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

BULLETIN 1956 March 11, 1971

TABLE OF CONTENTS

ITEM

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BULLETIN 1956

1. DISCIPLINARY PROCEEDINGS - POSSESSION OF INDECENT MATTER (PICTURES, PRINTINGS, WRITINGS) - POSSESSION OF PROPHYLACTICS - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 50 DAYS.

In the Matter of Disciplinary Proceedings against	)	
S. Edward Hausner t/a Skyline Lounge 789 Dowd Avenue Elizabeth, New Jersey	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-111 (for 1969-70 license period as extended for 1970-71 license period) issued by the City Council of the City of Elizabeth.	)	

- -

Theodore Cohen, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"1. On August 27, 1969, you allowed, permitted and suffered in and upon your licensed premises and had in your possession obscene, indecent, filthy, lewd, lascivious and disgusting printings, writings and pictures; in violation of Rule 17 of State Regulation No. 20.

"2. On August 27, 1969, you possessed prophylactics against venereal disease and contraceptives and contraceptive devices, in and upon your licensed premises; in violation of Rule 9 of State Regulation No. 20."

The Division offered the testimony of ABC Agent D and introduced in evidence various exhibits in substantiation of the charges.

A certified copy of the license application for the year 1969-70 was received in evidence, D-1. It discloses that the one-story masonry building located at 789 Dowd Avenue, wherein the licensed premises is contained, is used for the purpose of conducting a restaurant, tavern and night club business and that the entire building, except for the coffee shop in front, constitutes the licensed premises. (Refer to question No. 7 in said license application. See also sketch of premises, D-2 in evidence.)

Agent D testified that accompanied by three law

enforcement officers, he entered the licensed premises through the Dowd Avenue entrance on August 27, 1969 shortly after 3:00 p.m. He noted that this was a large room containing a dining room and dancing area, a bar to the left along the Dowd Avenue wall, another bar to the left running along the wall which partitioned off the coffee shop, a bandstand, a liquor storage area and a small office, on the North Avenue side of the building.

He and the other law enforcement officers spoke to the licensee, Hausner, and informed him that they desired to inspect the premises. The inspection terminated in the office area. It contained a safe, a filing cabinet, a desk, a couch and an opening which led to a small washroom. The safe and filing cabinet (which were locked) were opened by Hausner at the agent's direction. In one drawer of the filing cabinet he found and seized three books entitled, as follows: "Photographic Manual of Sexual Intercourse", "Oral Love" and "Variations in Love Making". These were received in evidence, D-3, D-4 and D-5, respectively. From the safe he seized a partially used tube of Ortho Vaginal Jelly (D-6 in evidence); an Ortho diaphragm, which is commonly used as a contraceptive device by females (D-7 in evidence) and three male contraceptives, commonly referred to as "French ticklers" (D-8 in evidence).

In the center drawer of the desk the agent found and seized three catalogs. A forty-eight page color catalog entitled "Adult Catalog" was marked D-9 in evidence. A four page color catalog bearing the legend "Save 25%" across the top of the cover page was marked D-10 in evidence. A twenty-four page color catalog bearing the title "Breathtaking Full Color Adult Catalog" was marked D-11 in evidence.

Upon questioning, Hausner admitted that all the items seized were his, except the diaphragm and jelly, which he asserted were his wife's.

After comparing the copy of the license application kept on the licensed premises on August 27, with the certified copy thereof (Exhibit D-1) he found that the answers to questions 7, 7(a) and (b) were the same on each.

On cross examination, Agent D testified that he and the local law enforcement officers proceeded to the licensed premises on a specific assignment to investigate an allegation that there was stolen liquor on the premises. None was found in the premises.

Upon identifying himself to Hausner and asking him what the extent of the licensed premises was, Hausner informed him that the licensed premises consisted of everything except the coffee shop.

On redirect examination, Agent D testified that he found papers pertaining to the conduct of the business of the sale of alcoholic beverages (such as bills and names of patrons) in the office.

On recross examination, Agent D conceded that some catalogs similar to those received in evidence (D-9, 10 and 11) are received by people through the mail, unsolicited. Hausner

informed him that he had received the catalogs in the mail the day previous to the subject investigation. He denied that Hausner informed him that he had initiated action to have his name removed from the mailing list.

In defense of the charges, the licensee, S. Edward Hausner, testified that in the conduct of the restaurant and bar business he employs thirty people. The room referred to as "office" bears a sign marked "Private". It contains a desk, filing cabinet, couch, shower, wash basin and toilet. He asserted that he "lived" there on August 27, 1969, the date of the agent's visit, and for some time prior thereto and still lived there on the date of the hearing herein. He works eighteen to twenty hours daily; he is separated from his wife.

On the date charged herein, he escorted the law enforcement officers to the cellar and various other areas of the establishment. Upon being requested by Agent D to inspect the office, he unlocked the door. The door is always locked. He was asked whether or not he lived there. He had clothes hanging over doors.

Referring to the books, he asserted that he had received them in the mail; he never read them; he "just threw them in the desk". Referring to the diaphragm and jelly found in the safe, he stated that those items belonged to his wife and, on advice of counsel, he removed them from his former home where his wife still resides. Referring to the contraceptives (D-8, in evidence), he testified:

> "I got them as a little gift in an envelope that came to me on Christmas day with a note that told me that I could go and do something to myself with them. Who sent them I don't know."

Referring to the advertising catalogs, he informed the agent that he had received them in the mail "yesterday or the day before, that they had just came in." He had received this type of catalog for the past eighteen months. Every tavern in the city had received them. After conferring with Councilman DeMartino, who sought to introduce an ordinance prohibiting the post office department from delivering unsolicited items, he (at DeMartino's request) held them for safekeeping. He had disposed of the catalogs he had received in the mail previously.

At the request of his attorney, he delivered to him five envelopes which he had received in the mail subsequent to August 27, 1969 unsolicited, addressed to him or to a Mike Barry or Berry, at the address of the licensed premises. These contained material similar to the catalogs marked D-9, 10 and 11 in evidence. The envelopes and their contents were received in evidence, L-1. He was not acquainted with a Mike Barry or Berry. The envelopes addressed to Mike Barry or Berry were addressed in care of Skyline Lounge, and bore the street address of the licensed premises.

On cross examination, Hausner testified that he had been receiving mail addressed to Mike Barry for approximately a year. Most of it were discarded. He held the last few in order to send them to his attorney. He never informed any of the companies to discontinue sending the mail to a Mike Barry at his premises. He never used the name "Mike Barry". He

does not know why mail was addressed to Mike Barry at his premises by various companies. No mail other than the type received in evidence was sent to Mike Barry at his (Hausner's) premises. He did not inform the agent of his conversation or plan with Councilman DeMartino because "It was late in the afternoon, and if I could visualize the situation, they were in a hurry to wind the thing up, and he was more concerned with the firearm that I had."

Referring to the three books (D-3, 4 and 5) he received them unsolicited, by mail, approximately six months prior to the date of the said visit by the agents, addressed to the Skyline Lounge. He did not pay for them. He placed them in the filing cabinet and never read them. He had no reason to either keep them or to discard them. He had many books in the premises. He was looking forward to reading all the books.

He sleeps on the couch in the office sixty percent of the time. Otherwise, he sleeps at 1405 Kent Place which he considers to be his residence.

The licensee asserted that the answer to question 7(a) which indicated that the coffee shop in front would constitute the licensed premises was unintentially erroneous. It was his understanding that, although it was not so indicated in the license application, the office was not a part of the licensed premises. Some time after August 27, 1969, he had the license application amended to exclude the office as part of the licensed premises.

Thomas J. Garvey, secretary of the local Board of Alcoholic Beverage Control, testified that he received a copy of a letter dated November 20, 1969, the original of which was sent to the licensee by the Division, informing him that the answers to questions 7 and 7(a) in the license application (D-1 in evidence) are contradictory. The rider filed with the local ABC Board by Hausner on November 24 was ambiguous. However, it may be assumed thereby that the licensee intended to eliminate the office as part of the licensed premises.

Michael J. DeMartino, a councilman of the municipality, who also serves as a member of the local ABC Board, testified that he is acquainted with Hausner and that prior to August 27, 1969, Hausner had spoken with him relative to the receipt of material through the mail which was not completely acceptable to the public at large.

On March 25, 1969, he introduced a resolution which was adopted by the City Council condemning the practice of sending unsolicited indecent, pornographic and lewd literature and photographs through the mail and urging that appropriate action be taken by the Federal authorities to prohibit the practice. (L-2, in evidence). L-3 in evidence consisted of mailings given to DeMartino, at his request, by other residents of the City including tavern owners. This prompted him to introduce the aforesaid resolution. Hausner had also informed DeMartino that he had received similar mailings. Thereupon, DeMartino requested Hausner to hold the mail.

On cross examination, the councilman characterized the mailings (L-2) offered in evidence by the licensee and the

catalogs confiscated by the ABC agent (D-9, 10 and 11), as being similar in nature.

Finally, DeMartino testified that, subsequent to the time that he introduced the resolution in March 1969, he visited the licensed premises and requested Hausner to hold for him all objectionable mailings. Hausner did not give him any such mailings, nor did DeMartino recall being informed by Hausner that he had any such mailings.

In determining the issues raised herein relative to the extent of the licensed premises and whether the office area which is apparently used at times by the licensee as living quarters constitutes a part thereof, I refer to R.S. 33:1-1(k) which defines "licensed premises" as "any premises for which a license under this chapter is in force and effect."

The application for the license in effect at the time of the alleged violations (Item No. 7) clearly states that the entire building, except for the coffee shop in front, constituted the licensed premises. From the inception of this Division, it has been uniformly ruled that the description in the application of the specific premises where alcoholic beverages are to be sold will, in general, determine what constitutes the licensed premises. Re City of Millville, Bulletin 35, Item 15; Re Cohen, Bulletin 295, Item 3; Lackowitz v. Waterford, Bulletin 426, Item 8; Elks Club, Vineland Lodge #1422, Bulletin 532, Item 12; New Jersey Tavern Owners, Inc. v. Belleville, et al., Bulletin 1182, Item 2.

I, therefore, find that the office constituted a part of the licensed premises.

In adjudicating Charge 2 first, I find that the evidence is not only substantial, but also uncontradicted, that the licensee possessed prophylactics and a contraceptive or a contraceptive device, in contravention of Rule No. 9 of State Regulation No. 20. Re Club Del Rose Corporation, Bulletin 1556, Item 1; Re Wally's Tavern, Bulletin 1568, Item 2. I, therefore, conclude and recommend that the licensee be found guilty of the second charge.

With respect to the first charge, I observe that Rule 17 of State Regulation No. 20 provides:

> "No licensee shall allow, permit or suffer in or upon the licensed premises or have in his possession or distribute or cause to be distributed any obscene, indecent, filthy, lewd, lascivious or disgusting recording, printing, writing, picture or other matter." (Emphasis added)

In order to sustain this charge, it is not necessary to find that the licensee exhibited the pictures or other matter. It need only be determined that the material was obscene and that the licensee possessed such obscene matter in the licensed premises or that the licensee allowed, permitted or suffered the same in or upon the licensed premises. Vide, Re Craner & Pilon, Bulletin 1825, Item 6; Re Rubbinaccio, Bulletin 1774, Item 2; Re Delabu, Inc., Bulletin 1873, Item 4, affirmed sub nom. Delabu, Inc. v. Division of Alcoholic Beverage Control (App. Div. 1970, not officially reported, reprinted in Bulletin 1898, Item 1.

Referring to the catalogs which the licensee asserted that he had received in the mail a day or two prior to the date charged herein, it is sufficient to note that they contain scores of photographs of completely nude females (some in color) posing in a manner as to focus attention to the genital area. There are also some photographs of males and photographs of males and females posing together in the nude.

Additionally, I have noted that, of the five mailings (each containing photographs similar to those contained in the catalogs) addressed to 789 Dowd Avenue, Elizabeth, New Jersey 07201 (the address of the licensed premises), two of the envelopes were addressed to "Ed Hausner" and bore no date on the postmark. The other three envelopes were addressed and postmarked thusly:

(1) "Mike Berry, c/o Skyline Lunch", Postmark "Jan. 9, 1969";

(2) "Mike Barry, c/o Skyline Lunch", Postmark "Dec. 27, 1969"; and

(3) "Mike Barry, c/o Skyline Lunch", Postmark "Jan. 5, 1970".

These were sent to the addressee by three different firms. Thus, it is apparent that by the introduction in evidence of the mailing postmarked "Jan. 9, 1969" the licensee has contradicted his testimony wherein he asserted that he delivered to his attorney mailings received by him subsequent to August 27, 1969. Further, it is my view that a permissible inference may be drawn that Hausner, himself, was instrumental in having mailings addressed to a Barry or Berry at Skyline Lunch. It would strain all reason to view the use of the same or similar allegedly fictitious name of an addressee, and the place and the address used by three different senders of mail as a purely coincidental occurrence. It is also noteworthy that Hausner admitted that he did not attempt to stop the mailings addressed to a Mike Barry, and the sole type of mail addressed to Barry was of the same type received in evidence.

With respect to the three books received in evidence and which the licensee asserted that he had received in the mail, unsolicited by him some months prior to the date charged herein and were unpaid for and unread by him, I find that they contain detailed descriptions of acts of sexual intercourse, homosexuality, anilingus, cunilingus, fellatio, troilism and some other rather bizarre acts. The book entitled "Photographic Manual of Sexual Intercourse" contained scores of photographs of nude males and females in various positions of intercourse. In arriving at an opinion concerning the guilt or innocence of the licensee, I am not required to pass judgment as to the morals of a person keeping books of this type in his home. Neither am I required to adjudge the legality of the mailing of the books. However, I am concerned with the alleged violation of Rule 17 of State Regulation No. 20.

From time immemorial, liquor licensed premises (whether they be taverns or restaurants or inns) have been used by people to congregate as places of conviviality, and to engage in social intercourse. They have never been sanctioned, in our jurisdiction, as places wherein nude pictures and books explicitly detailing various forms of sexual intercourse, may be kept.

This Division has consistently ruled that nudes, semi-nudes, indecent photographs and pictures have no place on liquor licensed premises. There is no requirement, under Rule 17 of State Regulation No. 20, to show that the licensee either displayed the items or made them available to patrons in any other manner. Cf. Re Rubbinaccio, Bulletin 1774, Item 2; Re Craner & Pilon, Bulletin 1825, Item 6, affirmed sub nom, Craner & Pilon v. Division of Alcoholic Beverage Control (App. Div. 1969), not officially reported, reprinted in Bulletin 1877, Item 1.

Although statutes penal in character normally must be strictly construed, the Legislature enjoined the courts otherwise in R.S. 33:1-73 which provides:

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

Vide, Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947); Kravis v. Hock, 135 N.J.L. 259 (Sup. Ct. 1947), reversed on other grounds, 136 N.J.L. 161 (E. & A. 1947). Further, Chief Justice Case, speaking for the court in Hudson Bergen etc. Ass'n v. Hoboken et al., 135 N.J.L. 502 (E. & A. 1947), at pp. 506-507, said:

> "The sale of intoxicating liquor has, from the earliest history of our State, been dealt with by legislation in an exceptional way. In its legal significance it is sui generis. 'It is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied.' Paul v. Gloucester County, 50 N.J.L. 585, 595. 'The sale of intoxicating liquor is in a class by itself.' Bumball v. Burnett, 115 Id. 254. 'The right to regulate the sale of intoxicating liquors by the legislature, or by municipal or other authority under legislative power given, is within the police power of the state, and is practically limitless. It may extend to the prohibition of the sale altogether. A license is not a contract. It is a mere privilege.' Meehan v. Excise Commissioners, 73 Id. 382; affirmed 75 Id. 557. 'There is no inherent power in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils.' Crowley v. Christensen, 137 U.S. 86; 34 L. Ed. 620. 'The liquor business is peculiarly subject to strict governmental control.' Franklin Stores Co. v. Burnett, 120 N.J.L. 596."

Later the court stated, at pp. 507-509:

> "The reason and the need for singling out the liquor traffic for peculiar limitation and strict supervision may be read in our statutes from early colonial times.... Thus, through nearly 250 years

> the legislature has struggled with the conditions arising out of the sale of liquor. The current statute is to be construed in the light of the long series of statutes of which it is the culmination and of the decisions of the courts regarding those statutes. Meticulous technicalities should not be permitted to thwart so considerable an effort toward keeping a public convenience from becoming a social evil. The state authorities should be given every reasonable opportunity to work out the mandate of the legislature...."

This language was quoted by the court in Greenbrier v. Hock, 14 N.J. Super. 39 (App. Div. 1951), at p. 43. See also In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); McFadden's Lounge v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61 (App. Div. 1954); Paddock Bar, Inc. v. Division of Alcoholic Beverage Control, 46 N.J. Super. 405 (App. Div. 1957).

In McFadden's Lounge v. Division of Alcoholic Beverage Control, supra, Judge Jayne pointed out at p. 62:

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

And in justification of the stringency of Rule 5 of State Regulation No. 20, he stated (at p. 66):

> "...disciplinary rule governing the conduct of those who have been granted the special privilege of vending alcoholic beverages at a designated location...must be measured in its relation to the reasonably apprehended evils of the trade...."

Additionally, our courts have uniformly held that the standard applied by Rule 5 of State Regulation No. 20 to licensed premises has been more restrictive than the standards applied to commercial or non-licensed premises. Vide, Davis v. New Town Tavern, 37 N.J. Super. 376 (App. Div. 1955), wherein the court ruled, at p. 378:

> "What is lewdness or immorality for purposes of a rule regulating premises licensed for the sale of alcoholic beverages may be determinable on a distinctly narrower basis than for purposes of regulation of commercial entertainment generally."

Referring once more to McFadden's Lounge, the court pointed out, at p. 68:

> "...we are not presently concerned with the preliminary censorship of a book or of an oral address or lecture. 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. Vide, Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888)... In re Schneider, supra."

In a business as highly sensitive as the traffice of liquor, the Director is charged with the exercise of constant vigilance in the enforcement of the various statutes and the rules and regulations pertaining thereto. A relaxation from the requirements of the provisions contained in the Alcoholic Beverage Law and the rules and regulations of this Division would be contrary to their intendment and against the dictates of sound public policy. A public convenience should not be allowed to degenerate into a social evil. See Jeanne's Enterprises, Inc. v. State of N.J. etc., 93 N.J. Super. 230 (App. Div. 1966), aff'd 48 N.J. 359 (1966).

Inasmuch as Rules 5 and 17 of State Regulation No. 20 refer to acts of obscenity, indecency, lewdness and the like, they are in pari materia, and therefore should be similarly construed.

Accordingly, after considering the entire record and the various precedents cited, I am persuaded by the credible evidence that the first charge has been sustained herein. I therefore recommend that the licensee be found guilty of this charge.

Licensee has a prior record of suspension of license by the Director for forty days effective January 10, 1968, Re Hausner, Bulletin 1779, Item 10 and again by the Director for fifty days, effective April 29, 1969, Re Hausner, Bulletin 1832, Item 5, affirmed sub nom., Hausner v. Keegan, (App. Div. 1969), not officially reported, recorded in Bulletin 1953, Item 1, both for possessing alcoholic beverages not truly labeled. Additionally, the license then held by Penn Brook Inn, Inc., for premises 33-35 West Grand Street, Elizabeth, in which corporation he was secretary-treasurer, was suspended by the Director, also for possessing alcoholic beverages not truly labeled, for sixty-five days, effective September 13, 1969. Re Penn Brook Inn, Inc., Bulletin 1358, Item 8.

It is, further, recommended that the license be suspended on the first charge for forty-five days (Re Delabu, Inc., Bulletin 1873, Item 4; Craner v. Pilon, Bulletin 1825, Item 6; Re Rubbinaccio, Bulletin 1774, Item 2) and on the second charge for ten days (Re Sabbia Liquor, Inc., Bulletin 1880, Item 4), to which should be added ten days by reason of the prior record of suspension for two dissimilar violations in 1968 and 1969, within the past five years (the prior record for dissimilar violation in 1960 occurring more than five years ago disregarded), or a total of sixty-five (65) days.

Conclusions and Order

Exceptions to the Hearer's Report and written argument in support thereof have been filed by the licensee. The exceptions contend that the three books in evidence (Exhibits D-3, D-4 and D-5) do not come within the proscription of Rule 17 of State Regulation No. 20 because they are of a scientific and clinical nature; that the three color catalogs (Exhibits D-9, D-10 and D-11) are not lewd or obscene, but even if they are so characterized, the Division rules are not intended to punish a licensee who, as here, possesses them after receiving

them in the mails, without solicitation; that the possession of the contraceptives and contraceptive devices in question (D-6, D-7 and D-8), though literally within the prohibition of Rule 9 of State Regulation No. 20, should not be the subject of disciplinary proceedings where, as here, they are personal to the licensee and his wife and not for distribution to or use by the licensee's customers. Additionally, it is argued that the cooperation of the licensee with Councilman DeMartino in the retention of the material received in the mail should be considered a mitigating circumstance in evaluating any penalty that might be administered in the factual context herein.

Having carefully considered the entire record herein, I agree with the licensee's contention as to Exhibits D-3, D-4 and D-5 and find him not guilty as to these items. However, I find that Exhibits D-9, D-10 and D-11 are pornographic, portraying nude persons in sexually suggestive poses and positions of a smutty nature, geared to appeal to the passions of the viewer, and they therefore are obscene, indecent, filthy, lewd, lascivious and disgusting printings, writings and pictures within the meaning of Rule 17 of State Regulation No. 20, and that Exhibits D-6, D-7 and D-8 are contraceptives and contraceptive devices, the possession of which is prohibited on licensed premises by Rule 9 of State Regulation No. 20. I do not consider it any defense to the charge herein that the improper material was merely retained after it was received in the mail without solicitation. Licensees must see to it that prohibited materials are not found on their licensed premises. If the Division had to prove that a licensee possessed these materials with intention to display them to customers, it would be considerably hampered in its responsibility to see that licensed premises do not become havens of social corruption, rather than of social convenience.

The possession of these items (D-6 to D-11, inclusive) having been admitted by the licensee, I conclude that his guilt of each of the charges has been established by a preponderance of the proofs adduced herein. The only question remaining is the quantum of penalty to be imposed.

Under all the circumstances, including the not guilty determination as to the three books, I find that there are mitigating factors concerning the first charge, as delineated in the hereinabove mentioned exceptions and arguments, particularly with respect to the licensee's cooperation with a member of the municipal licensing issuing authority. I will therefore reduce the recommended penalty on this charge from forty-five days suspension to thirty days suspension, but I will accept the Hearer's other recommended findings of facts, law and penalty.

In sum, I will impose a suspension of fifty days.

Accordingly, it is, on this 6th day of January 1971,

ORDERED that Plenary Retail Consumption License C-111 (for 1969-70 license period, as extended by the Director of the Division of Alcoholic Beverage Control for 1970-71 license period), issued by the City Council of the City of Elizabeth to S. Edward Hausner, t/a Skyline Lounge, for premises 789 Dowd Avenue, Elizabeth, be and the same is hereby suspended

for fifty (50) days, commencing at 2:00 a.m. Thursday, January 21, 1971, and terminating at 2:00 a.m. Friday, March 12, 1971.

RICHARD C. McDONOUGH
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - IMMORAL ACTIVITY (OBSCENE MOTION PICTURE FILM) - MITIGATING CIRCUMSTANCES - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against	)	
The Stonehouse, Inc. t/a The Stonehouse Route 206, Byram Township PO R.D. 2, Stanhope, N. J.	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-12, issued by the Township Committee of the Township of Byram.	)	

Donald J. Concilio, Esq., by Charles E. Carlson, Jr., Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges, as amended at hearing herein:

"1. On September 6, 1969, and prior thereto, you allowed, permitted and suffered in and upon your licensed premises, matter containing obscene, indecent, lewd and lascivious pictures, viz., motion picture films of nude or semi-nude and scantily clad female persons in obscene, indecent, lewd and lascivious poses and positions, displayed by means of a Rowe Ami Photo Vue apparatus; in violation of Rule 17 of State Regulation No. 20.

"2. On September 6, 1969 and prior thereto, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., the projection, exhibition and display thereon of the aforementioned motion picture films; in violation of Rule 5 of State Regulation No. 20."

On February 10, 1969, a notice (reprinted in Bulletin 1837, Item 1) was sent by the Director to all consumption licensees informing them that a recent investigation disclosed

a marked increase in the number of consumption licensed premises in which there have been found obscene, immoral and indecent films being shown by means of a coin operated combination juke box and movie projector. The films depicted almost nude females performing "dances of a lascivious nature such as strip teases, bumps and grinds and other physical gyrations emphasizing sexual appeal in a manner offensive to common decency and common morals." The Director noted that many of these films come within the provision of Rule 5 of State Regulation No. 20 which prohibits lewdness and immoral activity on licensed premises, and he warns licensees that violation of the rule is cause for suspension or revocation of the license.

Pursuant to a specific assignment to investigate the activity at the above licensed premises involving the showing of films on a photovue machine, an ABC agent visited the premises on Saturday, September 6, 1969 and operated the said machine. In the presence of Gerald D. Mazzei, president of the corporate licensee, he inserted quarters into the machine and played four records. Each of these pictures shown on the screen played for about two and a half minutes. The pictures were entitled "Jackie in Versailles", "Hot and Cold", "Strawberry Shortcake" and "Windless". In his opinion, one of these films "appeared to be lewd".

In a discussion with Mazzei he was informed that in February 1969 the vendor of this machine removed certain films from the machine because "of some notification by the ABC". In April 1969, certain films were removed, and others substituted; and he was advised by the vendor that this Division had approved the showing of the films then in possession of licensee. Twenty of the films were introduced into evidence at this hearing. At this point in the proceedings I directed the showing of eight of the films which were picked at random from the films in evidence, and had an opportunity to view them. All of the films, with the exception of one, were produced. The agent, however, stated that in the one film which was not produced, entitled "Windless" the performer had a "transparent halter on and at the end of the film she lifted the halter up and her busts were completely exposed." On cross examination the agent stated that the film was in his opinion obscene.

Gerald D. Mazzei, president of the corporate licensee, testifying on behalf of the licensee herein, gave the following account: This unit was installed in these premises in November 1968. In February 1969 the Modern Music Company, distributor of this unit and the film cartridges, instructed him to discontinue the use of this unit, which he did. Thereafter, in April 1969, he was informed by Modern Music Company that these films were presented to this Division and certain films were found objectionable. However, he was advised that, upon replacement of those films, it was now proper for him to resume the use of this unit with certain new and approved cartridges. Five or six of the cartridges which were found objectionable had been removed and replaced by others. He produced a letter from his vendor, over the letterhead of "Exclusive Distributors New York-New Jersey-Connecticut, Runyon Sales of New York, Incorporated", in which he was advised to "hereafter refrain from showing through the Photoviewer or otherwise at any time in the future any type of film wherein the female performers display bare breasts or pasties. All other type of available film are acceptable for showing."

Following receipt of that letter, he telephoned this Division with respect to the showing of the films, and was told to submit his inquiry by letter. No letter was sent. He then spoke to the representative of the vendor who assured him that it was perfectly proper to continue the use of the unit with the cartridges that he had on hand. In his opinion, none of the films was obscene or violated Rule 5 of State Regulation No. 20.

Robert W. Perry, a local committeeman and former Mayor and Police Commissioner of Byram Township, testified that he viewed the films and in his opinion they were neither obscene nor lascivious. He stated that, while some of the films showed a portion of exposed breasts, none of the films that he viewed at the hearing before me showed any breasts completely exposed.

I have had an opportunity at this hearing to view eight of the twenty films from the cartridges introduced into evidence. These films were picked at random by the Division's attorney and represented a fair cross-section of all of the cartridges. I am frank to admit that in none of these films did I see any acts of the performers which could be considered lewd, obscene or lascivious, or that catered to the prurient interest. None of these films showed any of the performers with bare breasts or breasts covered with a thin veil; none of the performers performed bumps and grinds or lewd gyrations. Nor were any of the songs or accompanying language risque or vulgar or predicated upon actual or implied illicit sexual relations or unnatural sex acts for the purpose of erotic excitation. About the most suggestive specifics of these films were the titles. I have found nothing in the activity or acts of the performers in these films that would not be permissible by live entertainers on licensed premises under the aforementioned regulation and the Division's mandated policy of strict control of such premises.

It has been held that a State may totally proscribe various forms of entertainment on liquor licensed premises. 48 C.J.S. Intoxicating Liquors, sec. 199; Am. Jur., Intoxicating Liquors, sec. 256; 151 A.L.R. 1185. As the court stated in Davis v. Newton Tavern, 37 N.J. Super. 376 (App. Div. 1955), "What is lewdness or immorality for purposes of a rule regulating premises licensed for the sale of alcoholic beverages may be determinable on a distinctly narrower basis than for the purposes of regulation of commissioning entertainment generally." In McFadden's Lounge v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61 (App. Div. 1954), affirming Re McFadden's Lounge, Bulletin 1003, Item 5, the Court stated:

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

Cf. Re Jeanne's Enterprises, Inc., Bulletin 1621, Item 1; affirmed 93 N.J. Super. 230 (reprinted in Bulletin 1714, Item 1).

The attorney for the licensee cites State v. Hudson County News Co., 41 N.J. 247 (1963) where the court discusses the question of obscenity. Justice Proctor, speaking for the court, cites the U.S. Supreme Court definition of obscenity. That definition as set forth in Manuel Enterprises v. Day, 370 U. S. 478 (1962) states that "obscenity ... requires proof of two distinct elements, (1) patent offensiveness and (2) prurient interest appeal". The term "patent offensiveness" or indecency describes material which can be deemed so offensive on its face as to affront community standards of decency. He further cites the case of Newark v. Humphres, 94 N.J. Super. 384, where the Court discusses the definition of "obscenity" and states:

> "Two further tests have subsequently been added as guidelines in aid of adjudicating what is obscene, namely, whether the presentation is 'patently offensive' because it affronts contemporary community standards relating to the description of sexual matters, and whether it is 'utterly without social redeeming value'."

State v. Hudson County News Co., 41 N.J. 247, 257 (1963). Cf. Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304 (1956).

The attorney for the Division, on the other hand, argues that "entertainment as presented on licensed premises must be of such character as not to be adverse to the public welfare and morals or the best interest of the industry," citing DeAngelo, Bulletin 753, Item 4. In that case, a dancer performed and executed a series of what is commonly known as "bumps". He also cites the case of Re Melchiorre, Bulletin 578, Item 3, in which the licensee pleaded non vult to a charge alleging that he permitted lewd and indecent activity on the licensed premises. In that matter, motion pictures showing a woman posing in the nude was held to be obscene as not being "conducive to good morals". The case of Jeanne's Enterprises, supra, is also cited in support of this charge. In Jeanne's Enterprises an entertainer named Pearl Williams rendered songs and stories which consisted of obscene, vulgar references to sex and sexual behavior and, according to the report of the Division's witnesses, her performance was geared on a pornographic level with dirt for dirt's sake. The court held that, where an entertainer's performance on licensed premises constituted in part lewd activity and the principal subject of her monologue was foul, filthy and obscene, the suspension of its license was a reasonable exercise of the supervisional power entrusted to the Director by the Legislature.

Under all of the facts and circumstances in this case, including the licensee's testimony regarding the removal of objectionable films for what he was assured were decent and proper films, the testimony of the local official who viewed some of the films and my actual viewing of films which, in my judgment were not lascivious, lewd or obscene, I find that the charges herein have not been established by a fair preponderance of the credible evidence.

It should be specifically emphasized that, notwithstanding the particular facts in this case upon which my determination is specifically limited, licensees are cautioned regarding their primary responsibility to refrain from

exhibiting motion pictures which would be in clear violation of the above stated regulation.

It is accordingly recommended that an order be entered finding the licensee not guilty and dismissing the said charges.

Conclusions and Order

Exceptions to the Hearer's Report and written argument in support thereof have been filed by the attorney appearing for the Division pursuant to Rule 6 of State Regulation No. 16. The exceptions contend that the charges in question should be sustained upon the basis of the female "topless" performance in the film entitled "Windless" and upon the basis that all of the films admitted in evidence should have been shown since they are lewd and indecent.

At my direction, oral argument was held before me. At such time seven of the seized films were shown in the presence of myself and the attorneys for the Division and the licensee. These films are entitled "Big Loser", "Rita in France", "Sea Nymph", "Happy Housewife", "Hot and Cold", "Bike Ride" and "Fire Drill".

Each of these films contained dancing performances by a female entertainer. I find that in each film, except for "Sea Nymph", a female performer exposed her breasts either by wearing transparent clothing or by not wearing any clothes at all over her breasts; that the female in "Big Loser" swayed her breasts while dancing, the one in "Rita in France" performed a "striptease", the one in "Hot and Cold" engaged in acts simulating sexual intercourse, and the one in "Bike Ride" caressed her private parts and assumed a position on the floor emphasizing her physical sexual attributes; that each of these six films contained poses and gyrations by the female performer of a sexual nature, appealing to and calculated to arouse sexual excitation and passions of the male viewer; and that such films therefore are deemed indecent, lewd and lascivious within the intendment of Rule 17 of State Regulation No. 20 and their exhibition on the licensed premises in question constitutes immoral activity thereon, contrary to Rule 5 of State Regulation No. 20. I further find that on September 6, 1969 the licensee allowed, permitted and suffered these films to be on its licensed premises and that the licensee also allowed, permitted and suffered them to be exhibited on said premises, in violation of the aforesaid rules.

Consequently, I shall not accept the Hearer's recommended findings but, instead, I find the licensee guilty of both of the preferred charges. Since this is the first prosecution of this nature subsequent to the Division's directive of February 10, 1969 mentioned in the Hearer's report, and since I find certain mitigating circumstances with respect to the licensee's failure to prevent the possession and display of these six objectionable films, I will impose a penalty of only fifteen days license suspension. However, in doing so I am giving notice to all licensees that future similar violations will be dealt with more severely, with more stringent penalties being imposed in such cases.

Accordingly, it is, on this 4th day of January 1971,

ORDERED that Plenary Retail Consumption License C-12, issued by the Township Committee of the Township of Byram to The Stonehouse, Inc., t/a The Stonehouse, for premises Route 206, Byram Township, be and the same is hereby suspended for fifteen (15) days, commencing at 3 a.m. Monday, January 18, 1971, and terminating at 3 a.m. Tuesday, February 2, 1971.

RICHARD C. McDONOUGH
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALES TO MINORS - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Estelle Lipnicki
Exec. of Est. of Frank Lipnicki
105 Railroad Avenue
Jersey City, N. J.

Holder of Plenary Retail Consumption License C-105, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.

CONCLUSIONS and ORDER

Edmund Polonitza, Esq., Attorney for Licensee.
Walter H. Cleaver, Esq., Appearing for Division.

BY THE DIRECTOR:

Licensee pleads guilty to a charge alleging that on September 30, 1970 she sold drinks of beer to four minors, one age 17 and three age 19, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Cf. Re Robinson, Bulletin 1630, Item 10.

Accordingly, it is, on this 15th day of January 1971,

ORDERED that Plenary Retail Consumption License C-105, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Estelle Lipnicki, Exec. of Est. of Frank Lipnicki, for premises 105 Railroad Avenue, Jersey City, be and the same is hereby suspended for twenty (20) days, commencing at 2 a.m. Tuesday, February 2, 1971, and terminating at 2 a.m. Monday, February 22, 1971.

Richard C. McDonough
Director