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

BULLETIN 2214

February 4, 1976

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ITEM

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1. APPELLATE DECISIONS - TYRONE'S HAVEN, INC. v. SOUTH RIVER.

Tyrone's Haven, Inc.,)
Appellant)
v.)
Borough Council of the)
Borough of South River,)
Respondent.)

On Appeal

CONCLUSIONS
and
ORDER

George J. Shamy, Esq., Attorney for Appellant
Kolodziej and Cohan, Esqs., by Frederick A. Simon, Esq.,
Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Borough Council of the Borough of South River (hereinafter Council) which, on June 25, 1975, denied renewal of appellant's Plenary Retail Consumption License C-12, for premises 91-93 Whitehead Avenue, South River.

Appellant contends that the Council's action was arbitrary and has no basis in law or fact. The Council answered that its action was based on the prior record of the appellant i.e., repeated violations of local ordinances and Alcoholic Beverage Control regulations.

An appeal de novo hearing was held in this Division at which the parties had full opportunity to offer evidence and to cross-examine witnesses, pursuant to Rule 6 of State Regulation No. 15. Additionally, the transcript of the proceedings before the Council was admitted into evidence, pursuant to Rule 8 of State Regulation No. 15.

Upon the filing of the appeal, the Director entered an order on June 30, 1975 extending the term of appellant's license pending a hearing of an Order to Show Cause respecting a continuance of the license pending the determination of this appeal.

The Council adopted the following resolution at the conclusion of the hearing:

"WHEREAS, Tyrone's Haven, Inc., principal office located at 202 Highway 18, East Brunswick, New Jersey, holder of Plenary Retail Consumption License C-12, premises being located at 91-93 Whitehead Avenue, South River, New Jersey, has applied to the Mayor and Borough Council of the Borough of South River, in the County of Middlesex, State of New Jersey, for a renewal of Plenary Retail Consumption License C-12 for the period of July 1st, 1975 to June 30, 1976; and

WHEREAS, petition objecting to the granting of said renewal of said Plenary License had been filed with the Mayor and Borough Council on May 28, 1975; and

WHEREAS, pursuant to State Regulation No. 2, Rule No. 6 and Rule No. 7, the Issuing Authority must provide for a Hearing on the said objections filed; and

WHEREAS, the holder of said License and the signers of the petition so objecting have been so notified by the Governing Body that a Hearing on the matter would be held on Wednesday, June 25th 1975, at 8:00 P.M., prevailing time, in the Borough Council Chambers in the Borough Hall, Main Street; and

WHEREAS, the Hearing so noted has been held as scheduled; and

WHEREAS, the Mayor and the Borough Council have considered all material so presented at such Hearing:

NOW, THEREFORE, BE IT AND IT IS HEREBY RESOLVED by the Mayor and Borough Council of the Borough of South River, in the County of Middlesex, the State of New Jersey, that the Mayor and Council have found that there have been repeated violations of local ordinances and Alcoholic Beverage Control Regulations; and

BE IT FURTHER RESOLVED that Plenary Retail Consumption License C-12 is not renewed for the license period of July 1st, 1975 to June 30, 1976; and

BE IT FURTHER RESOLVED that certified copies of this resolution be forwarded to the Alcoholic Beverage Control Commission, the Beverage Tax Bureau, the Chief of Police of the Borough and the applicant for their record purposes."

The transcript of the proceedings before the Council, upon which the foregoing resolution was based, reveals that testimony was elicited of twelve neighbors who reside in close proximity to the appellant's premises. In summary, their complaints of conditions attributed to the appellant revolved about: excessive noise emanating from within the premises; debris, including broken bottles;urination outside the premises; interruption of sleep by noisy patrons loitering outside the premises and walking to and from the premises; obscene language; frequent necessity of calling police; destruction of property; high speed driving of cars by patrons; vocal harassment of pedestrians by loitering patrons; and, in general, conditions which have made their lives unbearable.

An additional neighbor, Terry Ritter, testified that, on the day of the hearing, her seventeen-year old daughter was accosted on the street by persons in front of the licensed premises and was physically assaulted; and, that such harassment, normally vocal, is a usual occurrence of which she has personally been a victim.

The point was stressed by several of the aforesaid witnesses that these deleterious conditions never occurred in this neighborhood prior to the transfer of license to the present licensee, on August 28, 1974.

South River Police Department Detective Francis X. Eib, custodian of the police records, produced the twenty-eight police incident reports relative to the appellant's premises since the transfer of license to the present licensee. An examination of these reports indicates that only one incident had been the basis for formal charges, arrests and convictions. This incident, which took place on June 2, 1975, was a charge of loitering brought against four individuals standing in front of the licensed premises.

Detective Eib acknowledged that James Sprull and Conway Johnson (50% stockholder and manager, respectively, of the licensed premises) were cooperative when informed by the police of complaints, and that the complaints have lessened in number since the four arrests.

At the Division hearing, testimony was elicited from one additional neighbor, Vera Mrozek, who substantially corroborates the testimony of her neighbors, adding that, while her property has an assessed value of $50,000.00, it now could not even be sold for $30,000.00 - a fact she holds directly attributable to the situation created by the licensed premises.

Richard Lane, 50% stockholder in Tyrone's Haven, Inc., testified before the Council and at the Division hearing. The thrust of his testimony was that, at no time were formal charges instituted against the licensee by either the Council or the Division of Alcoholic Beverage Control, with respect to alleged violations of either Borough ordinances or state regulations; and, that cited complaints, which apparently were the basis for the action by the Council, concerned incidents occurringoutside the licensed premises, incidents over which the licen-

see has no control. Mr. Lane stated that, on the few occasions when he was advised that the music emanating from the premises was too loud, he readily complied the request to correct the situation.

The attorney for the appellant, in his closing remarks at the Division hearing, stated:

> "At no time was there any official complaint requiring a hearing before any judicial or any court by anyone with regard to any violation."
>
> "As I argued before them (Council) and argue today, it is not Mr. Lane's function, nor is it his role, nor is it his authority to issue summons for illegal parking and to control the patrons if they be patrons from his establishment with regard to their off-premises conduct. If he (patron) is abusive, if he is loud and offensive, it is a matter for the police authority.
>
> With regard to loitering, it is a public sidewalk, and it is a matter for the police."

I

The crucial issue in this appeal is: does appellant's record presented to the Council justify the Council's action in denying renewal of license. In short, did the Council act reasonably and in the proper exercise of its discretion in its determination?

Appellant alleges that it did not violate any State regulation governing the conduct of licensees and use of licensed premises, and that no disciplinary proceedings were instituted by the Council against it. It would have been a more satisfactory procedure for the Council to initiate such proceedings upon specific charges, and to base its refusal to renew on an adjudicated record.

It is understandable that local issuing authorities at times withhold the institution of disciplinary charges where warranted, with the expectation that the licensees will make good faith efforts to improve the conditions in the operation of the licensed premises. Cf. R.B. & W. Corporation v. North Caldwell, Bulletin 1921, Item 1.

In a matter parallel with R.B. & W. Corporation, supra, the Director held:

"Thus, in this matter, entirely apart from the consideration as to appellant's culpability for the deleterious conditions which surrounded this establishment, the broad question posed before the Council on the subject application for renewal, was whether, in the light of all of the surrounding circumstances and conditions, it was good for North Caldwell and the neighborhood involved, for this tavern to continue to exist at this particular location at all. The objective judgment of the Council was that its continuance would not serve the public interest and the immediate neighborhood." D'Ambola v. North Caldwell, Bulletin 1922, Item 1.

It is firmly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of the Board in the first instance and, in order to prevail on this appeal, the appellant must show unreasonable action on the part of the Board constituting a clear abuse of such discretion. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Magnolia, 38 N.J. 484 (1962). Prior to analyzing the testimony, it would be proper to state the applicable legal principles pertinent to the determination hereof. The burden of proof in all those cases which involve discretionary matters where the applicant seeks a renewal of the license falls upon appellant to show manifest error or abuse of discretion by the issuing authority. Downie v. Somerdale, 44 N.J. Super. 84 (App. Div. 1957).

As was stated in Zicherman v. Driscoll, 133 N.J.L. 586, 587 (1946):

> "The question of a forfeiture of any property right is not involved. R.S. 33:1-26. A liquor license is a privilege. A renewal license is in the same category as an original license. There is no inherent right in a citizen to sell intoxicating liquor by retail. Crowley v. Christensen, 137 U.S. 86, and no person is entitled as a matter of law to a liquor license. Bumball v. Burnett, 115 N.J.L. 254; Paul v. Gloucester, 50 Id. 585; Voight v. Board of Excise, 59 Id. 358; Meehan v. Excise Commissioners, 73 Id. 382; affirmed, 75 Id. 557. No licensee has a vested right to the renewal of a license. Whether an original license should issue or a license be renewed rests in the sound discretion of the issuing authority. Unless there has been a clear abuse of discretion this court should not interfere with the actions of the constituted authorities. Allen v. City of Paterson, 98 Id. 661; Fornarotto v. Public Utility Commissioners, 105 Id. 28. We find no such abuse. The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuing and renewing of licenses."

From the entire record herein, it has been clearly shown that appellant's premises has become a source of trouble and annoyance to the neighbors and to the police. The number of repeated calls to the police requiring response, as well as continued noise until early morning hours caused by patrons clearly characterizes the premises as a nuisance with which the municipality could well do without.

I find that the Board's action was properly within its discretionary power and not manifestly erroneous or unreasonable, Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957). Thus, the Director, absent such clear abuse or unreasonable or arbitrary exercise of discretion, should not substitute his judgment for that of the Board or reverse its finding. Lyons Farms Tavern, Inc. v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292 (1970).

It is, therefore, concluded that appellant has not met the burden imposed upon it under Rule 6 of State Regulation No. 15, requiring that it establish that the action of the Council was erroneous and should be reversed. Hence, I recommend that the action of the Council be affirmed, and the appeal be dismissed.

Conclusions and Order

Written Exceptions to the Hearer's report were filed by the appellant on October 24, 1975, and answering argument thereto was submitted by the respondent, pursuant to Rule 14 of State Regulation No. 15.

In its Exceptions, the appellant argues that its retention by the Council of the attorney who represented objectors at the hearing before the Council to represent it at this appeal de novo "points out the prejudice and interest of the Council when hearing this matter". It maintains that this indicates a "predisposition" in their consideration of this matter. I find this contention to be without merit.

The fact is that the Council was ably represented at the hearing before it by the Borough Attorney, and the appellant was also ably represented by its own attorney. Having made its determination, the Council was now at liberty to retain independent counsel to function as its legal representative at the hearing in this Division. The Council apparently was impressed with the ability of the attorney for the objectors and felt that he could ably represent it on this appeal. This does not, ipso facto, indicate any predisposition on the part of the Council.

The appellant takes further exception to the recommended finding of the Hearer in support of the action of the Council, because it contends that "there is no case in this State where any application for renewal of a license has been denied where there has not been a violation of law or a violation of ABC regulations". He states that since there have been no convictions of an ABC violation and since most of the complaints involved incidents that took place outside the licensed premises, the Hearer erroneously found that the Council acted properly in denying the renewal.

The appellant's statement in this letter is erroneous. The fact that no disciplinary proceedings were instituted by the Council is irrelevant to the adjudication of the matter on its merits. Numerous cases in this Division can be cited in support of this principle, i.e., that renewal of a license may be denied even absent a prior record of criminal or ABC violations. For example, see R. B. & W. Corporation v. North Caldwell, Bulletin 1921, Item 1; R.O.P.E., Inc. v. Fort Lee, Bulletin 1966, Item 1; Ocean Club Corporation v. Jersey City, Bulletin 2122, Item 2, aff'd. Appellate Division (1974) opinion not approved for publication, see Bulletin 2148, Item 2.

The well established principle is that a licensee is responsible for conditions both inside and outside the licensed premises. Gueche, Inc. v. Union City, Bulletin 2072, Item 5; Perkins v. Newark, Bulletin 2083, Item 2. As the Hearer pointed out, in the matter sub judice, the police were summoned in one year to no less than twenty-eight complaints, most of which occurred in the months immediately prior to the application for renewal of this license for the current license period.

In Nordco v. State, 43 N.J. Super. 277 (App. Div. 1957) which involved an appeal from the affirmance by the Director of this Division from the local authority's determination denying the renewal of a tavern plenary retail consumption license, the court held that there was no abuse of discretion in the refusal to renew this license based upon the tavern being a "trouble spot" in that the police were summoned fifty-nine times during the year for disturbances. Said the court (at p. 282):

> "It seems to us entirely proper for both the local and the state agencies, when passing on such application, to take into account not only the conduct of the licensee, but also conditions not attributable to its conduct, which render a continuance of a tavern in a particular location against the public interest."

The appellant also asserts that the action of the Council was motivated by racial prejudice. I find nothing in the record to support this action. The record establishes that the Council acted within the circumspect and exercise of its discretion based upon substantial evidence in support of its determination.

Finally, the appellant argues that neighborhood sentiment should not be a proper consideration in the renewal of liquor licensee. Our courts have held to the contrary. This principle which applied to applications for renewal as well as transfers of licenses, was recently cited in Lyons Farms Tavern, Inc. v. Municipal Board of ABC v. Newark, 68 N.J. 44, 49 (1975).

I have evaluated the other Exceptions and find that they have either been fully considered and correctly resolved by the Hearer, or are lacking in merit.

Thus, having considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report, the Exceptions filed by the appellant with respect thereto and the answering argument to the said Exceptions, submitted by the respondent, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of November 1975,

ORDERED that the action of the respondent Borough Council of the Borough of South River be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my Order dated June 30, 1975 extending the term of the said license pending the determination of the appeal be and the same is hereby vacated.

Leonard D. Ronco
Director

2. DISCIPLINARY PROCEEDINGS - LEWDNESS - INDECENT ENTERTAINMENT - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 65 DAYS.

In the Matter of Disciplinary Proceedings against	)	
Carlstadt Hideaway, Inc. 325 Paterson Plank Road Carlstadt, N.J.,	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-15, issued by the Mayor and Council of the Borough of Carlstadt.	)	

Joseph A. Pojanowski, III, Esq., Attorney for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded "not guilty" to the following charge:

> "On Friday, May 2, 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 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."

Pursuant to a specific assignment to investigate alleged lewd performances at the subject premises, ABC agents V and S, visited the said premises on May 2, 1975. They entered the premises at about 12:30 p.m. and remained there until about 1:10 p.m. during which time they made observations and filed reports with respect to a "go-go" dancer's performance.

The following is a summary of their testimony: The premises consists of a one-story stucco building in which is located the bar, elevated stage, a juke box, tables and chairs; and to the right rear of the bar is a kitchen. There is also a little room adjacent to the barroom.

At the time of their entry, there were approximately seventy-five to eighty males who were serviced by a barmaid known as Dorothy, and a bartender, identified as Richard Moran. Robert Porro, the corporate president and principal stockholder is the

manager, and was on active duty at that time. A waitress identified as Joanne Wilson, and several kitchen employees assisted in the operation of the business.

As the agents entered with their hands in their trouser pockets, a "go-go" dancer identified as Mrs. Annabell Capaccio, who was then performing for the patrons exclaimed "Hey, Bob! Those fellows have their hands in their pockets. Do you know what they are doing?" She raised her hand in the air and made a gesture that simulated male masturbation. All the patrons laughed at this remark.

The agents took positions at the bar and thereupon observed a male patron approach the dancer, who was attired in a two-piece bikini outfit. This outfit consisted of a halter top, "very brief bikini type" covering only the pubic area, with a little string going between the buttocks. The male patron approached her and placed his hand with a dollar bill inside the lower part of her bikini costume, inside her pubic area. Mrs. Capaccio took the dollar bill which was lodged in her pubic area and "put it sideways, from one end of the bikini to the other.". Then the male patron removed the dollar bill with his teeth. In doing so he placed his head into her pubic area and removed the dollar bill with his teeth.

The agents then ordered beers which were served to them by the bartender and took seats at a table which was located about four or five feet from the stage.

Continuing her dance, Mrs. Capaccio then embraced a metal column or pole on the stage and, raising her right leg upon the column, she moved her pubic area up and down the column and back and forth, in what appeared to the witnesses to be an act of simulating intercourse. She then lay on her back on the stage, lifted one leg straight up and said, "Hey, fellows! Do I need a shave?" Most of the patrons responded, "No way." While on the floor, she turned and lay on her stomach. Then, by raising herself with her knees, she continued to move her body in such way as to simulate sexual intercourse.

After she completed this part of her performance, she left the stage and obtained a napkin from a male patron, which she used to rub her pubic area to the delight of the patrons.

Continuing her performance, she left the stage and went to one of the rear tables, at which two males were seated. She placed one leg on top of the table and grabbed one male from behind and pushed his head close to her pubic area. At that time, one of the males placed a dollar bill in the "lower portion of the pubic area ... inside the bikini."

Leaving this table, she proceeded to another table where five males were seated. She sat on the lap of one of the males who grabbed her by the thighs "and ran his hands over her buttocks." She then returned to the stage, at which time another male patron approached her, placed a dollar bill inside "the lower

portion of her bikini, and put his hand right inside the pubic area." She put one leg around his hip, and as she put her other leg around his hip, he continued to keep his hand inside her costume, in her pubic area. With her both legs around the male's waist, she kept bouncingup and down while he held her with one hand, by her buttocks. All of this was done to the clapping and whistling of the patrons.

She then left the stage and proceeded to another table where two males were seated. Still performing for the patrons, she placed her one leg on top of the table and the other leg on the male's shoulder. At this point, the agents decided to identify themselves to Porro. When they informed Porro that they thought that Mrs. Capaccio was engaged in a lewd performance, Porro stated "I was watching her dance. She didn't take no clothes off. It wasn't a lewd show".

Mrs. Capaccio was then called into the kitchen, admitted "the activities that we told her about" but explained that it was her birthday, she was feeling good, and she felt she wasn't doing anything wrong.

These witnesses also noted that, at one point, two male patrons approached the stage and upon being introduced to this dancer, she opened the lower portion of her bikini, pulled it away from her body and permitted one of the male patrons to place a dollar bill inside the bikini.

On cross examination the agents explained that when they confronted Mrs. Capaccio and told her that they thought that she had put on a lewd show and "gave her a quick run-down of her activities" Porro insisted that there was no lewd show because "She didn't take her clothes off". The dancer insisted that although the patrons placed their hands down inside her bikini she "didn't think it was wrong."

Testifying on behalf of the licensee, Mrs. Annabell Capaccio gave the following account: She is a divorcee and has been a "go-go" dancer for the past six years; and was engaged as such for the licensee for several months prior to the date charged herein. She expects to continue performing at these premises after the vacation period.

On this date and time she changed her normal routine of dancing (normally twenty minutes on and twenty minutes off) and danced a full hour straight. She categorically denied all of the specific details of her performances as delineated by the agents. Specifically, she denied that she lay on the stage or lifted her legs to the audience. She received about ten dollar bills from the patrons, but never permitted them to put their hands inside her costume. She always received the dollar bills by hand; and never accepted any money after her performance because she felt that it would be a reflection of her character to do so.

She stated that Porro did not watch her performance because he was busy with his duties in the kitchen most of the time. She recalled that she did place her hands around the pipe column on the stage because she wanted to "catch her breath", but she never put her legs around the column. She never made any obscene gestures on that day. She never mounted any male or made any sexually suggestive motions in contact with his body while he was holding her. Finally, she never permitted any patron to touch her at any time.

On cross examination, she admitted that much of her buttocks were exposed because it was only covered by a string. She received about ten dollar bills during her performance which was handed to her by male patrons and which she placed on the side of her costume; but she never permitted any patron to touch her.

She explained that the dollar bills were given to her by the patrons because "they appreciate the performance, good dancer, girl with personality." She reasoned that she never accepted money after her performance rather than during the performance because accepting it at the end of the performance would make her feel like a "whore".

She was then asked to explain why the agents confronted her with these allegations when there was no basis in fact for it. Her answer:

> "Maybe a possibility because they couldn't see, you know, where they were sitting. Like where I am working, the front of the stage, if I move back away from the light, the spotlight, you know, you can still see me but it is a little bit dark."

Finally, she stated that she was not given any instructions by the manager with respect to her performance.

Dawn Sauers, a "go-go" dancer testified that she does not wear a string bikini, the type worn by Mrs. Capaccio, but noted that it is worn by "go-go" dancers. She explained that she has danced in these premises, and is familiar with Mrs. Capaccio's dancing. In her opinion, Mrs. Capaccio has a reputation for being a good entertainer.

On cross examination, she acknowledged that she was not present in the premises on the date charged herein.

Robert Porro, the president and principal stockholder of the corporate licensee, testified that he also serves as manager of these premises, and was engaged in that capacity on the date charged. He gave the following account: He and three other persons worked in the kitchen and, since this was a busy time of the day, he spent most of his time in the kitchen. He has eight employees during the lunch hour, including Joanne Jones, waitress, Marlene Greco, barmaid, Mr. Moran, bartender, his brother-in-law, Richard Lotito, Ronald LoPresti, and his mother.

He has cautioned his performers not to permit themselves to be touched by patrons. These instructions were given to Mrs. Capaccio. Although he didn't have much time to observe the performance, he did not see any patrons touching her body.

He was asked to define a "lewd performance". It was: "To me, lewdness is somebody taking their clothes off." He insisted that Mrs. Capaccio never took her clothes off nor made any sexually suggestive actions. When the agents confronted him with the charge that Mrs. Capaccio had engaged in a lewd performance, he questioned his waitress and bartender, and they stated that they did not see her perform in a "lewd manner".

On cross examination, he admitted that "I just glance around and go back in the kitchen." All told, he estimated that he witnessed the performance for a matter of "seconds". When the agents confronted him and questioned him about this performance, his mother asked, "What is lewdness? This girl didn't take off no clothes." He acknowledged repeating to the agents "A lewd show to me is taking clothes off. She didn't take no clothes off."

He was then asked why the bartender, waitress and other employees who are still employed at his premises were not available to testify. His explanation was that, so far as the bartender was concerned, although the date on which this hearing took place was not a heavy date "It was a day I couldn't afford to bring in the bartenders here." The barmaid comes into his premises in the morning to clean up but "...she is a sick girl." The waitress was engaged in her usual duties in the premises on this date.

Finally, he acknowledged that he did not believe the agents were improperly motivated.

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, 135 N.J.L. 259 (Sup. Ct. 1947); 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 probably 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 principles 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 charge.

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 observations should be directed at the full activities of the dancer during their visit. Consequently, their testimony was of a positive nature and unequivocal.

On the other hand, I find the testimony of both Mrs. Capaccio and Porro to be contradictory, negative and frankly unbelievable. I was particularly unimpressed with the testimony of Mrs. Capaccio. She insists that the patrons approached her during her performance, and in appreciation, even before the performance was concluded, they would simply hand her dollar bills which she placed on the side of her bikini costume. I find her version of what transpired defies the common experience of mankind, and does violence to the logic and effect of the presented facts. It is not one that I would consider probable in the circumstances. Cf. Gallo v. Gallo, supra.

Her total denial of any of the instances, observed by the agents makes one wonder whether she was even present at the premises on the date charged herein. The agents testified that she performed certain gyrations while lying on the floor of the stage. She says that the agents probably couldn't see her because the lighting was dim. She also explained that she refused to accept any gratuities at the conclusion of her performance because she felt that this would reflect adversely on her character. She never quite explained how she arrived at this strange reasoning, which I find to be completely incomprehensible.

Finally, she frankly admits that she was not instructed by Porro or anyone else as to what limits were placed upon her performance. However, Porro now says that he did, in fact, give her instructions with respect to her performance.

Porro conceives that a lewd performance requires that the person remove her clothing. He states that he saw very little of her performances for a matter of "seconds", while he was performing his other duties. I find his testimony to be negative, contradictory and unconvincing.

Although the bartender, the waitress and the other employees were present during the performance, and according to the agents, observed Mrs. Capaccio's performance, none of them was called by the licensee to testify, although admittedly, they are presently employed in the licensed premises and were available.

The failure to call witnesses who may have relevant testimony and who are available to testify creates an adverse inference; that is, if they were called they could not have truthfully contradicted the testimony of the Division's witnesses, and

their testimony would have been unfavorable to the licensee. Yacker v. Weiner, 109 N.J. Super. 351, aff'd. 114 N.J. Super. 526 (App. Div. 1970); Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1966); O'Neill v. Bilotta, 18 N.J. Super. 82, Aff'd. 10 N.J. 308 (1952).

Finally, it is clear, and I so find, that there was actual audience participation by the fondling of the performer and the placing of dollar bills inside her costume in the pubic area. Also, there was actual body contact between the dancer and patrons in the course of which she performed for the entertainment of the patrons in a lewd, indecent and immoral manner.

After a careful consideration of the entire record herein, I find that the charge 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 a prior adjudicated record of the payment of a fine to the Director on September 25, 1973, in lieu of suspension of license for the possession of an alcoholic beverage in a bottle which contained a label which did not truly reflect its contents.

It is, accordingly, further recommended that the license be suspended for sixty days for the charge herein, to which should be added five days for the dissimilar violation occurring within the past five years, for a total of sixty-five days. Cf. Re Cella Realty Co., Inc., Bulletin 2199, Item 1.

Conclusions and Order

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

In its Exceptions, the licensee contends that the recommended findings of the Hearer was erroneous because "the charge per se is violative of the due process clause" of the State and U.S. Constitutions because it is constitutionally imprecise.

This very issue was recently decided in favor of the Division by the Appellate Division of the Superior Court in the case of Howell's Sportsman's Inn, Inc. v. Division of Alcoholic Beverage Control, Docket #A-445-74, decided September 24, 1975.

In support of its finding that Rule 5 of State Regulation No. 20 is not violative of the due process provisions of the Fourteenth Amendment because of vagueness or overbreadth, it cited Winters v. N.Y., 333 U.S. 507, 518 (1948); Peterson Tav.

and Grill Ass'n. v. Bor. of Hawthorne, 108 N.J. Super. 433, 437, (App. Div. 1970), rev'd. on other grounds 57 N.J. 180 (1970).

See also Jeanne's Enterprises, Inc. v. State of New Jersey, etc., 93 N.J. Super. 230 (App. Div. 1966), aff'd. 48 N.J. 359, (1966). I find that the record plainly establishes the truth of the charge by substantial evidence. Thus, this contention is without merit.

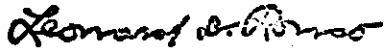
Finally, the licensee argues that, "assuming arguendo, that the alleged acts had, in fact, occurred", the recommended penalty is excessive and harsh. The short answer to this contention is that the penalty is in accordance with current Division practice. And the case of Mitchell v. Cavicchia, 29 N.J. Super. 11 (App. Div. 1953), cited by the licensee, does not mandate any lesser penalty, particularly since the instant case involves physical sexual contact between the licensee's entertainer and patrons. Therefore, in the light of the circumstances attendant upon the violation, the recommended penalty is not unreasonable or unduly harsh.

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

Thus, having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Hearer's report, the Exceptions filed with respect to the said report, and the answering argument 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 14th day of November 1975,

ORDERED that Plenary RetailConsumption License C-11, issued by the Mayor and Council of the Borough of Carlstadt to Carlstadt Hideaway, Inc., for premises 325 Paterson Plank Road, Carlstadt, be and the same is hereby suspended for sixty-five (65) days commencing at 3:00 a.m. on Wednesday, November 26, 1975 and terminating at 3:00 a.m. on Friday, January 30, 1976.



Leonard D. Ronco
Director