

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 MARKET STREET, CN-087
TRENTON, NEW JERSEY 08625

BULLETIN 2440

March 27, 1985

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

BULLETIN 2440

March 27, 1985

1. NOTICE TO WHOLESALERS OF REQUIREMENT THAT CURRENT PRICE LIST BE RECEIVED AT THE DIVISION OFFICES BY THE 15TH OF THE MONTH. WARNING IF FILING NOT TIMELY MADE.

It has been noted that not all Current Price Lists are received by the Division on or before the 15th of a month preceding the month for which those prices become effective. In fact, some Current Price Lists have still not been in Division custody on the following business day when they are made public. It appears that a practice or belief exists that a filing is timely as long as it bears a postmark of the 15th day of the month, even though not received in the Division until some time thereafter.

The applicable Division regulation, N.J.A.C. 13:2-24.6(a)4, requires that the Current Price List must be filed with the Division "...no later than the 15th day of each calendar month...." Filing is not satisfied by postmark. The actual Current Price List must be in the Division's offices by the close of business on the 15th day of each calendar month. If the 15th calendar day is a Saturday, Sunday or State holiday, the Current Price List must be in the Division's offices by the close of business on the next business day.

Because of the apparent misinterpretation of the meaning of "filing", sanctions will not be imposed for failure to have had the price information in the Division by the 15th of March, 1985. Filings postmarked by that date will be accepted one last time. However, for the price information to be filed for the month of May, 1985, if the Current Price List is not in the possession of the Division by the close of business on Monday, April 15, 1985, that Current Price List shall be rejected and the wholesaler will not be able to offer for sale any products to retailers for the month of May. The same will hold true for subsequent filing months.

The strict adherence to this standard to have the Current Price List in the Division's offices by the 15th of a month is required to insure the confidentiality and integrity of the price filings, to prevent unfairness to wholesalers who timely file but cannot on the business day after the 15th inspect their competitor's filings because they are still in the process of mail delivery,

and most importantly, to properly enforce the regulation and its requirement that the Current Price List be filed in the Division no later than the 15th of the calendar month.

Another practice which has evolved in connection with the posting of monthly prices has been reviewed and will be modified. Apparently, some wholesalers submit an extra copy of a Current Price List sealed in an envelope addressed to either "The Source" (a price compilation publication) or other wholesalers. These envelopes are left with Division personnel and picked up either at the close of business on the 15th of the month or on the next date when price information is made public. If wholesalers wish to provide price information to publications or other wholesalers, they must do so without utilizing the Division personnel or offices and should not provide such information until after the close of business (5:00 p.m.) on the 15th of the month. The Division will no longer accept these extra filings intended for other persons. Licensees may, however, directly deliver copies of their filings to other persons in the inspection room on the date of price inspections.

2. NOTICE TO RETAIL LICENSEES CONCERNING PROHIBITED PROMOTIONS.

The Division receives numerous written and verbal requests for opinions concerning those activities which can be conducted on retail licensed premises which would or would not violate the Division's prohibited promotions regulations. The questions often involve various different and distinct factual patterns but the basic concepts which are applied to those requests are similar, and it is deemed appropriate to generally discuss the applicable regulation and identify some specific examples.

The provisions of N.J.A.C. 13:2-23.16 proscribe three general advertising or promotional practices. They are as follows:

- (1) A retail licensee cannot offer to the public at large unlimited availability of an alcoholic beverage for a set price. This is self-explanatory and is intended to prohibit those practices which are generally identified as "all you can drink for \$_____".

Because the Regulation utilizes the term "public at large", three exceptions have developed in an interpretation of this phrase. It is not an uncommon practice for not-for-profit groups who obtain Social Affair Permits to conduct a fundraiser or entertainment event which might consist of the availability of draft beer, a bottle of table wine or distilled spirits without the requirement for separate purchases for each drink. The second area involves the activities

of retail licensees conducting New Year's Eve parties where for a set price an attendee generally receives a meal, entertainment and an "open bar" or the like. The third area involves retail licensees offering a package price which would include an "open bar" or "cocktail hour" for private parties such as weddings, anniversaries, birthdays, etc. where the expense is borne solely by the host for all guests or for closed banquets which are for a group or organization with tickets being purchased by the individuals attending.

The first two areas and these apparent exceptions are being reviewed in the Division and may be subject to further articulation in the future. A significant question has arisen as to whether or not these types of events are really excluding "the public at large". Apparently tickets can be purchased at the door on the dates of such offerings. If that is the case, then these offerings are in fact open to the "public at large". If the affair is conducted so that admission is limited to only those people who prepurchase admission tickets prior to the date of the event, then it may arguably be stated that these offerings are not open to the "public at large". Until otherwise indicated, the conduct of the three exceptions set forth above shall not be considered a violation of the prohibited promotions regulations. To the extent that licensees wish to express an opinion concerning the exceptions and whether they should be expanded, modified or eliminated, the Division would welcome such comments.

- (2) A retail licensee cannot advertise or offer to patrons or potential consumers that they will receive a gift, prize or anything of value if they purchase an alcoholic beverage product.

As it relates to retail licensees, there is one exception to this prohibition. That exception states that branded or unique glassware or a nominal value souvenir can be offered in conjunction with the purchase of a single drink. This exception basically encompasses novelty type drinks which are served in unique or souvenir type glassware bearing designation of the retailer's name or the identification of the drink or brand of alcoholic beverage being served.

Certain practices which are prohibited because they involve the giving of something of value conditioned or based upon the purchase of an alcoholic beverage product include a promotion which purports to reduce the price of a second drink, offers a discounted price if more than one alcoholic beverage product is purchased at the same time or offers an

alcoholic beverage product or non-alcoholic beverage product free or at a reduced price conditioned upon the purchase of an alcoholic beverage product. The prohibited practices also include "2 for 1", "3 for 1", and the like. In all these examples the "value" exists by either providing a free item or a discounted item based upon the purchase of an alcoholic beverage product.

Retail distribution licensees should be specifically aware that this Regulation, as well as the provisions of the Combination Sale Regulation (N.J.A.C. 13:2-24.9), specifically prohibit an offering of two or more bottles of wine or spirits at a price which is less than the sum of the individual prices for each bottle. For example, it is prohibited to advertise, offer or sell a product at \$2.50 for one bottle but \$4.49 for two bottles. The price reduction for the second bottle is being conditioned upon the purchase of an alcoholic beverage product, that is, the first bottle. This cannot be done.

- (3) A retail licensee cannot require or allow a patron or consumer to prepurchase more than one drink or product at any one time through either tickets, tokens, admission fees, two for ones or the like as a condition for entry into the licensed premises or as a requirement to be served or be entertained at the licensed premises.

Promotions which offer a consumer a multiple number of drinks for a set price are prohibited by this Regulation. Requiring a patron to purchase two or more drinks as a cover charge or an entertainment charge is prohibited by this Regulation. But the offering of one drink or product as a condition for entry on the licensed premises or as a requirement for service or entertainment is permitted.

It should also be noted that tokens or tickets which may be redeemable for a drink can be sold at normal prices to patrons to be redeemed for one drink at a time. What is encompassed by this is the ability of a patron to voluntarily prepurchase indicia that would represent the right to an alcoholic beverage product. This might well be a positive way of "backing up" a customer for whom another patron wishes to purchase a drink, rather than putting another open container drink in front of that patron. In these cases, the patron is not required to purchase tokens or tickets redeemable for drinks, but is doing so because of the manner in which the retail licensee or social affair permittee is operating the premises where alcoholic beverage activity is being conducted.

With regard to promotions, it is also purposeful to note that the sale of alcoholic beverages, whether by drink or in original container, cannot be made by a retail licensee below its cost. There have developed three exceptions to the "below cost" regulation, N.J.A.C. 13:2-24.8, which will be noted. The first exception involves the longstanding practice of allowing a retail licensee to "buy a patron a drink" as a gesture of good will. This activity is permitted so long as there is no advertising of the fact that the retail licensee will "buy" a patron a drink at any established interval or based upon the purchase by the patron of a certain number of drinks. The second exception involves the use of a free drink coupon. The Division has permitted retail licensees to offer a patron one open container drink per day per patron by utilization of a coupon or other advertised device. The last exception involves the inclusion of an alcoholic beverage drink with a meal at one price. The Division has not been aware of any abuses under these exceptions and shall continue to recognize them as appropriate if conducted as noted above.

In conclusion, retail licensees should recognize that the Division's Regulations concerning promotions seek to encourage retail licensees to serve one alcoholic beverage product at a time in order to enable the licensee to properly observe the patronage and determine whether or not an individual should or should not be served another drink. All licensees are well aware of the responsibilities imposed by law and regulation prohibiting the service of actually or apparently intoxicated patrons. By serving one drink at a time, the critical elements of observation and common sense can be interjected in the business operation. Practices which encourage or permit patrons to drink unlimited amounts without observing each individual transaction can only lead to the adverse consequences that naturally flow from misuse and abuse of the product.

3. NOTICE TO RETAIL LICENSEES REGARDING COLLECTION OF SALES TAX ON ALCOHOLIC AND NON-ALCOHOLIC BEVERAGES.

The Division has in the past issued various Bulletin Items identifying the requirements upon retail licensees to collect New Jersey sales and use tax in conjunction with the sale of certain items. Specifically, in Bulletin 2434, Item 5 (March 13, 1984) and Bulletin 2437, Item 8 (December 27, 1984) the Division addressed various situations where tax was or was not required to be collected by retail licensees. For the purposes of including within one Bulletin Item the applicable standards, and to clarify the collection of sales tax as it relates to non-alcoholic malt beverages and "wine", the principles and requirements shall be herein set forth. To the extent that any statement herein may be considered inconsistent with a prior Bulletin Item, then such prior Bulletin Item is superceded.

As it relates to the collection of sales tax on the sale of an alcoholic beverage, the following should be noted:

- (1) Since there is a 7.3% wholesale tax imposed on the sale of alcoholic beverage products from the wholesaler to the retailer, in lieu of the retail sales and use tax, no licensee can charge a customer the 6% retail sales tax on the sale of an alcoholic beverage.
- (2) Retail licensees should be aware that a municipality may levy a sales tax which must be collected at the time of sale of an alcoholic beverage product. To the Division's knowledge, only one municipality, Atlantic City, has such municipal sales tax.

As relates to the sale of non-alcoholic beverages, which include non-alcoholic malt beverages or "beer", non-alcoholic "wine", carbonated soft drinks and non-carbonated soft drinks, the following should be noted:

1. Carbonated non-alcoholic beverages, which would include non-alcoholic malt beverages or "beer" and carbonated non-alcoholic "wine", are subject to the 6% retail sales tax whether sold for consumption on the licensed premises or sold in original containers for consumption off the licensed premises.
2. Carbonated soft drinks and other carbonated non-alcoholic beverages are subject to the 6% sales tax whether sold for consumption on the licensed premises or in original containers for consumption off the licensed premises.
3. Non-carbonated, non-alcoholic "wine" products and non-carbonated soft drinks are subject to the 6% sales tax only if sold for consumption on the premises, but are exempt from the 6% sales tax if sold in original containers for off-premises consumption.

Retail licensees are reminded that if they have a practice of including on a "bar tab" both alcoholic and non-alcoholic beverages, the 6% retail sales tax must be collected on the non-alcoholic beverages. The only exception to the collection of any sales tax on a carbonated non-alcoholic beverage exists when that beverage is mixed with an alcoholic beverage and sold as a single drink.

Finally, it should also be noted that retail licensees that sell liquored candy as permitted in consequence of an amendment to N.J.S.A. 24:5-9 on August 28, 1984 must collect the 6% retail sales tax on any sale of such product.

4. NOTICE TO MANUFACTURERS AND WHOLESALERS - ANNUAL COMPENSATION STATEMENTS FOR HOLDERS OF SOLICITOR PERMITS.

N.J.A.C. 13:2-37.2 prescribes that:

"On or before April 1 of each year, each manufacturer and wholesaler employing any holder of a Solicitor's Permit during the preceding calendar year shall file with the Director a true statement listing all compensation, itemized as to salary, commission, reimbursed expenses or otherwise, paid to each Solicitor by such manufacturer or wholesaler during such calendar year".

This is to serve notice, therefore, that annual statements of compensation for the calendar year 1984 are to be filed with the Division, attention John W. Markert, Deputy Director - Trade Practice Bureau.

Failure to comply with the provisions of the aforementioned Regulation may result in the institution of disciplinary proceedings.

5. STATE LICENSE TRANSACTIONS - FEBRUARY 20, 1985 TO DATE.

The following transactions have taken place with reference to state-issued licenses since February 20, 1985:

LICENSE TYPE	NUMBER	STATUS
Limited Wholesale license Crown Gifts, Inc. 95 Broad Street Red Bank, NJ 07701	3401-25-295-001	New license iss. eff. 02/25/85
Public Warehouse Liquor Value, Inc. 1011 Route 22 Mountainside, NJ 07092	3401-28-296-001	New license iss. eff. 02/25/85
Limited Wholesale license Nestor Imports, Inc. 1901 E. Linden Avenue Suite 19 Linden, NJ 07036	3401-25-298-001	New license iss. eff. 02/25/85
Plenary Retail Transit license American International Airways, Inc. 1616 Pacific Avenue Atlantic City, NJ 08401	3400-13-978-001	Surrendered & Cancelled 02/25/85

Transportation license Carl Moscatello Trucking Corp. 29 Argyle Place No. Arlington, NJ 07032	3401-20-299-001	New license iss. eff. 02/26/85
Public Warehouse license Brook Warehousing Corp. Englehard Dr., Box 506 Manville, NJ 08835	3400-28-840-001	Surrendered & Cancelled 02/26/85
Wine Wholesale license The Wine Group, Inc. P.O. Box 697 Ripon, CA 95366	3401-26-237-001	New license iss. eff. 03/07/85
State Beverage Distributors Gary R. Leverage & Linda J. Leverage 310 Ward Avenue Bordentown, NJ 08505	3401-19-300-001	New license iss. eff. 03/11/85
Limited Wholesale license Winegate Importers, Inc. 2 Garber Square Ridgewood, NJ 07450	3401-25-297-001	New license iss. eff. 03/13/85
Transportation license Shelbyville Express, Inc. Railroad Avenue Shelbyville, TN 37160	3401-20-301-001	New license iss. eff. 03/13/85
Plenary Wholesale license Northern Wines & Spirits Corporation 61 Heller Road Bellmawr, NJ 08031 From: Kasser Wines & Spirits Corp.	3401-23-257-001	Change of Corporate Name iss. eff. 03/14/85
Additional Warehouse license Northern Wines & Spirits Corporation 161 Frelinghuysen Avenue Newark, NJ 07114 From: Kasser Wines & Spirits Corp.	3401-24-258-001	Change of Corporate Name iss. eff. 03/14/85
Wine Wholesale license Trip Distributors, Inc. 11 Getty Avenue Paterson, NJ 07503	3401-26-292-001	New license iss. eff. 03/19/85
Limited Wholesale license V & P Import, Inc. 4 Rosol Lane Saddle Brook, NJ 07662	3401-25-302-001	New license iss. eff. 03/22/85

6. DISCIPLINARY PROCEEDINGS (WEST NEW YORK)-ALLOWING SERVICE OF UNLIMITED QUANTITIES OF ALCOHOLIC BEVERAGES AT A SET PRICE, COMMERCIALIZED GAMBLING AND LEWD AND IMMORAL ACTIVITIES - EFFECT OF REFUSAL TO SETTLE CASE BEFORE TRIAL ON SUBSEQUENT APPLICATION FOR A MONETARY PENALTY - AGGRAVATING FACTORS RESULTING IN ENHANCED PENALTY - LICENSE SUSPENDED FOR 310 DAYS (FIRST OFFENSE).

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

IN THE MATTER OF DISCIPLINARY)	FINAL CONCLUSIONS AND FINAL
PROCEEDINGS AGAINST)	ORDER SUSPENDING LICENSE FOR
)	310 DAYS.
WILLIAM HAAS & STEPHEN CAPPADONA,)	
t/a "REFLECTIONS")	AGENCY DKT. NO. S-14,386
6100 POLK STREET)	H-7183-107
WEST NEW YORK, NJ 07093)	OAL DKT. NO. ABC 1571-84
HOLDER OF PLENARY RETAIL CONSUMPTION)	
LICENSE NO. 0912-33-025-003)	
ISSUED BY THE BOARD OF COMMISSIONERS)	
OF WEST NEW YORK)	
)	

Jeanne E. Gorrisen, Deputy Attorney General (Irwin I. Kimmelman, Attorney General of New Jersey), for Petitioner

Robert C. Auriemma, Esq., Attorney for Licensee

INITIAL DECISION BELOW

HONORABLE LEON S. WILSON, ADMINISTRATIVE LAW JUDGE

DATED: SEPTEMBER 20, 1984

RECEIVED: SEPTEMBER 21, 1984

BY THE DIRECTOR:

Written Exceptions were filed on behalf of the licensee as is provided by N.J.A.C. 13:2-19.6(a). In its Exceptions the attorney representing the licensee requests a reduction in the recommended suspension of 280 days since he states such suspension will bankrupt his client and cause very harsh economic repercussions for him. He also requests the opportunity to make a monetary offer in compromise in lieu of a portion of the suspension. I reject these requests for the reasons stated below:

The licensee was charged with seven violations of the alcoholic beverage control law or regulations as follows: (1) having allowed, permitted or suffered a practice or promotion that offered to the public at large unlimited availability of any alcoholic beverage for a set price, in violation of N.J.A.C. 13:2-23.16; (2) having allowed, permitted or suffered gambling in and upon its licensed premises, in violation of N.J.A.C. 13:2-23.7; (3) having allowed, permitted or suffered lewdness and immoral activity in and upon its licensed premises, in violation of N.J.A.C. 13:2-23.6; (4) having allowed, permitted or suffered its licensed premises to be used in furtherance or aid of or accessible to an illegal activity or enterprise, viz., prostitution, in violation of N.J.A.C. 13:2-23.5; (5) having allowed, permitted or suffered an employee to work on its licensed premises without obtaining a current, required city license to tend bar, in violation of local ordinance #1369; (6) having conducted its licensed business without keeping on its licensed premises a copy of the application for the current license and/or the last filed long-form license application, in violation of N.J.A.C. 13:2-23.13(a)(2);

and (7) conducting its licensed business without keeping on the premises a list containing the names and addresses and other required information with respect to all persons then currently employed on its licensed premises, in violation of N.J.A.C. 13:2-23.13(a) (3).

The Administrative Law Judge upon the consideration of the entire record found that the preponderance of the credible evidence sustained findings of guilt to all seven violations. In this regard I concur in the factual and legal findings of the Administrative Law Judge and I shall adopt same as my conclusions herein. I differ, however, with respect to the proper penalty to be imposed in this case.

Initially, I wish to state my reasons for rejecting the Exceptions proffered by the licensee wherein he requested a reduction in the recommended penalty. My review of the entire record leaves me to conclude that the evidence overwhelmingly sustained the charges in this case. Moreover, I note that several of the charges included very serious violations of our laws and regulations. Such violations were knowingly and willfully undertaken by the licensees themselves. Finally, prior to adjudication, the licensees were given an opportunity to settle this case. My policy is that if the case is not settled prior to trial, I will not entertain a request to convert the penalty, whether in whole or in part, into a monetary offer in compromise in lieu of the suspension. For these reasons, I conclude that the Exceptions should be rejected and I so reject same.

Furthermore, I differ with the Administrative Law Judge regarding the proper penalty to be imposed with respect to the gambling violation. The Deputy Attorney General representing the Division indicated the precedent penalty in such case was a 120 day suspension of license. The Judge, nevertheless, found that the licensees did not attempt to engage any of their patrons in gambling. Upon review of the situation as he viewed it, he found that the gambling was more of a ". . . private crime committed by these licensees, an offense qualitatively different, though perhaps no less offensive, than one capitalizing on a license." (Initial Decision, p.12.) Since he did not find that patron gambling was encouraged or permitted, in this instance he suggested that a closure for 90 days instead of 120 days appeared appropriate. I reject this conclusion.

Although it may be true that attempting to engage patrons in gambling is an aggravating factor to be considered, another factor which must be given substantial weight is the fact that the licensees themselves were engaged in commercialized gambling. The Division has been especially concerned about commercial gambling on a licensed premises since the days soon after the Division was established. See, e.g., Re: Revocation Proceedings - Gambling - Penalties, Bulletin 112, Item #15 (March 26, 1936). Commercialized gambling was differentiated from the friendly wager for a drink or such between patrons, although such conduct was also prohibited and could lead to revocation of one's license. See, e.g., Rules Concerning Conduct of Licensees and Use of Licensed Premises, Bulletin #51, Item #1 (October 28, 1934); Bulletin #51, Item #2

(October 29, 1934); Bulletin #51, Item #3 (October 30, 1934); Bulletin #65, Item #10 (March 7, 1935); Revocation Proceedings - Gambling - Discussion of Penalties, Bulletin 132, Item #7 (July 23, 1936). Nevertheless, where commercialized gambling was involved, the penalty imposed would be quite severe. In the Matter of Disciplinary Proceedings against Fourth Ward Young Democratic Club, Bulletin 597, Item #8 (November 29, 1946). Commercialized gambling was generally determined by the types of gambling permitted, the scale of the gambling, and whether or not the house took a "cut" of the wagers. Fourth Ward Young Democratic Club, Ibid., In the Matter of Disciplinary Proceedings Against Peter J. Wagenaar, Bulletin 911, Item #9, (June 21, 1951). However, later cases also emphasized among other factors the use of the telephone since same permitted gambling on a much more extensive scale and with persons whose main activity was illegal gambling. See, e.g. Motacki v. Clifton ABC Board, Bulletin 1304, Item #2, (September 16, 1959); In the Matter of Disciplinary Proceedings Against Frank Tumulty, Bulletin 1502, Item #3 (February 19, 1963), In the Matter of Disciplinary Proceedings Against Jean Arnone, Bulletin #1971, Item #3, (March 23, 1971); In the Matter of Disciplinary Proceedings Against 333 Club, Inc., Bulletin 2250, Item #2 (December 10, 1976).

Based upon the facts and testimony in the instant case, it appears that the licensees themselves were utilizing the telephone to place bets with an organized illegal gambling operation. The amount of the bets would appear to have exceeded \$100.00 for just that one particular day (See, e.g., Exhibit P-3 and testimony of agent D.M.) Such betting is a not inconsequential amount and it clearly furthers the pernicious effects that organized crime has upon our society. New Jersey's interests in keeping such elements out of its licensed premises is well known. Narducci et al v. Atlantic City, Bulletin 2305, Item #3 (October 4, 1978) Affirmed per curiam (App. Div., January 18, 1980, A-706-78) (unreported). In the Matter of the Application of George "Chip" Dunn for a Special Concessionaire's Permit, Bulletin 2435, Item #6 (March 15, 1984).

As the effects of commercial gambling and the instances occurring on licensed premises have increased, the Division has addressed same by increasing the precedent penalty to be imposed. See, e.g., Notice to All Bartenders, Re: Increased Penalties for Permitting Booking and Numbers Activity on Licensed Premises, Bulletin 1560, Item #6 (April 27, 1964); In the Matter of Disciplinary Proceedings Against Gino's Bar and Grill, Inc., Bulletin #2299, Item #2 (June 15, 1978). Moreover, I note that the precedent penalties are viewed as the minimum to be imposed and not a maximum by any means. See, e.g., In re: Jean Arnone, Ibid; In the Matter of Disciplinary Proceedings against De Forest Tavern, Inc., Bulletin 2142, Item #3 (February 21, 1974).

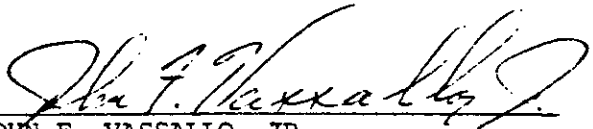
In consideration of the previously referenced factors, I find that the precedent penalty of 120 days suspension for the gambling offense is fully warranted. With respect to this entire proceeding, although representations were made that one of the licensees, Mr. William Haas, no longer has an interest in the license, it is clear that the other charged licensee, Mr. Steven Cappadona was also involved in the carrying out of these violations.

Although Mr. Haas may have taken a more active part, it is clear that such violations occurred with Mr. Cappadona's implicit knowledge as well as his express actions in same cases. Therefore, upon this record I can find no reason to mitigate the precedent penalty and I shall herein suspend the license for a total of 310 days.

Accordingly, it is on this 5th day of November, 1984,

ORDERED that the Plenary Retail Consumption License no. 0912-33-025-003 issued by the Board of Commissioners of West New York to William Haas and Steven Cappadona, t/a Reflections, for premises at 6100 Polk Street, West New York, New Jersey be and the same is hereby suspended for the balance of its term, to wit, midnight, June 30, 1985 commencing at 3:00 a.m. Monday, November 25, 1984, and it is further;

ORDERED that in the event that said license is renewed for the 1985-86 license term, said license be and the same is hereby suspended until 3:00 a.m., Monday, September 30, 1985, for a total period of 310 days suspension.


JOHN F. VASSALLO, JR.
DIRECTOR

APPENDIX: INITIAL DECISION BELOW



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ABC 1571-84

AGENCY DKT. NO. S-14,386, H-7183-107

DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Petitioner,

v.

WILLIAM HAAS & STEPHEN CAPPADONA,

a New Jersey partnership,

t/a "REFLECTIONS,"

Respondents.

APPEARANCES:

Jeanne E. Gorrissen, Deputy Attorney General (Irwin I. Kimmelman, Attorney General of New Jersey), for petitioner

Robert C. Auriemma, Esq., for respondent

Record Closed: August 7, 1984

Decided: September 20, 1984

BEFORE LEON S. WILSON, ALJ:

By its Notice of Charges Preferred issued February 6, 1984, the Division of Alcoholic Beverage Control (Division) instituted these disciplinary proceedings against the alcoholic beverage license held by William Haas and Stephen Cappadona, t/a "Reflections." The Division alleged seven different violations of its disciplinary regulations discovered during the course of a confidential investigation in October 1983.

OAL DKT. NO. ABC 1571-84

By an undated and unsigned note apparently submitted to the Division together with a copy of the Division's correspondence relating to these charges, respondents entered their plea of "not guilty" and requested a hearing before the Director.

On March 7, 1984, the matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Following pretrial conference on May 7, 1984, and pursuant to a Prehearing Order issued May 29, 1984, the matter was tried before me at Newark on July 19, 1984. The parties requested and were granted leave to submit posthearing memoranda. That on behalf of the respondent was received August 2, 1984; at the conclusion of petitioner's opportunity to submit written argument, and in the absence of any request to make such submission out of time, the record was deemed closed August 7, 1984.

FACTS

The facts of the matter were established through the testimony of two confidential investigators of the Division of Alcoholic Beverage Control. They are identified in this record by their initials only, at the special request of the petitioner. Supportive documentation offered by the Division in evidence is mentioned in the discussion following and listed in the annexed appendix. The owner of the subject license, Mr. Stephen Cappadona,¹ was present during the proceedings before me and participated by counsel in the examination of the witnesses and the presentation of argument; however, he declined to testify and no evidence was presented on behalf of the licensee. From the evidence before me, I make the following Findings of Fact:

¹ By posthearing submission, counsel represents that on or about April 30, 1984 William Haas' interest in the subject license was purchased by Mr. Cappadona. Although that purchase was subject to approval of a person-to-person transfer, not established in the record before me, the representation, for purposes of these proceedings, is accepted and Mr. Cappadona is treated as the sole owner of the subject license.

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Pursuant to an undocumented complaint, either anonymous or confidential, D.M. and R.Z., confidential agents of the Division of Alcoholic Beverage Control, visited the licensed premises known as "Reflections" during the evening of October 1, 1983. The tavern was equipped with an irregular shaped bar at its left side, which was served by some twenty patrons' stools. To the left of the bar was a raised dance stage. Toward the rear was an entrance to a lavatory and a back room with an entrance to a kitchen. Taking seats at the bar, and exchanging greetings with the barmaid, one Ann D'Amore, the agents noted a sign about two and one-half by three and one-half feet in size, posted at the bar. It read, in clear lettering, "Sunday, October 16 - about 6:00 P.M. - OPEN BAR with Raven + ?" At their request, Ms. D'Amore explained the sign. She told them there would a "locked door party during which the shades would be drawn." Raven was the stage name for a go-go dancer; the question mark referred to another dancer whose name was not yet known. Asking how they might join the party, Ms. D'Amore told them to speak to "Billy" (Billy Haas, co-owner of Reflections) who would be in the following Wednesday.

The agents paid for their drinks (one beer each) and left after approximately an hour and a half. They returned at about the same hour on October 5, 1983. There were between five and eight patrons present and a go-go dancer was there. Ms. D'Amore, again serving at the bar, recognized the agents and asked if they were still interested in going to the party. Told it cost \$20.00 to get in, they asked "Is it really worthy it?" Ms. D'Amore answered "You've got to talk to Billy because he's got to watch who he lets in. It could mean his license. It will be more than you see today." The dancer that evening was fully clothed.

D.M. asked if he could buy his ticket that night and if Z. could buy his at the door on Sunday. Ms. D'Amore gave D.M. a piece of paper and requested he write his name and pay her \$20.00 for the ticket. He did so and the agents again left. On October 13, 1983, they again returned to Reflections. As on the fifth, they found approximately five to eight patrons and a go-go dancer. Ms. D'Amore was behind the bar.

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The sign was no longer posted. The agents asked Ms. D'Amore if the party were still on. She in turn directed them to Mr. Haas, who was there that evening with Mr. Cappadona.

Agent Z. gave Ms. D'Amore twenty dollars for his ticket. Mr. Haas came over to the bar and spoke to the agents. He said "The party is really worth it - anything can happen." Ms. D'Amore, however, said she doesn't want to work a party like that.

Finally, on October 16, 1983 the two agents returned for the fourth and last time. Having made appropriate prearrangement with a third A.B.C. agent and the West New York Police Department, D.M. and R.Z. arrived at Reflections at about 12:45 p.m. that Sunday afternoon.³ In addition to Messrs. Haas and Cappadona, there were only two or three other patrons. When asked why there was so few people, Mr. Haas told the agents he had sold twenty tickets but that no one yet had come. Both Mr. Haas and Mr. Cappadona served at the bar.

Each of the agents had a drink; neither paid for the drinks. They were told their \$20.00 admission price included the cost of their drinks. Mr. Haas told the patrons that he expected the dancer shortly. In the meantime, both he and Mr. Cappadona were seated at the bar near a telephone. The agents were approximately ten stools from them, within 30 feet. They heard Mr. Haas say to Mr. Cappadona, "Hurry up and make the picks, the games are starting; I have to call them in." There was a newspaper on the bar in front of them. Mr. Cappadona wrote on the newspaper. Mr. Haas placed a telephone call and wrote some information on a 3 by 5 piece of paper. Soon after, the phone rang and Mr. Haas spoke again on the telephone. Hanging up he said to Mr. Cappadona: "There in."

³ The record does not indicate when the hour of the Sunday performance was changed from that advertised, or how the agents learned of that change.

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Agent D.M. testified that from the conversation and action he witnessed, the words "there in" are properly to be interpreted "the bets are recorded." The parties stipulated that that agent is well qualified to know that "there in" means that bets are placed.

A professional football game was being shown on a television set at the bar. Mr. Haas sat with the agents to watch the game. He told them "I have Cleveland twenty times," and asked if they were winning.

As scores of the professional football games that day were announced, Mr. Haas examined the piece of paper on which he had written, while he had been with Mr. Cappadona at the telephone.

At 1:30 P.M., a woman, later identified as Ms. Linda Pollock, entered "Reflections." Ms. Haas greeted her and said, "Hurry up, get dressed and show us your tits." By that time there were between eight and ten patrons at the bar.

Ms. Pollock remained at the bar, in street clothes, mingling with the patrons until shortly before 2:45 P.M. She then went into the back room (the kitchen?) and returned almost immediately dressed in costume. It was described as a leotard body suit. When she returned to the barroom she took her place on the stage. According to the investigator she danced for several minutes, without music, engaging some of the patrons in conversation. She then removed the upper portion of her costume exposing her left breast for about a minute, during which she caressed herself. Replacing her costume, she concluded her "dance" after several more minutes. As she did so an unidentified male patron at the bar engaged her in conversation. "She got off the stage and went to the back, out of sight. She was out of view for a good half hour."

The agents, suspicious, determined to investigate further. Agent Z. went to the back of the room. He returned a few moments later and reported to D.M. that he had seen Ms. Pollock and the unidentified male patron through the partially opened door to the

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kitchen. The woman was nude; the male partially so. He saw her performing an act of fellatio upon him. After Ms. Pollock returned to the barroom, the agents asked Mr. Cappadona, who was tending bar at the time, how they might "get in the backroom with the dancer." He told them to talk to Billy. They did.

Billy Haas told the investigators "She's giving blow jobs in the backroom - it's \$20.00 but she sets her own price - whatever she wants to charge she charges." Agent M. asked Mr. Haas "if I could call a friend of mine." He responded saying, "As long as he's not a cop or an A.B.C. agent - because if he is - I can't beat the charge."

D.M. then spoke with Ms. Pollock directly. She repeated the information given him by Mr. Haas and they went into the kitchen. The investigator placed a twenty dollar bill under her pocketbook as she prepared. Several moments later agent Z. opened the door and identified himself. A few seconds later, the alerted West New York police officers came to the door; the ABC agents let them in.

Once the agents identified themselves, they attempted to examine the licensee's "paper work." They discovered that neither the license application nor the employee list, both required by ABC regulations, were at the premises. Mr. Haas specifically acknowledged, "I don't have them here."

As a result of these events, Ms. Pollock was charged with prostitution and both Mr. Haas and Mr. Cappadona were charged with maintaining a nuisance.

Shortly after October 16, 1983, agent D.M. conducted an investigation regarding Ms. D'Amore, who had served him and his partner during their three previous visits. He found that her permit, issued pursuant to a municipal ordinance, had expired the previous June.

In consideration of all of these matters, the Director preferred the charges enumerated here.

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Further testimony established that the licensee's previous disciplinary record was entirely clear. No previous violations have ever been committed there.

DISCUSSION

The proceedings of the Division of Alcoholic Beverage Control at issue here are governed by the provisions of the Alcoholic Beverage Law, N.J.S.A. 33:1-1 et seq., and regulations of the Director of the Division of Alcoholic Beverage Control, N.J.A.C. 13:2-1 et seq. By N.J.S.A. 33:1-25, "no license . . . shall be issued to any person . . . who has been convicted of a crime involving moral turpitude," and, by N.J.S.A. 33:1-31,

Any license, whether issued by the director or any other issuing authority, may be suspended or revoked by the Director . . . for any of the following causes:

a. Violations of any of the provisions of this chapter;

...

i. Any other act or happening occurring after the time of making of an application for an license which if it had occurred before said time would have prevented the issuance of the license; [N.J.S.A. 33:1-31]

The Director's regulations, adopted pursuant to statutory authority, include several express prohibitions pertinent here. The regulation against lewdness and immoral acts provides:

(a) No licensee shall engage in or allow, permit or suffer in or upon the licensed premises:

1. Any lewdness or immoral activity;

...

3. Nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such a manner as to become a nuisance. [N.J.A.C. 13:2-23.6]

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The regulation supporting the charge of gambling states:

(a) No licensee shall engage in or allow, permit or suffer in upon the licensed premises:

1. ...

...

3. Any pool-selling, bookmaking, or any unlawful game or gambling of any kind;

4. ...

5. Nor shall any licensee possess, have custody of, or allow, permit or suffer in or upon the licensed premises any slip, ticket, book, record, document, memorandum or other writing pertaining in any way to any lottery, pool-selling, bookmaking or unlawful game or gambling of any kind. [N.J.A.C. 13:2-23.7]

The regulation violated by the act of prostitution states:

(a) No licensee shall allow, permit or suffer in or upon the licensed premises the habitual presence of any known prostitute ... or other person of ill repute.

(b) ...

(c) No licensee shall allow, permit or suffer the licensed premises to be accessible to any premises upon which any illegal activity or enterprise is carried on, or the licensed premises or business to be used in furtherance or aid of or accessible to any illegal activity or enterprise. [N.J.A.C. 13:2-23.5]

Unlimited quantities of alcoholic beverages for a fixed price is prohibited in this language:

(a) No licensee or registrant privileged to sell or solicit the sale of alcoholic beverages within this State shall, directly or indirectly, allow, permit or suffer any practice or promotion that:

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1. Offers to the public at large unlimited availability of any alcoholic beverage for a set price; or

...
3. Requires or allows a consumer to prepurchase more than one drink or product at a time via tickets, tokens, admission fees, two for one, or the like, as a condition for entry into a licensed premises or as a requirement for service or entertainment thereon. [N.J.A.C. 13:2-23.16]

Finally, the Division requires the presence on premises of its documentation to the licensee, as follows:

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

1. ...
2. A photostatic or true copy of the application for the current license as well as the last filed long-form application (if current application is the short form), is kept on the licensed premises; and

3. A list, in form prescribed by the Director of the Division of Alcoholic Beverage Control, containing the names and addresses of, and required information with respect to, all persons currently employed on the retail licensed premises, is kept on the licensed premises.

(b) Such application copy and such list shall be available for inspection by the Director, his deputies, inspectors and investigators, and by any other officer defined by N.J.S.A. 33:1-1(p). [N.J.A.C. 13:2-23.13]

In addition, an applicable ordinance of the Town of West New York, a copy of which was received in evidence as P-7, requires the registration and certification by Town authorities of every employee of a licensed premises and further requires that such certification be renewed annually before May 31st of each year. Ordinance No. 1369, Town of West New York, adopted Feb. 20, 1980; P-7.

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By its petition of appeal, respondents do not challenge either the factual allegations of the Director nor the interpretation of the regulations recited as governing, and as authorizing sanction of the conduct disclosed. Rather, respondents urge merely that the Director moderate the sanction to be imposed lest its impact effectively destroy his business, and the economic opportunity his license represents.

Several matters are raised in mitigation of the sanction to be imposed. These are:

Mr. Cappadona argues that it was his former partner and not himself, who authorized ("suffered," "permitted") the lewd performance and immoral activity on the premises. "It is our feeling and in view of the testimony adduced from the police officers, that William Haas was the primary culprit and lawbreaker with regard to this matter." Rb, p. 1. Inferred from this argument, and the fact that Mr. Haas is no longer associated with Reflections, is the suggestion that severe sanction is unnecessary to prevent recurrence.

Second, it is represented that Mr. Cappadona is a veteran and that he has "never been involved in any criminal act either in the form of arrest, or conviction." Ibid.

Third, it is represented that the partners purchased their license and the tavern approximately six months before the incidents related here and "had very little experience with regard to the running of a tavern." Ibid.

Fourth, there is no record of any previous disciplinary violation against this license.

The Director, in imposing sanction for a violation of his lawful regulations is held to no explicit objective statutory standard. The Legislature, and through it the people of this State, have vested in him the broadest discretion to punish violations of applicable law, upon receipt by him of proof that such violation occurred. In the exercise of that discretion he need only state his reasons for assessing the penalty proposed, which reasons must be grounded in factual matter presented in the record before him. In short, the

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Director is free to impose suspension or revocation of an alcoholic beverage license without limitation, except that he may not act in a manner that is arbitrary, capricious or unreasonable.

By representation of counsel for the petitioner here, the Director has proposed to impose as sanction for these several violations, all of which are effectively admitted and acknowledged by the respondent here, the following sanctions:

- (a) Lewd performance and immoral acts: 60 days.
- (b) Gambling: 120 days.
- (c) Unlimited quantities: 20 days.
- (d) Prostitution: 90 days.
- (e) Expired employee certificate: 10 days.
- (f) No application: 5 days.
- (g) No employee list: 5 days.

or a suspension of this license for a total period 310 days. Each offense, and the periods of suspension severally proposed in connection with them, ought be separately considered.

The behavior of Ms. Pollock, implicated as sanctions "a" and "d," constitutes lewd performances, immoral acts, and acts of prostitution, beyond doubt. They were knowing and intentional violations not only of the Director's regulations, but of general criminal law as well. Moreover, they were not only known to and countenanced by the licensees here, it is fairly to be inferred they were promoted by them. No more aggravated instance of such violations could be conceived, except perhaps in terms of repeated

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occasions and multiple performers. Moreover, none of the proposed mitigating factors diminish the licensees culpability with regard to these offenses. The proposed sanction, totalling 150 days closure, is fully justified in the circumstances. Indeed, in consideration of the licensees' promotion of these calculated violations of the law, and their acknowledgement of the risks in doing so, the proposal may be seen by some as merely moderate.

The gambling offense as to which closure of 120 days is proposed, is relatively less outrageous. That these licensees employed their business premises for personal gambling activities cannot be doubted. Respondents do not contend that because this activity involved "only" principals of the licensee, and did not involve any of the patrons attracted to the tavern by its liquor license, that it is any less a violation of the Director's regulations. Nor could they. The agency's prohibition is directed not to the persons who engage in gambling, but the use of a licensed premises as a facility for that illegal activity.

In this respect, the gambling offense is aggravated by the fact that the then owners of this license themselves committed the offensive acts. Their liability here is not merely derivative, it is direct and unqualified.

It is fairly to be noted, in this regard, however, that neither Mr. Haas nor Mr. Cappadona sought to engage any of their patrons in gambling. Likewise, it ought be noted that the tavern was ostentatiously closed to the general public at the time² and thus this gambling activity is not properly to be characterized as routine illegal activity advanced by possession of the Division's license. It is thus a private crime committed by these licensees, an offense qualitatively different, though perhaps no less offensive, than one capitalizing on a license.

² These events occurred on a Sunday afternoon during which time the doors were locked and the premises "closed" as advertised. The Director preferred no charge here that the licensee violated the provisions of the prohibition against Sunday sales. N.J.A.C. 13:2-10.8.

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The Director proposed to close the licensed premise for a period of 120 days in consequence of this violation. Such sanction is generally appropriate where patron gambling is encouraged or permitted. In an instance such as this, lacking that element, that sanction might with justification be moderated without diminishing the severity of the offense proven here or the extent to which it is properly condemned by the Director. To these ends, closure for a period of 90 days appears appropriate.

Sanction proposed for failure of the licensees to maintain on the licensed premises and in their possession the application and employee list required by regulations, five days closure each, are appropriate and justified in the circumstances. That the principals in this enterprise were novices cannot immunize them from these requirements, nor does it diminish their responsibility to comply with these regulations.

The charge arising from violation of the municipal ordinance, which required current certification of employees, is likewise appropriate in the circumstances. It is the licensees' responsibility to see to it that their employees satisfy such requirements; it is they who are liable to sanction for failure of that responsibility.

Mr. Cappadona's suggestion that he was somehow less culpable than his partner and, in consequence, that the sanction ought to be reduced because he alone will bear its burdens, remains to be addressed. It is no defense, nor any mitigation, to violation of the Director's regulations that one of the principals in a licensed activity is somehow overborne or misdirected by another who is more assertive or active. Indeed, it is fairly to be suggested that one in such a subordinate role takes on additional responsibility to check his less heedful partner. No claim is made here, however, that Mr. Cappadona was in any way a reluctant participant. Certainly, he voiced no objection and exhibited no hesitation.

Moreover, no evidence before me suggested that Mr. Cappadona was in any way subordinate to Mr. Haas, either in the planning, execution or profit connected with the

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several illegal acts charged. For these reasons, though he now is the sole owner of this license where he was not before, his license must nevertheless bear the full burden of the sanction appropriate to these offenses.

For the foregoing reasons, therefore, I **CONCLUDE** that the charges preferred by the Division of Alcoholic Beverage Control against the license t/a "Reflections," and each of them, has been sustained by a preponderance of the credible evidence, and that, with the exception of the sanction proposed with regard to the gambling offense noted, the sanctions proposed by the Director therefor are proper and justified in the circumstances. With regard to that exception, closure of 90 days in lieu of 120 days proposed by the Director, is adequate to serve the interests of the regulation and of the agency.

Accordingly, I **DIRECT** that the alcoholic beverage license authorized at premises known as "Reflections" be suspended for a period of 280 days and that said suspension take effect at close of business on Saturday, November 24, 1984, or such other day as may be established by the Director within 45 days hereafter.

This recommended decision may be affirmed, modified or rejected by the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.**, who by law is empowered to make a final decision in this matter. However, if **JOHN F. VASSALLO, JR.** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with the Division of Alcoholic Beverage Control for consideration.

Date: September 20, 1984

Leon S. Wilson, ALJ

* * * * *

PUBLICATION OF BULLETIN 2440 IS HEREBY DIRECTED THIS
27th DAY OF MARCH, 1985.

John F. Vassallo, Jr.
JOHN F. VASSALLO, JR.
DIRECTOR