STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2436 AUGUST 16, 1984

ITEM

1. DIRECTOR'S OPINION ON REGULATION-WHEN "NOTICE OF DELINQUENCY" NEED NOT BE TRANSMITTED AFTER "NOTICE OF OBLIGATION" IS SERVED [N.J.A.C. 13:2-24.4(b).

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1. DIRECTOR'S OPINION ON REGULATION-WHEN "NOTICE OF DELINQUENCY" NEED NOT BE TRANSMITTED AFTER "NOTICE OF OBLIGATION" IS SERVED [N.J.A.C. 13:2-24.4(b)]

It has been brought to the attention of the Director that two different practices are being followed by wholesalers concerning N.J.A.C. 13:2-24.4(c), which mandates that a Notice of Delinquency be transmitted to all other wholesalers within three business days after a Notice of Obligation has been served pursuant to N.J.A.C. 13:2-24.4(b). If the bill has been paid within the three-day period following the service of the Notice of Obligation, some wholesalers have interpreted the Regulation to still require the transmission of a Notice of Delinquency, and thereafter the immediate transmission of a Notice of Satisfaction. Other wholesalers have interpreted the Regulation as not requiring anything further if the bill is paid within the three-day period following the service of the Notice of Obligation and before the transmission of the Notice of Delinquency would be required under N.J.A.C. 13:2-24.4(c).

The Director agrees with the latter interpretation. To require otherwise is not economically feasible, especially when it is considered that all costs eventually are passed on to the consumer. Additionally, to require a Notice of Delinquency and an immediate Notice of Satisfaction, after the outstanding invoice has been paid, does not accomplish anything or add anything to the goals that are intended by the credit regulation.

Therefore, the following should be the practice applied by all wholesalers of alcoholic beverage products in New Jersey: If payment has not been received in accordance with the terms of sale which have been set forth upon an individual delivery invoice pursuant to N.J.A.C. 13:2-39.1, but which terms may not conflict with N.J.A.C. 13:2-24.4(a) or allow more than thirty days' credit from the date of delivery, the wholesaler shall furnish a Notice of Obligation by either personal delivery or first class mail as set forth in N.J.A.C. 13:2-24.4(b), as recently amended (see Bulletin 2433, Item 2). If, after serving the Notice of Obligation, and within the intervening time until the third business day thereafter when the Notice of Delinquency must be transmitted to all wholesalers, the retailer satisfies the obligation, nothing further need be done. In such event a Notice of Delinquency, to be followed by an immediate Notice of Satisfaction, need not be transmitted.

On the other hand, it should be noted that the only time that the Notice of Delinquency need not be transmitted to all other wholesalers is when actual payment has been made and received by the wholesaler. Such receipt of payment does not include postdated checks, or any other promise of future payment. Also, the holding of a check by a wholesaler will be deemed by the Director to be a promise of future payment, and failure to promptly negotiate a check that has been received in satisfaction of a debt following the expiration of the thirty (30) day period from the date of delivery will not be considered as receipt of payment and the Notice of Delinquency must be transmitted. Where such is done, the Notice of Satisfaction cannot be transmitted until the instrument of payment has been negotiated.

In the event that a payment is received in the form of a check, which is promptly deposited so that no Notice of Delinquency need be transmitted, but the check is thereafter returned unpaid, upon receipt of the returned check or receipt of notice or advice of such dishonor of the check, the wholesaler must immediately transmit a Notice of Delinquency to all wholesalers of alcoholic beverages. A Notice of Satisfaction may not thereafter be furnished until actual receipt of payment (together with all other charges that have been properly set forth for the terms of delivery), and if payment is by regular check, the check has to be cleared into the depositor-wholesaler's account.

If any licensee has any question regarding an unusual situation, telephonic inquiry should be made of the Division.

2. RESPONSE TO WHOLESALER REGARDING QUESTION OF CALCULATION OF "COSTS" WHERE PROMPT PAYMENT DISCOUNT IS OFFERED.

An inquiry has been received from a New Jersey licensed wholesaler concerning the ability of retail licensees to reflect their savings (from discounts for prompt payment) in their retail or resale prices to consumers. The following answer was sent by the Director under date of July 25, 1984 and the response is applicable to all wholesale licensees offering discounts for prompt payment and to all retailers purchasing from such wholesalers and utilizing such discounts:

> "In your referenced letter you have indicated that you have had numerous inquiries from retail licensees concerning their ability to reflect savings from discounts for prompt payment in their resale prices to customers. Your inquiry arises from the fact that your company has offered, through proper filing in its current price list, discounts for prompt payment of less than a 30-day period. Your inquiry is further prompted by N.J.A.C. 13:2-24.8, which

presently provides that no licensee shall offer to sell or sell alcoholic beverages at a price 'below cost', which is defined as the actual proportionate invoice price to the retailer. The amount of the discount given for prompt payment is, of course, not reflected in the price shown on the invoice.

Once payment has been made by the retailer according to the terms of the prompt payment offer, we would deem it an amendment of the invoice to exclude that amount from the total invoice price in calculating the 'cost' price for the purposes of setting the retail or resale price to consumers.

We caution that the terms for the discount for prompt payment must be strictly complied with and that the actual payment must be received in your accounting office by the deadline for the period for which a prompt discount is offered. It will not be sufficient for the payment to be sent by the retailer by that date or even for the payment to be given to one of your solicitors on that date. The reasoning behind this is that the prompt payment discount is justified by reason of your having the use of the money by the end of that discount period, if not before, and unless it is in your accounting office by such date you would not have the use of it. For example, if a 2% discount is offered for payment within 10 days, and if the invoice amount was $100.00 and the invoice is dated on the first of the month, the retailer may deduct $2.00 from the invoice provided that the payment of $98.00 is received in your accounting office by the 11th of the month. If it is not received by that time, the retailer should only be given credit for payment of $98.00 of the $100.00 and a $2.00 balance remains due. At the same time, the retailer would not be able to base the resale cost on the $98.00 unless that payment is actually in your accounting office by the deadline date.

The other question which arises is when the retailer may calculate the cost price based on the invoice price less the discount for the prompt discount. The answer is clear that such calculation may not be made based on the reduced amount until the payment has actually been made and presented to your accounting office. It may not be anticipated.

If you or any retailer has any further question concerning this matter, you should not hesitate to contact us."

ITEM #3. NOTICE TO SUPPLIERS REGARDING N.J.A.C. 13:2-24.5(a)2 AND NECESSITY FOR STRICT COMPLIANCE THEREWITH.

TO: ALL MANUFACTUERS, SUPPLIERS, WINERIES, BREWERS, IMPORTERS, BLENDERS AND RECTIFIERS SELLING OR INTENDING TO SELL ALCOHOLIC BEVERAGES TO WHOLESALERS OR DISTRIBUTORS WITHIN NEW JERSEY:

N.J.A.C. 13:2-24.5(a)2 requires that each of the above addressees shall:

> "By the first day of the month preceding the month for which they are to become effective, make available to all its wholesalers or distributors its prices, inclusive of all discounts, allowances or differentials;"

There is no provision in the Regulation for a supplier to amend and/or modify any of the prices, discounts, allowances or differentials, after they have been made available to wholesalers and distributors.

It has been brought to our attention, however, that some suppliers are making changes and adjustments up to a day or two before the due date of the Current Price Lists, which is the 15th day of any given month. This practice causes the wholesalers and distributors to petition the Director to amend their Current Price Lists, which are due at the Division by the 15th of the month and which, in most cases, are based upon the original price information provided to New Jersey wholesalers by the suppliers on or before the first day of the month and, assumedly, were to become effective on the first day of the following month.

This is to serve notice, therefore, that the aforementioned Regulation will be strictly enforced. Supplier price information shall be transmitted to New Jersey wholesalers by the first day of the month preceding the month for which they are to become effective and there shall be no changes or modifications in the interim, unless good cause is shown and approval received from the Director.

4. NOTICE: IDENTIFICATION OF DISPLAY SERVICES THAT HAVE REGISTERED PURSUANT TO N.J.A.C. 13:2-24.12.

On April 16, 1984 the Division adopted a new Regulation, N.J.A.C. 13:2-24.12, which requires the registration of display service entities. Prior notice of this regulatory change and information concerning the procedure for registration were set forth in Bulletin 2435, Item 2 on April 19, 1984. The following companies have properly registered with the Division as display companies and are authorized to furnish display materials to retail licensees of the State of New Jersey:

| Registration No. | Name of Display Service Entity | Date Filed |
|---|---|---|
| 001 | Forsythe Advertising Agency, Inc.<br>Ten Patton Drive<br>West Caldwell, NJ 07007 | May 16, 1984 |
| 002 | Pioneer Productions<br>2414 East 63 Street<br>Brooklyn, NJ 11234 | May 21, 1984 |
| 003 | Advanced Horizons, Inc.<br>Building 89<br>River Terminal Development<br>Port Kearny, NJ 07032 | May 25, 1984 |
| 004 | Marko Display and Graphics Co., Inc.<br>2090 Oak Tree Road<br>Edison, NJ 08820 | May 29, 1984 |
| 005 | Excelsior Display Company<br>695 Rahway Avenue<br>Union, NJ 07083 | May 29, 1984 |
| 006 | Garden State Liquor Display Company<br>214-216A Main Street<br>New Milford, NJ 07646 | July 16, 1984 |
| 007 | Unique Display<br>23 West Olive Street<br>Post Office Box 251<br>Westville, NJ 08093 | July 19, 1984 |

The Division has received several inquiries from New Jersey licensed wholesalers inquiring whether the activities they engage in at retail licensed premises in providing certain display materials require the New Jersey wholesale licensee to submit a Display Service Registration Form under N.J.A.C. 13:2-24.12. In those cases where the New Jersey wholesaler receives display materials without charge from a product supplier or importer and thereafter utilizes its regular employees to place the displays at the retail licensed premises, no display service registration will be required at the present time. In the event subsequent evaluation in the Division indicates that such policy should be changed, adequate notice will be provided New Jersey wholesale licensees to permit future compliance with this Regulation. On the other hand, if in any case a New Jersey wholesale licensee places a display through its own employees at a retail licensed premises and then bills the cost of the display or employees' services to the supplier or manufacturer whose product is the subject of the display, the wholesaler in New Jersey must obtain a Display Service Registration Number and comply with the provisions of this Regulation.

Finally, the Display Service Regulation requires the submission of a quarterly report which must identify the amounts and sources of all monies received by the display service entity from any licensee, permittee, registrant, supplier, importer or manufacturer of alcoholic beverages. The report should also identify the name, address and license number of all licensees that have been furnished display material and set forth the value of such display material. The first quarterly report was due July 15, 1984 and should encompass, where possible, the activities of the display service company for the full three months quarter. Where a submission of a report is made which only identifies activities from April 16, 1984 (the effective date of this Regulation) through June 30, 1984, such report will be considered satisfactory at this time. The next quarterly report will be due October 15, 1984 and must include a complete and detailed representation of activities for the months of July, August and September 1984.

5. DISCIPLINARY PROCEEDINGS (TOWNSHIP OF OLD BRIDGE)--ALLOWING LEWD AND IMMORAL ACTIVITY, CONDUCTING BUSINESS WITHOUT KEEPING AN EMPLOYEE LIST ON PREMISES--LICENSE REVOKED (FOURTH OFFENSE).

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

| | | |
|---|---|---|
| IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST: | : | FINAL CONCLUSIONS SUSTAINING CHARGES OF PERMITTING LEWDNESS AND IMMORAL ACTIVITY AND FINAL ORDER REVOKING LICENSE |
| FIZER CORPORATION<br>t/a GO-GO RAMA<br>HWY 35 & LAURENCE PKWY.<br>OLD BRIDGE, NJ 08857 | : | S-14,303, H-7883-72<br>S-14,389, H-7284-010<br>(CONSOLIDATED) |
| HOLDER OF PLENARY RETAIL CONSUMPTION LICENSE NO. 1209-33-015-001<br>ISSUED BY THE TOWNSHIP COUNCIL OF OLD BRIDGE. | : | |
| | : | |

Levy and Robertson, Esq., by Robert Edward Levy, Esq.,
Attorney for Licensee

Carol L. Widemon, Esq., Deputy Attorney General
Representing the Division

BY THE DIRECTOR:

## I. PROCEDURAL HISTORY

I determined to hear this disciplinary proceeding myself pursuant to the provisions of N.J.S.A. 52:14F-8(b). The issues involved in this matter result from charges instituted by the Division pursuant to N.J.S.A. 33:1-31. The following charges were preferred against the Respondent Licensee, Fizer Corporation, t/a Go-Go Rama:

1. On or about October 21, 1983, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., you allowed, permitted and suffered female persons, while performing on your premises for the entertainment of your customers and patrons to engage in conduct, by themselves and in association with patrons and customers of your licensed premises, of a lewd, indecent and immoral character and to commit and engage in acts, gestures and movements of and with their hands, legs and other parts of their bodies, by themselves and in association with your patrons and customers, in a manner and form having a lewd, indecent and immorally suggestive import and meaning; in violation of N.J.A.C. 13:2-23.6(a)1.

2. On October 21, 1983, you conducted your licensed business without having on the licensed premises a list in form prescribed by the Director of the Division of Alcoholic Beverage Control, containing the names and addresses of, and required information with respect to, all persons currently employed on the licensed premises; in violation of N.J.A.C. 13:2-23.13(a)3.

3. On January 27, 1984, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., you allowed, permitted and suffered a female person, while performing on your premises for the entertainment of your customers and patrons, to engage in conduct, by herself and in association with patrons and customers of your licensed premises, of a lewd, indecent and immoral character and to commit and engage in acts, gestures and movements of and with her hands, legs and other parts of her body, by herself and in association with your patrons and customers, in a manner and form having a lewd, indecent and immorally suggestive import and meaning; in violation of N.J.A.C. 13:2-23.6.

4. On January 27, 1984, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., you allowed, permitted and suffered female persons, while performing on your premises for the entertainment of your customers and patrons, to engage in conduct on your licensed premises of a lewd, indecent and immoral manner and to commit and engage in acts and gestures and movements of and with their hands, legs and other parts of their bodies in a manner and form having lewd, indecent and immorally suggestive import and meaning; in violation of N.J.A.C. 13:2-23.6.

5. On January 27, 1984, you conducted your licensed business without keeping on your licensed premises a list containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises; in violation of N.J.A.C. 13:2-23.13(a)(3).

The Licensee entered pleas of "not guilty" to the above noted charges and requested that all five charges be consolidated and disposed of at one hearing. The matter was therefore set down for hearing before me on March 21, 1984.

## II. PREHEARING MOTIONS

Prior to the hearing, during a telephone conference call held between myself and both counsel, Licensee's attorney moved for dismissal of the charges based upon the following grounds: (1) dancing performed on premises of the Licensee is protected by the First Amendment of the United States Constitution and Article I, Section 6 of the New Jersey Constitution; (2) nude and semi-nude performances in licensed premises are entitled to protection under the Free Speech Provision of the United States Constitution and the New Jersey Constitution; (3) the burden of proof of the validity of N.J.A.C. 13:2-23.6(a)(1) is upon the ABC; (4) N.J.A.C. 13:2-23.6(a)(1) is in conflict with the express public policy of the State of New Jersey; (5) failure to hold hearings prior to promulgation of N.J.A.C. 13:2-23.6(a)(1) renders such regulation void; (6) N.J.A.C. 13:2-23.6(a)(1) is invalid in that it fails to give fair warning, fails to give notice, and denies due process of law; (7) N.J.A.C. 13:2-23.6(a)(1) is violative of the Fifth Amendment of the United States Constitution in that it is void for vagueness; (8) N.J.A.C. 13:2-23.6(a)(1) is invalid in that it lacks standards; (9) the New Jersey Constitution may be given broader application than that of the Federal Constitution. I denied all motions for reasons further described below. Prior

to the actual taking of the testimony, the Licensee's counsel renewed these motions and I again denied them. Counsel for the Licensee also moved to have the charges made more definite and to strike the term "indecent" from charges #1, 3, and 4. Both motions were denied. Licensee's counsel then moved for a continuance of the hearing because of an alleged failure of the Division to timely and fully respond to the Licensee's interrogatories, and to provide the Licensee with "full" discovery. As a result, the Licensee's counsel stated he did not have sufficient time to prepare a defense. This motion was denied. The reasons for all denials are discussed below. The matter then proceeded with the taking of testimony.

## III. STATEMENT OF FACTS

Inspector Z. was sworn and testified that he and Inspector S. and G. are employed as investigators by the Division of State Police - Alcoholic Beverage Control Enforcement Unit and were assigned to investigate the Licensee in an undercover capacity and in furtherance thereof they visited the premises on October 21, 1983. Inspector Z. stated they entered the premises separately and that the patronage during his visit varied from 125 to 175 patrons at the time he left. During his investigation, he noticed Peter Lorenz, the floorman, and Messrs. Steven and Andreas Fizer, who were on the premises, and who talked to the barmaids and go-go dancers. There were also three barmaids in attendance. There was a raised dance floor behind the bar which served as a stage.

When Inspector Z. entered the premises, a dancer, later identified as Sharon Usher, was dancing totally topless. She had blue sheer material draped around her waist and during her activities on the stage she cupped her breasts with her hands and jiggled them. Inspector Z. testified that he was approximately 7 to 9 feet away from the stage while Ms. Usher was dancing. During her dance she would occasionally stop and leave the stage to accept tips from patrons. During such time she would jiggle her breasts and she would also bend over and expose her anus to patrons after receiving a tip from them. Inspector Z. also testified that Ms. Usher allowed numerous patrons to fondle her breasts while they were tipping her. During her second dance set, she would cup patrons hands to her breasts while they would tip her and leave their dollar tips in between her breasts. Inspector Z testified that after Sharon Usher finished, Lydia Musgrave entered the stage area wearing a two piece white bikini with a white sheer shawl. She removed her top in approximately 30 seconds, and later removed her bottom and tied her shawl around her waist with her buttocks exposed. Inspector Z. testified he could see her pubic hair and could also see through the sheer material which she wore. While getting tips from patrons, she would step down from the stage and show her front pubic area or turn and expose her "anal sphincter." He did not observe any physical contact between Ms. Musgrave and patrons.

When Ms. Musgrave finished, Ms. Usher returned to the stage wearing leg warmers, leopard skin shorts and a tank top. She removed her top, cupped her breasts, and licked her own nipples. She also removed her shorts and bikini bottom and took her left middle finger and, placing it near her vagina, moved it in an in and out motion. She was fondled by approximately 8 patrons while receiving tips from them. During this time, Inspector Z. saw Inspector G. leave the premises. Also, during these performances, Inspector Z.noticed that the barmaids would occasionally stop and look at the dancers, but did not attempt to stop the

dancers. Inspector Z. also saw Andreas and Steven Fizer going in and out of the bar area. Andreas at times would make comments to the dancers, but did not attempt to stop them; neither did Steven Fizer.

Inspector S. was sworn and testified that he too visited the Licensee in an undercover capacity on October 21, 1983. His testimony was in substantially conformity with the prior testimony of Inspector Z.

Inspector G. was sworn and testified that he entered the premises around 10:45 p.m., identified himself and asked Steven Fizer to show him the documents required to be kept on the licensed premises, including an E-141-A Form. It was stipulated to by counsel that Ms. Usher's name was not on the E-141-A Form that night. It was further stipulated between counsel that three persons were not on the E-141-A list on the night of January 27, 1984 and the Licensee's counsel stipulated that the two maintenance men not listed could not be considered independent contractors, as was being argued concerning the dancers.

Inspector K. took the stand, was sworn and testified that he was employed by the ABC Enforcement Unit and on January 27, 1984 he visited the licensed premises in an undercover capacity along with Senior Inspector G. and Insectors G., S. and Z. Inspector K. testified that he entered the premises around 8:15 p.m. with Inspector S. and saw approximately 200 to 250 patrons inside. The patronage increased by approximately 75 patrons during the time Inspector K. was in the premises until he left around 10:00 p.m. While in the premises he noticed Mr. Peter Lorenz was collecting admission fees of $2.00 per person, four barmaids were serving the customers and both Messrs. Steven and Andreas Fizer were present. Inspector K. stood near the center of the bar and watched two go-go dancers performing on stage (Ms. Usher and Ms. Hawk). Ms. Usher was wearing a white sheer dress and Ms. Hawk had on a red sheer body suit with a black silver studded collar around her neck. She had several snaps between the legs of her body suit. The body suit was sheer and transparent and Inspector K. could see her breasts, nipples, and pubic hair, since she had nothing on underneath it. When Inspector K. entered the premises, Ms. Usher was on her back on the dance stage massaging her vaginal area. He also believed he saw her insert her middle finger in her vagina and move it in and out and up and down manner. Ms. Hawk had the bottom portion of her body suit unsnapped and her pubic hair was exposed. She changed shortly thereafter while on the stage to a blue dress which also had strings and beads. While Ms. Usher was on stage, she squeezed her breasts and a milky substance shot out. She collected tips from patrons and continued squeezing her breasts. At one point, she squeezed her breast and shot the milky substance on a patron's jacket and tie. In response, he stated, "those are real." While Ms. Usher was doing this, there were two barmaids behind the bar who watched, but did not attempt to stop the performance.

Ms. Hawk took her collar off and spread her legs with her suit unsnapped. She rubbed her collar into her vagina, back and forth. He could see her pubic hair as she had the collar between the lips of her vagina. She then bent over and spread the cheeks of her buttocks with her hands to show her

anal area. She then laid down with her back on the stage and placed her finger in her vagina and rotated it, going in and out of her vagina.

Thereafter, two other dancers took the stage, Ms. Nash and Ms. Ullman. Ms. Nash had on a white tube top, a blouse, white garter belt and stockings, white G-string and a white flower in her hair. She took off her blouse and pulled down her tube top from her breasts and received dollar tips from the patrons. She removed the G-string portion of her costume exposing her pubic area, at which time she spread the lips of her vagina to patrons' sight. Ms. Ullman wore white stockings, shoes, garter belt and blouse. She danced topless and removed her bottom. She left her garter belt on, but exposed her pubic area to the patrons.

Ms. Usher and Ms. Hawk then resumed the stage. Ms. Usher had a white fish-net dress on with nothing under the dress. Inspector K. could see through the dress. Ms. Usher pulled the top portion of her dress down below her breasts. She went over to an electric fan and the wind blew the dress and exposed her pubic area to the patronage. Ms. Hawk pulled off her bikini bottom and exposed her pubic hair. The barmaids continued to serve the patrons, but no employees tried to stop the dance. Inspector K. stated that patrons were charged $2.00 per bottle of beer and, as each bottle was emptied, the barmaids would ask if they wanted another beer.

Inspector Z. was sworn and testified that he too entered the licensed premises in an undercover investigative capacity on January 27, 1984. His testimony was in substantial conformity to that of Inspector K.

Inspector S. testified that he entered the premises on January 27, 1984, in an undercover capacity. His testimony was in substantial conformance with Inspectors K. and Z. It was further stipulated that the testimony of Inspector S. would be substantially the same as the prior testimony.

The Deputy Attorney General rested her case and the licensee elected not to introduce any testimony or other evidence into the record.

## IV. DISPOSITION OF PRE-HEARING MOTIONS

The Licensee made several motions prior to the start of the hearing all of which motions I denied. Those motions were previously set forth fully at page 2, supra, and shall not be repeated here. The reasons for my rulings are as follows:

Motions #(1), (2), (6), (7), (8), and (9) attacked N.J.A.C. 13:2-23.6(a)(1) (No licensee shall engage in or allow, permit or suffer in or upon the licensed premises: Any lewdness or immoral activity.) on various constitutional grounds. It is clear that administrative proceedings are not the proper forum to decide constitional claims. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979); Seip v. Mayor etc., of Frenchtown, 79 N.J. Super. 521 (App. Div. 1963). Moreover, this regulation has withstood numerous constitutional challenges similar to the ones the Licensee is now making. See, e.g., In the Matter of Disciplinary Proceedings Against Oak Street Tunnel Cor., t/a the Tunnel, A-3366-80T2 (App. Div. 1982) (unreported opinion) hereinafter cited as Oak Street Tunnel and

In the Matter of L & R Meadowview Corp., t/a The Meadowlands, A-5432-80T2 (App. Div. 1982) (unreported opinion) and cases cited therein.

Licensee's motions (3), (4), and (5) deal with the validity of N.J.A.C. 13:2-23.6(a)(1) and whether or not it expresses the public policy of the State. I find that it is a valid regulation and does, as applied, properly express New Jersey's public policy concerning these matters.

This regulation, in the same manner of any other regulation, is entitled to a strong presumption of validity and the heavy burden of demonstrating its unconstitutionality is on the challenger. N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67 (1980), cert. den. 101 S. Ct. 342 (1980); Stamboulos v. McKee, 134 N.J. Super. 567 (App. Div. 1975). Moreover, as previously noted, such challenges are more appropriately raised in a court of competent jurisdiction rather than an administrative hearing. Finally, it should be pointed out that this entire subchapter, including the complained of regulatory provision, of New Jersey's Alcoholic Beverage Control Regulations was recently readopted as provided by New Jersey's Administrative Procedures Act. Although there was ample and adequate notice provided for the proposed readoption, the Licensee did not comment on same. The regulation has been properly readopted and the Licensee will not now be heard to complain that the regulation is void because no "hearings" were held prior to its promulgation period. Thus, I find against the Licensee in its challenge of N.J.A.C. 13:2-23.6(a)(1).

Regarding the issue of public policy, it has long been held by this Division that all topless dancing is prohibited on licensed premises. See, e.g., In the Matter of Disciplinary Proceedings Against Play Pen Incorporation, Bulletin 1778, Item #5, and cases cited therein. The conduct charged in the instant case goes far beyond even those more limited bounds. Whether or not New Jersey's public policy concerning lewdness and nude dancing is less constrained concerning criminal charges brought against nude dancers, it is well settled that "[what] is lewdness or immoral activity for the purposes of alcoholic beverage control may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally." Davis v. New Jersey Tavern, 37 N.J. Super. 376, 378 (App. Div. 1955). See also, In re Club "D" Lane, Inc. supra, 112 N.J. Super. at 579-580; Oak Street Tunnel, supra (Ra5).

My denial of the Licensee's motion to have the charges made more definite and to strike the term "indecent" was based upon holdings of numerous prior cases that the terminology utilized in these charges gives sufficient notice to licenses on what issues are presented. Paterson v. Tavern and Grill Owners Ass'n v. Borough of Hawthorne, 108 N.J. Super. 438, (App. Div. 1970), rev'd on other grounds, 57 N.J. 180 (1970). Furthermore, I note that this Licensee has previously been the subject in three instances of similar charges. In two instances the Licensee contested the charges and was found guilty and in the third, the Licensee pleaded non vult. In consequence of these charges, the Licensee received a ninety (90) day suspension of license on the violations arising out of the first contested case, and a sixty (60) day suspension of license based on the charges in the second contested case. Furthermore, a ninety (90) day suspension of license was imposed pursuant to the Licensee's non vult plea on the third set of charges. Those suspensions have been served; nevertheless, the Licensee appears to be continuing its challenge of N.J.A.C. 13:2-23.6(a)(1) in the Federal courts on Constitutional grounds similar to those raised in the present appeal, upon the record established in the second contested case.

Unsuccesful in obtaining an unconditional stay of the Division suspension order (i.e., a stay order which did not prohibit nude dancing) from either the Superior Court of New Jersey, Appellate Division, or the State Supreme Court, the Licensee, while otherwise proceeding with its State level appeal, also filed suit in the United States District Court for the District of New Jersey. That Court denied, with prejudice, both the Licensee's application for a temporary restraining order and for a preliminary injunction. It retained jurisdiction, however, over Licensee's requests for costs and attorney's fees under 42 USC 1983. Shortly after the Licensee initiated suit in Federal District Court, the Appellate Division dismissed the Licensee's appeal with prejudice for failure to prosecute. The Licensee is continuing its suit in the Federal Courts.

The sixty (60) day suspension imposed and served in this second contested case was, in accordance with a negotiated settlement of the third noted case, immediately followed by the ninety (90) day suspension imposed on the charges stemming out of this third case, pursuant to the Licensee's non-vult plea. In consequence thereof, the Licensee's premises were closed for a continuous one hundred fifty (150) day period (March 7, 1983 through August 9, 1983) on the basis of these two cases. Notwithstanding this lengthy suspension, however, just a little more than two months after the termination of this suspension, the Licensee was again charged with similar violations which are part of the instant consolidated case.

In all three prior cases, the Licensee has been the subject of substantially identical charges based on significantly similar activities. The Division's position has been consistently sustained at various levels of appeal in both the State and Federal courts. It is impossible to believe that at this late date, the Licensee does not know what type of conduct this regulation prohibits. I therefore find that the Licensee had sufficient notice of the charges so as to properly defend against them. These motions are hereby denied.

Regarding the Licensee's motion to continue the hearing to obtain "full" discovery, and review full and complete responses to its interrogatories so as to prepare a defense, I denied same on the basis that most of its interrogatories were not germane to this hearing. By supplying the investigative reports, I find that the Division has fulfilled its responsibilities of providing appropriate discovery to the Licensee for the charges under consideration. Additionally, I note that the Licensee, having had the first charges preferred against it on December 7, 1983 and the second on February 7, 1984, had ample time to send out its interrogatories. The Licensee, by its own volition chose to wait until March 13, 1984 (which by chance was also just before the hearing was scheduled to begin) to send out interrogatories. It should not now be heard to complain when the hearing proceeds without further interruption. Moreover, as noted, I have found that the Licensee's interrogatories either were not germane to the matter now in hearing or else had been properly responded to by the Division.

As is apparent in view of the above noted recitation concerning the litigious activities of the Licensee, almost every tangential argument which can be made against the enforcement of this regulation, has been and continues to be made. It therefore seems appropriate to repeat the observation made by a former director under somewhat similar circumstances that ". . . the various motions serve only to obfuscate the issue as they have little or no relevance to the matter under consideration." In the Matter of Disciplinary Proceedings Against Anthony De Gennaro Bulletin #2285, Item #4.

## V. DISPOSITION OF POST HEARING MOTION

At the conclusion of the hearing, an opportunity was provided to both parties to submit motions, and to otherwise supplement the record as provided by N.J.A.C. 13:2-19.6. Both a motion and argument was submitted by the Licensee and argument was submitted by the Deputy Attorney General representing the Division. Thereafter, the Licensee submitted Answers in response to the Division's argument.

The Licensee argues that the dancers performing at the Licensee's premises on the dates in question were "independent contractors" and therefore were not required to be included on the E-141-A form (the list of employees). The Deputy Attorney General argues to the contrary.

N.J.A.C. 13:2-23.13 provides, in pertinent part, as follows:

(a) No licensee shall conduct the licensed business unless:

* * *

3. A list, in form prescribed by the Director of the Division of Alcoholic Beverage Control, containing the names and addresses of, and required information with respect to, all persons currently employed on retail licensed premises, is kept on the licensed premises. N.J.A.C. 13:2-23.13(a)(3).

In an early case which reviewed the Division's interpretation and application of a related rule, the New Jersey Supreme Court held that the ". . . regulation only makes it necessary to prove that the females are 'employed on the licensed premises.' To sustain a conviction for a violation of that regulation it is immaterial whether said females were in the employ of the licensee or were independent contractors. The only issue is: were they employed on the licensed premises and, while so employed, did they accept any drinks as gifts from any customer or patron of the licensee. * * * The Commissioner, since the adoption of this regulation in November, 1940, has consistently construed the word 'employed' as used in said regulation to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship'. Such a construction seems to be a logical one. Our Courts have held that administrative interpretations of long standing given a statute by the official charged with its enforcement will not be lightly distrubed by the Courts." Kravis v. Hock, 137 N.J.L. 252, 255 (Sup. Ct. 1948). That interpretation has been consistently upheld by our courts, even in a case where the "performer" provided his services without charge to the Licensee. Freud v. Davis, 64 N.J. Super 242 (App. Div. 1960).

Therefore, I shall deny Licensee's motion requesting the dismissal of the charges that it failed to have an accurate and complete employee's list on their premises, since I find that the dancers were "employees" required to be listed on the Division prescribed form by N.J.A.C. 13:2-23.13(a)3. In light of my denial of this motion and the evidence of record that, on both occasions, persons employed on the licensed premises were not listed on the E-141-A form as charged, I find the Licensee guilty of these two charged violations.

## VI. APPLICABLE LAW AND ANALYSIS OF EVIDENCE

We are dealing here with a purely disciplinary matter concerning charged infractions of the regulations. The Division need only establish its case by a fair preponderance of the credible evidence. Bulter Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, supra. Therefore, 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 (1964).

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 this principle as a guide, I have carefully evaluated the testimony produced on behalf of the Division. I have personally had the opportunity to observe the witnesses' 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, nor any 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 during their visits. Consequently, their testimony was of a positive nature, was specific and was entirely corroborative.

I make this finding notwithstanding that there were some minor inconsistencies in the testimony of the agents on various activities occurring on the nights in question. Such inconsistencies were insignificant and did not affect the overall impression of accuracy and veracity which their testimony created.

I reject the implication of "false in one, false in all" that the Licensee sought to apply. Likewise, I reject any possible contention that their testimony was incredible because the agents had to refresh their recollection by the use of their previously written reports. One has to consider that several months have elapsed between the investigation and hearing, during which time they undoubtedly have participated in many different investigations.

The Licensee chose not to produce any witnesses or introduce any testimony. I shall not take this as an adverse inference against it. Licensee's attorney conducted a detailed and multifaceted cross examination of the agents. Although certain minor inconsistencies were revealed, no significant deviations in their testimonies were demonstrated.

As previously noted, determining what is lewd or immoral in conjunction with the sale of alcoholic beverages may be determined on a "distinctly narrower basis" than regulation of commercial entertainment or free speech generally. Davis v. New Jersey Tavern, supra. Because of the State's broad authority to control intoxicating liquors under the Twenty-First Amendment, it has been held that states may adopt regulations which proscribe acts that may otherwise fall within the normal parameters

of protected artistic expression guaranteed by the First and Fourteenth Amendments. The regulation must be adopted in the "context of licensing bars and nightclubs to sell liquor by the drink." California v. LaRue, 409 U.S. 109, 114 (1972); see also, In re Seagram & Sons v. Hostetter, 384 U.S. 35, 41 (1966). Therefore, since the conduct which took place in the present matter was in the context of a tavern which sold liquor by the drink, the State may proscribe certain activities even were they normally protected by the First and Fourteenth Amendments.

Based on the evidence of record, I find that the activity which took place in the present matter was not artistic expression, but just the sort of circus type atmosphere which a state may prohibit. California v. LaRue, supra. The activity was not free speech or communication but rather the expression of gross sexuality. The so-called entertainment of the dancers was obviously nothing more than a blatant appeal, by lewd actions, to the prurient interest of the patrons. It was a bait to bring customers to the tavern and to hold them there for the obvious purpose of increasing the sale of alcoholic beverages. Indeed, there is testimony of such beverage sales activity taking place during these dancers' performances. As such, it is the type of activity that may validly be curbed.

As further noted, there has been a long-standing policy in New Jersey against "topless dancers." In Play Pen Incorporation, supra, the then Director, Joseph P. Lordi, reiterated the policy of New Jersey concerning licensed liquor establishments:

> "In passing, however, I wish emphatically to advise all licensees, that so called 'topless' female employees, whether entertainers or otherwise, and whether with pasties described by the Division agents or the larger ones described by the licensee's witnesses, will not be tolerated on licensed premises in this State. Moreover, future similar violations will result in more stringent penalties." Bulletin 1778, Item #5.

The action of the Director was found to be a "reasonable exercise of the supervisory power entrusted to him by the Legislature." In re Club "D" Lane, Inc., supra, at 581. Moreover, the activities of the dancers in the instant case far exceeded the prohibited "topless" conduct condemned in Play Pen as noted above.

In the case at hand I find that the conduct of the dancers was clearly violative of the standards and policies of N.J.A.C. 13:2-23.6(a)(1) and that the Licensee allowed, permitted or suffered the occurrence of lewdness or immoral activity on its licensed premises according to the facts of record.

## VII. PENALTY

There is no common, inherent, natural, or constitutional right to a liquor license; it is a mere privilege, Eskridge vs. Division of Alcoholic Beverage Control, 30 N.J. Super, 472 (App. Div. 1954). In the public interest, the right to prescribe the conditions under which intoxicants may be sold is practically limitless. Such power is vested in the Division or other issuing authority (N.J.S.A. 33:1-31), and the extent of any penalty imposed for violation of the law or regulation promulgated thereunder, rests within the sound discretion

of the issuing authority. Benedetti vs. Board of Commissioners of Trenton, 35 N.J. Super. 30 (App. Div. 1955). In Re 17 Club, Inc., 26 N.J. Super 43 (App. Div. 1953). We are dealing here with a situation where the Licensee's principal officers were present during continuing violations of the subject regulation. Butler Oak Tavern vs. The Division of Alcoholic Beverage Control, 36 N.J. Super. 512, aff'd 20 N.J. 373 (1956).

These violations not only consisted of lewd, immoral and obscene conduct of performers dancing in the nude, but of lewd, indecent and disgusting actions in association with patrons and customers of this establishment. Despite the previous penalties, as well as the original charges which were preferred in December 1983, the Licensee thereafter continued to permit this prohibited activity on its licensed premises.

As was stated by then Director Lerner in the case of In the Matter of Disciplinary Proceedings Against L & R Meadowview, Corp.,Bulletin ____, Item ____, aff'd, A-5432-80T2 (App. Div. 1982) (unreported opinion), "If the licensee studiously planned the quickest and surest method of relieving itself of the licensed privilege, it could hardly have adopted a more prodigious means than that which it employed by its continued profligacy. It has, by its actions, manifested an utter disregard of the Law."

Thus, under the facts and circumstances as noted above, I am compelled to conclude that, in the public interest, the only proper penalty is outright revocation of the license privilege. In the Matter of Disciplinary Proceedings Against Tiny's Bar & Grill, Inc., Bulletin 1804, Item 1; In the Matter of Disciplinary Proceedings Against Royal Castle, Inc., Bulletin 1843, Item 1.

On merely the charges and activities concerning the instant matters herein, the Licensee would be subject to a very substantial suspension. (See, In the Matter of Disciplinary Proceedings Against Oak Street Tunnel Corp., Bulletin ___, Item ___.) aff'd. A-3366-80T2 (App. Div. 1982) (unreported opinion). With a prior record such suspension would have been further significantly enhanced. See, e.g., Butler Oak Tavern, supra. However, based on this particular Licensee's prior record and the penalties imposed thereon, it is clear that suspensions, even substantial ones, do not have the desired corrective affect on its behavior.

As was noted, the Licensee, during mid-1983, was subject to a one hundred fifty (150) day continuous suspension. Nevertheless, two months after that suspension terminated, the License engaged in the same type of prohibited conduct. Moreover, after having the initial charges preferred against it on December 7, 1983, a little less than two months later, the Licensee again engaged in similar conduct, which thus led to the preferring of the second set of charges.

As was held in Butler Oak Tavern, supra. at 386, "the appellant had thrice violated (the regulation) in the present case. The Director had the authority to suspend or revoke its license. R.S. 33:1-31. The latter course was taken. Whether the administrative determination rests upon appellant's flagrant disregard in the subsequent violation of December 21 or in view of the prior record of violations coupled with a desire to bring about a more respectful adherence to the laws and regulations, it is unassailable." I am fully satisfied that revocation is the only appropriate penalty upon my findings of guilt to the charges in the within matter.

## VIII. ORDER

Accordingly, it is on this 9th day of May, 1984,

ORDERED that Plenary Retail Consumption License No. 1209-33-015-001 issued by the Township Council of the Township of Old Bridge to Fizer Corporation, t/a Go-Go Rama, for premises at Route 35 and Laurence Parkway, Old Bridge, be and the same is hereby revoked, effective immediately.

JOHN F. VASSALLO, JR.
DIRECTOR

PUBLICATION OF BULLETIN 2436 IS HEREBY DIRECTED THIS

16th DAY OF AUGUST, 1984.

JOHN F. VASSALLO, JR.
DIRECTOR