STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 2036 March 29, 1972

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
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1. APPELLATE DECISIONS - UNION LIQUORS v. UNION CITY.

Union Liquors, Inc., Appellant, v. Board of Commissioners of the City of Union City, Respondent.	On Appeal CONCLUSIONS and ORDER

George J. Kaplan, Esq., Attorney for Appellant
Edward J. Lynch, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Respondent, Board of Commissioners of the City of Union City (Board), suspended appellant's plenary retail consumption license for premises 3810 Kennedy Boulevard, Union City, after appellant pleaded guilty to a charge of sale, service and delivery of alcoholic beverages to two minors, each eighteen years of age, in violation of Rule 1 of State Regulation No. 20, for a period of sixty days, with five days remitted for the guilty plea or a net suspension of fifty-five days, commencing August 8, 1971.

In its petition of appeal, appellant challenges the action of the Board for the following reasons:

> "(a) The licensed premises together with the license is presently on the market for sale, having been advertised as such in the newspapers, and Mr. Ehinger [president of corporate appellant-licensee] is a person getting along in years, and when young persons nineteen (19) and twenty (20) years of age enter the premises and demand the sale and service of alcoholic beverages, it becomes extremely difficult to refuse such sale and services, because of the fact that they threaten violence to Mr. Ehinger and destruction of the licensed premises.
>
> (b) In view of the nature of the offense and the circumstances surrounding same, it is respectfully submitted that the penalty of 60 days closing imposed on the licensed premises is both much too harsh and much too oppressive, and the licensee respectfully requests a reduction of said penalty."

Respondent denies that its action was erroneous.

Upon the filing of this appeal an order was entered on August 6, 1971, staying respondent's order of suspension pending the determination of the appeal.

At the hearing de novo held pursuant to Rule 6 of State Regulation No. 15, limited to consider the reasonableness of the penalty imposed by the Board, James E. Lagomarsino, a member of the Board testified that the Board arrived at the penalty meted because:

> "...this is a violation that was repeated a third time. We felt that we had to impress on the owner the necessity to be vigilant when he dealt with minors. I understood the other factors, pressure factors, involved by the youth in the area, problems presented to the police, but he had to be impressed of the necessity of not selling liquor to minors. Since his record in the past was not good, we felt that this was the only way we could do it."

It is noted that appellant has a previous adjudicated record of suspension by the municipal issuing authority for ten days for serving a minor (age 14) on November 26, 1966 and again for ten days for serving three minors (each 18 years of age) on August 3, 1970. The last suspension was stayed upon application of licensee to this Division for the imposition of a fine in lieu of said suspension in accordance with the provisions of Chapter 9 of the Laws of 1971, whereupon the appellant was ordered to pay the sum of $400 fine in lieu of said suspension. Re Union Liquors, Inc., Bulletin 1987, Item 9.

Appellant asserted that he is seventy years of age; his clerk is seventy-three years of age; that he is located across the street from a low-income housing development at which numerous minors congregate; that some minors have become very abusive and belligerent upon being refused service; that he is attempting to sell the business; and that under the circumstances the penalty is too severe and may impede the sale of the business.

It is basic that a licensee is the master of his tavern and is fully responsible for engaging in or allowing any conduct therein which is prohibited by law. Although the licensee's fear of physical reprisal may be understandable under the circumstances recited herein, it is nonetheless no defense whatsoever to the charge.

Undoubtedly, in admeasuring the penalty, the Board considered the prior record of similar violations within the past five years and was hopeful that the suspension imposed would serve as a deterrent to this and other licensees.

Additionally, it should be observed that the suspension imposed in local disciplinary proceedings rests, in the first instance, within the sound discretion of the local issuing authority. The power of the Director to reduce the suspension on appeal is confined to cases where the suspension is manifestly unreasonable. Sventy and Wilson, Inc., v. Point Pleasant Beach, Bulletin 1930, Item 1; Cf. Pom Bon, Inc., v. Cliffside Park, Bulletin 1897, Item 1, and cases cited therein, wherein a penalty of revocation of license (for sales to minors) was affirmed by by the Director. See also Delroz, Inc. v. West Orange, Bulletin 1755, Item 1; aff'd (App. Div. 1968), opinion not approved for publication. The prevention and sale of intoxicating liquor to minors not only justifies but necessitates the most rigid control. Paddock Bar, Inc. v. Alcoholic Beverage Control Div'n, 46 N.J. Super. 405 (App. Div. 1957).

A liquor license is a mere privilege. Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888); Mazza v. Cavicchia, 15 N.J. 498 (1954). And, as Judge Jayne, speaking for the court in In re 17 Club, Inc., 26 N.J. Super. 43, 52 (App. Div. 1953), said:

> "The governmental power extensively to supervise the conduct of the liquor business and to confine the conduct of that business to reputable licensees who will manage it in a reputable manner has uniformly been accorded broad and liberal judicial support."

I conclude that the appellant has failed to meet the burden of establishing that respondent's action was erroneous and should be reversed as provided by Rule 6 of State Regulation No. 15.

It is, therefore, recommended that an order be entered affirming the Board's action, dismissing the appeal, and fixing the effective dates for the suspension of license imposed by the Board, and stayed by the Director pending the determination of this appeal.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's report were filed by the attorney for appellant.

I find that the matters contained in the exceptions have either been considered and satisfactorily answered by the Hearer in his report or are without merit.

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

Accordingly, it is, on this 25th day of February 1972,

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

ORDERED that my order dated August 6, 1971 staying respondent's order of suspension pending the determination of this appeal be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-179, issued by the Board of Commissioners of the City of Union City to Union Liquors, Inc., for premises 3810 Kennedy Boulevard, Union City, be and the same is hereby suspended for fifty-five (55) days, commencing at 3:00 a.m. Tuesday, March 14, 1972, and terminating at 3:00 a.m. Monday, May 8, 1972.

Robert E. Bower
Director

2. SEIZURE - FORFEITURE PROCEEDINGS - UNLAWFUL SALE OF ALCOHOLIC BEVERAGES FROM MOTOR VEHICLE - CLAIM OF INNOCENT LIENOR OF MOTOR VEHICLE RECOGNIZED - ALCOHOLIC BEVERAGES, MISCELLANEOUS PERSONAL PROPERTY AND CASH ORDERED FORFEITED.

In the Matter of the Seizure on May 3, 1971 of a quantity of alcoholic beverages, miscellaneous personal property, one 1969 Ford Econoline Van and $12.94 in cash at the intersection of Hobart Avenue and Wayside Drive in the Township of Millburn, County of Essex and State of New Jersey.	:	Case No. 12,474 On Hearing CONCLUSIONS and ORDER

Community State Bank and Trust Company, by John Gannon, Administrative Assistant, Installment Loans, claimant.
Donald W. Rinaldo, Esq., by Louis Monotti, Esq., appearing for claimant, Ralph J. Spero.
Harry D. Gross, Esq., appearing for the 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 77 containers of alcoholic beverages, miscellaneous personal property, a 1969 Ford Econoline Van and $12.94 in cash, as set forth in a schedule attached hereto, made a part hereof, and marked Schedule "A", seized on May 3, 1971 in a mobile sandwich truck at the intersection of Hobart Avenue and Wayside Drive, Township of Millburn, constitute unlawful property and should be forfeited.

At the hearing held on August 16, 1971, Ralph J. Spero, agent for and on behalf of Falls Lunch, 2131 Morris Avenue, Union, N.J. appeared and sought the return of the seized motor vehicle. He disclosed that the Community State Bank and Trust Company, Linden, N.J. as lienor, held a substantial interest therein.

Accordingly, an adjournment until September 7, 1971 was granted to afford the lienor an opportunity to be heard with respect to its said lien.

The Division file was admitted in evidence with the consent of all parties and reports therein established that on May 3, 1971 at approximately 2:00 P.M. Officers Lombardi and Tyms of the Millburn Township Police Department observed a red van truck marked "Rolin Lunch", parked near a construction site at the corner of Hobart Avenue and Wayside Drive, Millburn Township.

The proprietor, subsequently identified as Ralph J. Spero, 601 Knopf St., Linden, N.J. began selling sandwiches and soda to the construction workers. He was thereafter observed selling cans of beer to the workers. The officers approached the van and each officer purchased a 12 ounce can of Schaefer Beer using a five-dollar bill, the serial number of which had been previously recorded. The officers thereafter identified themselves to Spero and placed him under arrest, charging him with the unlawful sale of alcoholic beverages in violation of N.J.S.A. 33:1-50(a).

The officers summoned Division agents who completed the seizure of the items set forth in the inventory attached hereto and transmitted the two cans of Schaefer Beer purchased by the officers to the Division chemist for analysis.

The Division file also included the certificate by the Director that no alcoholic beverage license or special permit of any kind has ever been issued to Ralph James Spero at premises intersection of Hobart Avenue and Wayside Drive, Township of Millburn; an inventory of the seized items; affidavits of mailing and publication of Notice of Hearing; and the Director's Certificate of chemical analysis by the Division chemist that two 12 ounce cans of Schaefer Beer seized in the instant matter are alcoholic beverages fit for beverage purposes, with an alcoholic content by volume of 4.42% and 4.50% respectively.

Ralph J. Spero appeared with counsel and candidly admitted the sale of beer to construction workers at this site for several weeks prior to the date of seizure. He asserted that he did this as a convenience to his patrons and not for profit, selling beer for twenty-five cents per can after having purchased it at retail. "I knew I was doing something against the law but it was not to make money..."

With respect to the seized vehicle, he testified that he purchased it new, and there remained due and owing some $1,400.00-$1,500.00 to the Community State Bank and Trust Company of Linden.

John Gannon, representative of the Community State Bank and Trust Company, Linden, N.J., testified that his bank has a conditional bill of sale on the vehicle herein. He submitted a conditional sales contract indicating that Falls Lunch, 2131 Morris Avenue, Union, N.J. by its president, Ralph Spero, entered into said agreement on November 11, 1969 whereby it was to make 36 monthly payments of $67.53 with respect to the 1969 Ford Econoline Van. He further submitted the New Jersey Certificate of Ownership for the said vehicle showing Community State Bank and Trust Company, Linden, N.J. as secured party. He stated that the reasonable market value of the vehicle in saleable condition was $1,200.00 and that the balance due the lienor on the date of hearing was $1,049.90.

Additionally, he testified that in the instant matter, a credit check was made, and the bank records indicate that Spero was in the restaurant/box lunch business on Morris Avenue, Union and the truck was to be used in that business. Further, the bank determined that Mrs. Spero was employed by the Westinghouse Co. in Bloomfield, N.J.

He added that the bank processes approximately 50 such loans a month following the same investigating procedure, by a credit check through its affiliated mortgage company.

The seized alcoholic beverages are illicit because they were intended for sale and sold without a license. N.J.S.A. 33:1-1(i).

Such illicit alcoholic beverages, the personal property together with the vehicle containing same, and the cash seized as set forth in Schedule "A" herein constitute unlawful property and are subject to forfeiture. N.J.S.A. 33:1-2; N.J.S.A. 33:1-66.

The Director has the discretionary authority to return property subject to forfeiture to a party who establishes to the satisfaction of the Director that he has acted in good faith and did not know or have any reason to suspect that his property would be used in violation of the Alcoholic Beverage Law. N.J.S.A. 33:1-66(e), Rule 3(c) of State Regulation No. 28.

With respect to the claim of Spero, it is clear that the Director has no discretionary authority to return his property since by Spero's testimony he cannot be said to have acted in good faith nor can he be said to have been ignorant of the fact that his property would be used in violation of the Alcoholic Beverage Law.

With respect to the claim of the Community State Bank and Trust Company, I am satisfied from the evidence presented in support of its claim that it acted in good faith and did not know or have any reason to know that Spero would be involved in unlawful alcoholic beverage activity. Re Seizure Case No. 11,106, Bulletin 1538, Item 6.

It is, therefore, recommended that the claim of Falls Lunch be denied and that the lien of Community State Bank and Trust Company upon the motor vehicle in question to the extent of the balance due as of the date of hearing in the amount of $1,049.90 be recognized.

It appears that the market value of the said vehicle is such that the proceeds of a public sale would not exceed the amount of the lien and the costs of seizure and storage.

It is, accordingly, recommended that said motor vehicle be returned to the lienor herein upon payment by it of the costs of seizure and storage. It is, further, recommended that the remaining alcoholic beverages, miscellaneous personal property and cash, as set forth in Schedule "A", attached hereto, be ordered forfeited.

Conclusions and Order

No exceptions to the Hearer's Report were filed within the time provided by Rule 4 of State Regulation No. 28.

Having carefully considered the entire matter herein, including the transcript of the testimony, the exhibits 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 24th day of February, 1972

DETERMINED and ORDERED that if, on or before the 14th day of March, 1972, the Community Bank and Trust Company, Linden, New Jersey, pays the costs of seizure and storage of the 1969 Econoline Ford Van, more fully described in Schedule "A", attached hereto, it will be returned to it; and it is further

DETERMINED and ORDERED that the balance of the seized property, including the alcoholic beverages and cash, as more fully described in Schedule "A", attached hereto, constitute unlawful property and the same is hereby forfeited in accordance with the provisions of N.J.S.A. 33:1-66 and State Regulation No. 29 and 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.

Robert E. Bower,
Director

SCHEDULE "A"

77 - containers of alcoholic beverages
114 - cans of soda
Miscellaneous personal property
$12.94 - cash
1 - 1969 Ford Red Van Econoline 300 N.J. Registration X34871.

3. DISCIPLINARY PROCEEDINGS - UNLAWFUL PURCHASE FROM RETAILER - SALE IN VIOLATION OF LOCAL ORDINANCE (HOURS) - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 35 DAYS.

In the Matter of Disciplinary Proceedings against

Lawnside Republican Club
Gloucester Avenue
Lawnside, N.J.,

Holder of Club License CB-3, issued by the Borough Council of the Borough of Lawnside.

CONCLUSIONS and ORDER

Ballen, Batoff & Laskin, Esqs., by Lee B. Laskin, Esq., Attorneys for Licensee
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee changed his plea of guilty to non vult to Charge No. 1, and pleaded not guilty to Charge No. 2, as follows:

"1. On divers dates from on or about March 29, 1971 to on or about April 17, 1971, you the holder of a club license, without authority of special permit first obtained from the Director of the Division of Alcoholic Beverage Control, purchased or obtained numerous orders of various kinds and brands of alcoholic beverages from other than holders of New Jersey manufacturer's or wholesaler's licenses, viz., from holders of plenary retail consumption and distribution licenses; in violation of Rule 15 of State Regulation No. 20.

2. On Saturday, June 12, 1971, between 3:00 A.M. 3:35 A.M. you sold, served, delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, and allowed the consumption of alcoholic beverages on your licensed premises; in violation of Section 5 of an ordinance adopted by the Borough Council of the Borough of Lawnside on April 1, 1942, as amended June 5, 1946."

The Division produced the testimony of three ABC agents in substantiation of the contested charge.

Agent G testified that, accompanied by ABC agents P and B, he arrived in the vicinity of the licensed premises (a club licensee) on Saturday, June 12, 1971, at 2:20 a.m. The licensed premises is contained in a block building, the entrance being gained by descending some steps.

Approximately five minutes after arrival, agent P unsuccessfully attempted to gain admission to the licensed premises. The premises were then kept under surveillance. Between 3:00 and 3:15 a.m. agent G observed approximately fifty cars parked in the immediate area of the licensed premises. During that period of time, he observed several individuals enter

the licensed premises. At approximately 3:20 a.m. the agents departed from their post of observation and contacted the local police authorities. At 3:35 a.m., accompanied by Police Chief Catlett and Sergeant Johnson, agents G, P and B, entered the licensed premises. Continuing, agent G testified as follows:

> "Well, when we first went in, I observed a woman coming from behind the bar. There were approximately 40 people at the bar. Some were drinking and some weren't. There were approximately fifteen people where the service area is. Some of them were drinking and some weren't."

Agent P seized the drink of an Alexander Kendell who was at the bar and poured it into a sample bottle. Agent G then identified himself to the doorman, Harry Sadler, and to Frank Menoken, the club steward.

On cross examination, agent G stated that the local police had not been contacted concerning the subject investigation prior to the telephone call made at approximately 3:20 a.m. that day.

In order to gain entry, he knocked on the door, showed his credentials to Sadler and walked in, followed by the other ABC agents and the local police officers. Chief Catlett was wearing a uniform. He denied pushing in the door and pushing Sadler aside in order to gain entry. He did not see a clock on the wall.

Agent P testified that, accompanied by agents G and B, he arrived in the vicinity of the licensed premises on June 12th at approximately 2:20 a.m. Shortly thereafter, he descended some steps and rang the bell at the doorway of the licensed premises. His membership was challenged by Sadler; he was refused admittance, and rejoined the other ABC agents at the point of observation.

Between 3:00 and 3:15 a.m. he observed a number of people exit from a tavern "up the street" and enter the subject licensed premises. He had checked the time on his watch with the time on the radio. At approximately 3:35 a.m., led by agent G and followed by agent B, local Chief of Police Catlett and Sergeant Johnson, he entered the licensed premises. He observed patrons at the bar, some with beverages in front of them (including bottles of beer), and some other persons just standing around. He saw no money on the bar and saw no bartenders. He seized a glass that was on the bar in front of a male, identified as Alexander Kendell, and upon exiting from the premises he poured the contents of the glass into a sample bottle.

On cross examination, agent P testified that he saw the local police officers drive up in a police car, however, he did not recall whether or not Chief Catlett and the other officer were wearing police uniforms. He alone, attempted to gain entry at approximately 2:30 a.m. which was a lawful hour of sale. Sadler challenged his membership. Upon responding negatively, he was denied entry. He denied that this motivated the agents to remain in the area for an additional hour; they were pursuing a specific assignment to investigate alleged sales to non-members.

The agent observed several beer bottles on the bar. He did not see an accumulation of glasses and bottles on one part of the bar. He did not observe waitresses with glasses and bottles at one end of the bar. Kendell was at the front end of the bar. He saw an open bottle of beer alongside of him. The agent continuously held on to the glass that he seized from in front of Kendell.

Continuing, the agent testified that he did not fill in the information contained on the label glued to the sample bottle or the tag attached thereto until the following Monday morning. After leaving the licensed premises he proceeded to the local field office and placed the sample bottle in a desk assigned to him under lock and key. The only other person who would have access to a key to the desk would be the supervisor in charge of the field office.

On redirect examination, agent P testified that Kendell's hands were encircling the glass. He did not see either Kendell or anyone else consume any beverage.

Agent B testified that the agents departed from their post of observation in order to contact the local police authorities. Upon arriving at the police station they flagged down a passing police car operated by Sergeant Johnson. In response to a telephone call made at the police station, the Chief came to the station. Agent B then testified that upon arrival the Chief "...was wearing some kind of a jacket and trousers and a hat. I think he took the jacket off and left it at the police station." Going to the licensed premises with the police sergeant and the agents, the Chief was wearing a shirt.

Upon arrival at the licensed premises he observed approximately fifty patrons therein. Some were at the bar, others were in the service area and others were in the area of the pool table. He observed a partially consumed drink in front of Kendell which agent P seized. He did not see Kendell consume any of it. He did observe other patrons consume beer and mixed drinks. Agent G showed his credentials upon entry and the entire group was allowed entry into the licensed premises. Agent P kept the partially filled glass in his possession until he poured the contents in a sample bottle which he obtained from the trunk of agent B's car. Agent B then testified that the three agents proceeded to the field office. Agent P thereupon removed the bottle from the car and placed it under lock and key in his desk.

The bottle, above referred to, the certified report of the State chemist indicating that the bottle contained an alcoholic beverage and the closing hour ordinance were admitted in evidence.

In defense of the contested charge, Frank Menoken, the club steward, testified that he recalled agent P entering the licensed premises accompanied by "Robert", a local policeman and club member (later identified as Robert Moore), approximately an hour prior to the time when all of the agents entered the premises accompanied by the Police Chief. Agent P was allowed to enter as Robert's guest; however, he wasn't permitted to purchase a drink because he wasn't a club member. Agent P then left the premises.

At about five minutes before closing time the three ABC agents pushed their way in while all the patrons were leaving the premises; agent G elbowed the doorman Sadler in the chest causing him to fall back; Chief Catlett remained on the steps and did not enter the premises; it was their procedure to blink lights at 2:45 a.m. as a signal for last call for drinks; the wall clock is set twenty minutes fast; there were approximately fifteen persons in the premises when the agents entered; and Chief Catlett was not wearing a uniform.

Harry Sadler testified as follows: he was employed by the licensee as a doorman; he recalled agent P entering the premises on June 12th and conversing with Menoken; he returned later with the other two ABC agents at approximately 2:55 a.m. which was after he had flashed the lights on and off indicating closing time; at 2:55 a.m. in answer to a knock he opened the door and told the agents that the place was closed; agent G struck him in the chest and sent him reeling back; some patrons had already departed from the premises; fifteen to twenty people remained in the premises; preparations had been made to close the premises; and he observed agents P and G take a drink from a male.

On cross examination, the witness insisted that agent G did not identify himself to him, knocked him back and immediately ran behind the bar.

Alfreda Menoken testified that she was employed in the kitchen of the licensed premises. On the date charged herein, the lights were blinked fifteen minutes prior to the closing time, as customary. At 2:55 a.m. while cleaning up the kitchen, she heard scuffling; saw agent G behind the bar and saw about fifteen or twenty persons in the licensed premises. She observed agents G, P and Frank Menoken engage in conversation.

On cross examination the witness asserted that the entry was made by the agents at 2:55 a.m.; that the clock read 3:15 a.m.; however, the clock was set twenty minutes fast.

Sharon Parker testified that she had patronized Pearl's, a licensed premises in the immediate neighborhood of the subject licensed premises earlier on the night in question. While there, she saw two of the ABC agents in Pearl's in the company of Chief of Police Catlett and Robert Moore, a local police officer. Thereafter, she proceeded to the subject licensed premises to visit the previous witness, Alfreda Menoken. At approximately 2:55 a.m. she heard pounding on the door and someone shouted that the place was closed. She then observed agent G push his way into the room, proceed to behind the bar and ask everyone to leave. Agent P confiscated a glass that one of the patrons had his arms wrapped around but was not drinking from. She warned the licensee that the law enforcement officers were going to visit the premises that night.

Franklin Harper gave the following account: he is employed as a bartender at Pearl's; he was a patron at the licensed premises on the date specified in the charge because he had the night off; at "somewhere around 3:00" and after the lights had blinked signalling last call for drinks he heard a rap at the door. Someone called out that the place was closed. The door opened and then the commotion started. A male entered and ordered everyone to leave. He asserted that he could not afford to get into trouble; he was on his way out and he left.

On cross examination, the witness testified that he heard at Pearl's earlier that night that the subject licensed premises was going to be raided. Between 11:30 p.m. and midnight he proceeded to the licensed premises for the purpose of warning Menoken of the proposed raid.

In rebuttal, agent P testified that he had on one occasion entered the licensed premises accompanied by an Officer Morris who, unknown to him, was a club member. However, that entry was made on April 18th and not on June 12th. On that occasion he gave Menoken an assumed name. He found no violations on April 18th. He never met Officer Morris thereafter.

Basically, a factual issue has been presented for determination.

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 not criminal, and, therefore 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, 555 (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.

Based upon the foregoing principles, I find that the believable evidence preponderates in favor of the Division. I find that the agents' testimony that they did not enter the licensed premises until approximately 3:35 a.m. to be credible and fully factual. On the other hand, I find the testimony offered by the profusion of the licensee's witnesses to the effect that one of the agents muscled his way in followed by the other two agents at 2:55 a.m. to be incredible, and a vain attempt to exculpate a licensee who had violated the local hours ordinance.

I am mindful too, that the raid on the licensed premises was made in the presence of the local Police Chief and a local police sergeant who could have been subpoenaed by the licensee to contradict the agents' testimony relative to the time of entry if the fact was as represented by the licensee's witnesses.

Additionally, it is my view that the testimony of some of the witnesses for the licensee to the effect that agent P had gained admittance to the licensed premises earlier that morning accompanied by a club member was false.

I am impressed by the fact that the agents did not, in concert, testify that they witnessed patrons consuming drinks which is an element of the charge. To the contrary, only one agent testified that he witnessed patrons consuming alcoholic beverages. This belies the suggested inference that the agents were maliciously motivated in pursuing the subject investigation.

In his summation, the attorney for the licensee placed great emphasis on discrepancies in the testimony of the agents concerning whether the police chief was, or was not, wearing a uniform, and the size of the patronage in the premises upon entry. There were variations. However, the variations or discrepancies, which I have carefully analyzed and considered, do not relate to the substance of the charge, or to any material issue, but relate to details of minor consequence.

Counsel raised the doctrine of "falsus in uno, falsus in omnibus" in an attack upon the testimony of the agents. The maxim is not a mandatory rule of evidence but rather pertains to a permissible inference which the finder of fact may or may not draw. The testimony is not to be stricken in its entirety but rather, the trier may sift the evidence and evaluate its credibility. Cf. State v. Guida, 118 N.J.L. 289 (Sup. Ct. 1937). Furthermore, a necessary element is that the false statement must be made with respect to a material fact. State v. Sturchio, 127 N.J.L. 366 (Sup. Ct. 1941); State v. Guida, supra.

After examining all of the evidence herein it is my view that the Division has met the burden of establishing the truth of the charge by a preponderance of the credible evidence.

Accordingly, after considering the entire record and the various precedents cited, I am persuaded by the clear and convincing proofs in this case that Charge No. 2 has been sustained by a fair preponderance of the credible evidence. I, therefore, recommend that the licensee be found guilty of the said charge.

As heretofore indicated it has pleaded guilty to Charge No. 1.

Licensee has a previous record of suspension of license, by the municipal issuing authority for ten days, effective October 28, 1968, for sale to non-members.

It is further recommended that an order be entered suspending the license on the first charge for fifteen days, Re Holiday Lounge, Inc., Bulletin 1958, Item 6; and on the second charge for fifteen days, Re Lou-Mar Cafe, Bulletin 2024, Item 7, to which should be added five days for the record of suspension of license for dissimilar violation occurring within the past five years. Cf. Re Cataldo, Bulletin 1958, Item 11, without remission for the confessive plea to the first charge in view of the contest to the second charge, Re Collbern, Inc., Bulletin 1735, Item 4, or a total of thirty-five days.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by the licensee, pursuant to Rule 6 of State Regulation No. 16.

I find that the matters contained in the exceptions have either been considered in detail and answered by the Hearer in his report, or are without merit.

Consequently, having considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions and argument filed with reference 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 February 1972,

ORDERED that Club License CB-3, issued by the Borough Council of the Borough of Lawnside to Lawnside Republican Club for premises Gloucester Avenue, Lawnside, be and the same is hereby suspended for thirty-five (35) days, commencing at 3:00 a.m. Thursday, March 9, 1972, and terminating at 3:00 a.m. Thursday, April 13, 1972.

Robert E. Bower
Director

4. DISCIPLINARY PROCEEDINGS - LEWDNESS (INDECENT ENTERTAINMENT - POSSESSION OF CONTRACEPTIVE DEVICE - STATUETTE) - LICENSE SUSPENDED FOR 40 DAYS.

In the Matter of Disciplinary Proceedings against

The Vacston Co., Inc.
t/a Village Barn
502 Frelinghuysen Avenue
Newark, N. J.,

Holder of Plenary Retail Consumption License C-335, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS and ORDER

Sheldon and Freda, Esqs., by Victor J. Freda, Esq., Attorneys for Licensee
Dennis M. Brew, Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to three charges, i.e., that on September 3, 1971 it (1) permitted lewdness and immoral activity on the licensed premises in the form of indecent entertainment, in violation of Rule 5 of State Regulation No. 20; and (2) possessed contraceptive devices upon the licensed premises, in violation of Rule 9 of State Regulation No. 20; and (3) permitted an obscene object on the licensed premises in violation of Rule 17 of State Regulation No. 20.

Pursuant to a specific assignment to conduct an investigation of an alleged lewd "go-go" show, ABC agents H, G and R visited the licensed premises.

Agent H testified that on September 3, 1971 he visited the premises about 9:50 p.m., accompanied by agents G and R and two other agents of this Division. Agents H, G and R entered the premises leaving the other agents outside at posts of observation. The agents entering sat in the middle of a long bar at the end of which was a "go-go" platform on which a "go-go" girl was then dancing. She was attired in the normal "go-go" costume and her dance was typical of usual "go-go" performances.

After a short rest interval, the dancer continued normal dancing until, at an apparent signal from the manager of the licensed premises, she removed the top portion of her costume and danced for several "numbers" with her bare breasts fully exposed. Each agent had a clear and unobstructed view of the dancer during this exposition.

Agent G departed the premises then for the purpose of summoning the local police.

Further testimony of agent H revealed that upon return of agent G with the police, the agents identified themselves to the manager, the bartender and the dancer, at which point the manager vehemently denied that the dancer had danced "topless". A search of the premises revealed a packet of contraceptives in a drawer, and a wooden figurine, the subject of the third charge of the complaint, was discovered on a shelf in the back bar. At

first glance it is merely a man from his head to his waist standing in a barrel. However, when the barrel was raised the lower portion of the man's body was exposed displaying an over-proportioned male organ.

Agents G and R substantially corroborated the testimony of agent H. Agent G added that a short conversation had with the bartender respecting the limited physical endowments of the female dancer, the bartender responded that the next dancer was more amply proportioned.

The testimony of agent R was similar to that of the other agents, adding that during the dancer's "topless" performance he moved from his seat at the bar to a standing position nearer the "go-go" platform where the scene of the exposure was equally visible.

Respecting the signal given by the manager (later identified as Mr. Antonelli) to the dancer in apparent response to which she removed her bra, each agent testified that there was some hand motion made by the manager with assenting nod from the dancer.

Sergeant Robert Gingrich of the Newark Police Department testified on behalf of the licensee, that he was in the premises at the approximate time the agents were, although he did not recall seeing them then. He saw the "go-go" girl dance while he was there and at no time did she remove any clothing. Upon his departure, he saw units of the police arrive, recognized a detective whom he knew, and learned that their visit encompassed the search for some suspect.

The bartender, Alfred Dodge, testified that he was on duty that evening, saw no exposure by the dancer and recalled that Sergeant Gingrich left the premises five or ten minutes before agent G returned with the police.

Paul Antonelli, the manager, testified that the dancer was always fully clothed and that he was present the entire evening on the date of the investigation. While not specifically recalling, he admitted that he may have made some gesture to the girl as instructions to dance another "set", but denied his gestures were in the form described by the agents or that such instructions had any reference to dancing "topless".

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, therefore, require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956); 36 N.J. Super. 512, 519 (App. Div. 1955).

Testimony to be believed must not only proceed from the mouths of credible witnesses 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, 555 (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.

Counsel for the licensee apart from soliciting a general denial by the bartender and the manager that there was female exposure, took great pains by thorough cross examination to pin-point the timing of the alleged indecent dance, directing that defense to the rationale that such would not have taken place in the presence of a sergeant of the police or, in con-

verse, his denial that such a dance took place would dissolve the credibility of the agents. All testimony respecting time was approximate. Assuming that the sergeant did not see the "topless" dance, it is equally arguable that the hand signal given by the manager to the dancer followed the sergeant's departure as an "all clear" that the covering garment could be removed.

I find that the testimony of the agents was clear and convincing; that the dancer did what they said she did, and that the testimony of the bartender and the manager was unconvincing.

Referring to the second charge, i.e., the possession of prophylactics against venereal disease, in violation of Rule 9 of State Regulation No. 20, the evidence disclosed the discovery of one packet of such devices in a drawer adjacent to the bar. Rule 9 of said regulation prohibits the possession of such devices for sale and the possession of such devices in any appreciable quantity gives rise to a presumption that their presence is for sale. Here, however, but one packet was found; in the absence of any others the presumption of its presence for sale is thus dispelled. I shall recommend that the licensee be found not guilty of this, the second charge of the complaint.

The third charge relates to the discovery of a small wooden statue consisting of a small figurine of a man whose lower half is enclosed in a barrel. The manager affirmed that examples of this statue are novelty devices and are readily obtainable in a variety of stores. It is obvious that the statue is not an object of art and in common parlance would be called "dirty".

We are not here concerned with censorship of a book, nor with the alleged obscenity of a theatrical performance. Our immediate interest and attention is confined to the disciplinary action taken against the licensee of a public tavern, whose privileges may lawfully be tightly restricted to limit to the utmost the evils of the trade. McFadden's Lounge, Inc. v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 61, 68 (App. Div. 1954). Lewdness or immorality for the purpose of alcoholic beverage control may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally. Davis v. New Town Tavern, 37 N.J. Super. 376, 378 (App. Div. 1955). The presence of this odious statue is clearly violative of the applicable rule.

I conclude, after evaluation of the evidence and the applicable law that Charges No. 1 and No. 3 herein, have been established by a fair preponderance of the credible evidence and recommend that the licensee be found guilty on both. I further find that Charge No. 2 herein has not been established and thus recommend that the licensee befound not guilty on that charge, and that it be dismissed.

Absent prior record, it is accordingly recommended that the license be suspended for thirty days (Re Caprio, Bulletin 1974, Item 5) on the first charge, and ten days on the third charge herein (Re Lisowski, Bulletin 1200, Item 5), making a total suspension of forty days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the Prosecutor of this Division with reply furnished by the licensee, pursuant to Rule 6 of State Regulation No. 16.

I have carefully considered the matters contained in the said exceptions, and find that they have either been considered and satisfactorily answered in the Hearer's report, or are lacking in merit. Thus, having analyzed and considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions with respect thereto, I concur in the findings and conclusions of the Hearer as applicable to Charges No. 1 and No. 3, and adopt his recommendations.

However, I cannot agree with the findings and recommendation of the Hearer with respect to Charge No. 2. I am persuaded and find that the presence of the contraceptive device within the licensed premises constitutes a violation of the said Charge No. 2. Cf. Re Wally's Tavern, Inc., Bulletin 1611, Item 2. The mere possession on the licensed premises of these devices is violative of Rule 9 of State Regulation No. 20. In view of the penalties recommended on the first and third charges herein, and considering all of the facts and circumstances with respect to Charge No. 2, I am satisfied that no penalty of suspension on the said charge is warranted. I shall therefore suspend a penalty thereon.

Accordingly, it is, on this 3rd day of March 1972,

ORDERED that Plenary Retail Consumption License C-335, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to The Vacston Co., Inc., t/a Village Barn for premises 502 Frelinghuysen Avenue, Newark, be and the same is hereby suspended for forty (40) days, commencing at 2:00 a.m. Thursday, March 16, 1972, and terminating at 2:00 a.m. Tuesday, April 25, 1972.

Robert E. Bower
Director

5. STATE LICENSES - NEW APPLICATION FILED.

Kobrand Corporation
134 East 40th Street
New York, New York

Application filed March 24, 1972 for plenary wholesale license.

Robert E. Bower
Director