S's entry. However, Loxley and Campisi departed the premises prior to the time that the agents identified themselves to Burke.

A few minutes after entry, a female, referred to as Alex, and later identified as Alexandra Grzesik,mounted the stage to dance to music provided by a nearby juke box. Her two piece costume consisted of a pink very brief halter top, and an even briefer bottom which barely covered the vaginal area. Pubic hair was visable on either side of the costume bottom. It was attached to an even smaller patch which was intended to cover the buttock cleavage by bands less then one half inch in width. The bottoms appear to be hand knitted of a black material which has a silver colored metal thread spun within it. She was not wearing panty hose beneath the costume bottom.

As she danced, she placed her hands inside the bottoms and rubbed her pubic area provocatively, and on occasion,she pulled the material to one side or the other, thereby exposing the vaginal area. At other times during the performance, she pulled the halter top over, exposing her breasts to the audience. She also fondled her nipples causing them to become erect.

At another point during the performance, she turned away from the audience, bent forward and placed her hand through her legs and pulled the material aside exposing her vagina and anus to the audience's view. This act ended at 1:40 P.M. and S departed the premises to consult with G who remained outside.

At about 2:15 P.M. S re-entered, this time in the company of G; they sat at the bar. The dancer was performing another set which, substantially, duplicated the previous one. It ended at 2:30 P.M.. Her costume appeared to be the same as the one she used during the previous set.

At 2:40 P.M. she began to dance again in much the same manner with one notable exception. She took two one dollar bills which she had received as gratuities, moistened one side and applied them to the ends of her bare breasts covering the nipples. She then danced about causing the bills to flutter upwards exposing the full breast. This continued for approximately five minutes during which the bills fell off several times; she picked them up each time and reaffixed them as described above.

Agent G made a salacious comment directed to Burke relative to the appearance of the dancer's vagina and pubic hair. Burke responded in kind, indicating to S that he was aware of the nature and extent of the dancer's performance. This last set ended at 3:05 P.M.

On cross-examination, S stated that the lighting was adaquate to see the dancer without difficulty, since hewas seated approximately 10 to 15 feet from her during the performances.

Agent G, who had been sequestered during S's testimony at the request of licensee's lawyer, was then called as a witness by the Division. His testimony corroborated that given by S.

In defense of the charge, Thomas A. Michaels, an automotive service manager explained that he was at the licensed premises that day, and saw between fifteen and twenty minutes of the dancer's performance while having his lunch. He stated that he saw no exposure of the entire breast, vagina or anus as was testified to by the two ABC Agents. His recollection was that her performance did not differ from any other go-go dancers he had witnessed; and that she wore stockings or pantyhose.

John F. Burke described his establishment as a blue-collar mens bar catering to truck drivers and factory workers in the neighborhood. His busy hours are between noon and 3:00 P.M. and 4:00 to 8:00 P.M. He engages "go-go" dancers on Tuesday, Wednesday, Thursday and Friday, between noon and 3:00 P.M. and also 4:00-8:00P.M. on Thursday and Friday evenings. No female dances more then once a week. The females who dance at his tavern are hired by him directly; he engages no booking agency for these services. He stated that the females are very knowledgable relative to the ABC rules, and what does and does not constitute a violation of same. He testified that the dancer, on the day in question, did wear pantyhose; he saw them distinctly. Further, he denies that she exposed herself in the manner alleged by the two agents. He acknowledges hearing Agent G's comment and making the retort attributed to him but attempted to ascribe a different connotation to them.

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 circumstances 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. My evaluation 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 corporate licensee's stockholder-manager and its patron. 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 were improperly motivated.

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.

It is basic that in disciplinary proceedings, a licensee is fully accountable for any violation committed or permitted by its agents, servants or employees, Rule 33 of State Regulation No. 20. In re Schneider, 15 N.J. Super 449 (App. Div. 1951). See also In re Olympic, Inc. 49 N.J. Super. 299. Clearly the instructions of the owners of taverns to their employees, or their absence from the premises or their non-involvement in the incident does not absolve the licensee when a violation does occur as happened in the subject case.

In adjudicating this matter I note the logic used by Judge Jayne speaking for the court in McFadden's Lounge v. Div. of Alcoholic Beverage Control, 33 N.J. Super 61 (App. Div. 1954), wherein he stated at p.62:

> "Experience has firmly established that taverns where wine, men, women, and song centralize should be conducted with circumspect respectability. Such is a reasonable and justifiable demand of our social and moral welfare intelligently to be recognized by our licensed tavern proprietors in the maintenance and continuation of their individualized privilege and concession."

The Division's unrelenting policy of prohibiting "topless" female employees whether entertainers or otherwise has been affirmed by the courts. See In re Club "D" Lane, Inc., 112 N.J. Super 577 (App. Div. 1971).

Accordingly, after examining the various precedents cited, I am persuaded by the clear and convincing proof in this case, that the charge has been sustained by a fair proponderance of the credible evidence.

I recommend that the appellant's license be suspended for thirty days on the charge of permitting a lewd show on his licensed premises, plus an additional thirty days for a similar violation within the past two years, to which should be added five days for each of two dissimilar violations within the past five years.

In sum, I recommend that the appellant's license be suspended for a total of seventy days.

CONCLUSIONS AND ORDER

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

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

Accordingly, it is, on this 30th day of March 1977,

ORDERED that Plenary Retail Consumption License C-195, issued by the City Council of the City of Elizabeth to B & M Lounge, Inc., for premises at 317 Trumbell Street, Elizabeth, New Jersey, be and the same is hereby suspended for seventy (70) days commencing at 2:00 a.m. Wednesday, April 13, 1977 and terminating at 2:00 a.m. Wednesday, June 22, 1977.

JOSEPH H. LERNER
DIRECTOR

5. STATE LICENSES - NEW APPLICATION FILED.

Velardi Associates, Inc.
312 Allwood Road & Samworth Road
Clifton, N. J.

Application filed July 25, 1977 for State Beverage Distributors License.

Joseph H. Lerner
Director