

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

BULLETIN 1903

April 9, 1970

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1. APPELLATE DECISIONS - HILLCREST TAVERN, INC. v. PATERSON.

HILLCREST TAVERN, INC.	)	
t/a HILLCREST TAVERN, INC.,	)	
Appellant,	)	ON APPEAL
v.	)	CONCLUSIONS
	)	AND ORDER
BOARD OF ALCOHOLIC BEVERAGE	)	
CONTROL FOR THE CITY OF	)	
PATERSON,	)	
Respondent	)	

-----  
Andrew Marchisen, Esq., Attorney for Appellant  
Joseph L. Conn, Esq., by Samuel K. Yucht, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal challenges the determination and action of respondent Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board) which by resolution dated April 30, 1969 suspended appellant's plenary retail consumption license for premises 194-196 Union Avenue, Paterson, for twenty days effective May 12, 1969, after finding it guilty in disciplinary proceedings of a charge alleging it allowed, permitted and suffered a brawl, act of violence or other disturbance on its licensed premises, in violation of Rule 5 of State Regulation No. 20.

Appellant in its petition of appeal contends that respondent's action was erroneous in that the alleged violation did not occur in the licensed premises and, further, that the "weight of evidence in this matter discloses that whatever altercation that took place, was caused by other persons and not the Appellant or its president, and that the Appellant and the corporate president acted in a proper manner in the incident complained of on March 5, 1969."

Respondent's answer admits the jurisdictional allegations in the petition and denies the substantive contentions.

Upon filing of the appeal an order was entered staying the order of suspension pending further order herein.

The attorneys for the respective parties agreed to submit the appeal on the transcript of testimony taken in proceedings before respondent Board pursuant to Rule 8 of State Regulation No. 15.

Richard G. Marchitto testified that on March 5, 1969, at approximately 1 a.m., he entered the licensed premises and

ordered a drink from John Brown, Jr. (president of the corporate licensee) with whom he had been acquainted. Then "we had an argument and I turned around and walked out the door and we were arguing on the way out and I tried to put my hands out to tell him to stay away." He continued, "Well, John Brown came over kind of boisterous, loud mouth, and I tried to keep him away from me and I was on my way out, turned my back and I got pushed through the door and later, outside, was jumped." And additionally, "Well, as I was going out the door he grabbed me and I grabbed back in defense of myself and was pushed out of the door. Once I got out the door I was on the ground. I got stomped on my back."

Upon the witness being questioned as to where he was jumped, he responded, "Right outside the door; right on the sidewalk." He sustained a "broken spine" as a result of the incident, necessitating hospitalization for a period of two weeks. Timothy O'Brien (who had accompanied Marchitto to the licensed premises) assisted him home.

On cross examination the witness asserted he had visited a tavern in the immediate vicinity of the licensed premises prior to entering the licensed premises, where he had "four, five or six beers." His hair was disheveled because he is engaged in construction work and he also helped a friend "on a car." He did not recall seeing a female tending bar. It was his impression that the female was standing alongside John Brown, Jr. who was on the patron's side of the bar. He didn't see anyone behind the bar. He denied being requested to leave the premises by either the barmaid (identified as Joan Chanowski) or by Brown. He denied that, while outside the tavern, he argued with John Brown, Sr. and that he grabbed him by his shoulder and shirt and held him. Finally the witness testified that as soon as he entered the door, Brown commenced shouting at him and said he didn't want him in the licensed premises because several months prior thereto they had engaged in an argument concerning a watered-down drink.

In essence, Ray Massaker testified he stopped in the tavern while en route home to purchase cigarettes and to have a "nightcap." He had patronized the licensed premises on two previous occasions. He went into the men's room and, upon emerging therefrom (after two or three minutes), he saw no one in the tavern. Upon going outside he saw several persons standing around. John Brown was being held back by a female. He led Brown back into the tavern. He did not see anything happen in the tavern. He saw no assault on the sidewalk. He had been in the tavern approximately fifteen minutes prior to the alleged occurrence. He did not see anyone on the sidewalk although he had assumed someone was on the sidewalk. He did not recognize Marchitto as being present at the scene.

Timothy O'Brien testified that, on the day of the alleged occurrence and pursuant to his suggestion, he and Marchitto entered the licensed premises. Concerning the incident in question, he testified as follows:

"Well, they [Marchitto and Brown] were arguing. Their voices were loud and they started moving towards the side door. They were kind of milling around. I was trying to figure, more or less, what was going on, whether I should get into it. You know, I was really so confused, and as they had gone to the side door and I went out. I was out on the sidewalk. They stood in

the doorway arguing for a while and Richie came out the door like on a fly and in the process of doing that he took a swipe at Brown's sweater jacket. Apparently they had been scrapping because I remember him saying, 'Look what he did to my sweater.' Mr. Brown came out along with, I believe, another person by the name of Mr. Massaker who pushed him off to the side because I made the pavement. When I got up I saw Mr. Brown was kicking Richie; in fact, it was Mr. Massaker who pulled the man off, pulled Brown off Richie .....

He picked Marchitto up and drove him home. Concerning their state of attire he testified that they were both in their work clothes. It was possible that their "hair was messed and we had dirty hands and dirty clothes." He did not recall whether or not the barmaid Joan Chanowski was behind the bar when they first came in. He returned to the bar later that morning in order to find out why the incident had occurred. Joan Chanowski was tending bar at that time.

Detective Patsy Affinito, of the local Police Department, testified that, pursuant to assignment, he visited Marchitto (who was confined in a hospital) on March 24. A warrant was issued for Brown's arrest. Brown came in voluntarily and cooperated with the Police Department.

In defense of the charge, Joan Chanowski testified that she was tending bar on March 5 at 1 a.m. when Marchitto entered the barroom accompanied by O'Brien. O'Brien immediately went into the men's room. She refused to serve Marchitto because he appeared to her to have "had enough to drink" and she summoned Brown. Marchitto directed obscene language at Miss Chanowski. Brown requested Marchitto to leave and enlisted O'Brien's aid in getting Marchitto to leave. She observed O'Brien and Marchitto leave the premises and Brown "go the ladies' room instead of the men's room." John Brown, Sr. (Brown's father), who had been sitting at the bar, went outside. When Brown came out of the ladies' room he inquired of his father's whereabouts and then went outside. Miss Chanowski observed Marchitto holding John Brown, Sr. by his jacket. The questioning then revealed the following:

"Q And what did you see, you looked out the outside window?

A I was standing by that section there and I saw what was going on. So John went to the guy and said, 'Take your hand off my father.' So the guy took his hands off his father and he pulled John by the vest.

Q Where did this take place?

A Outside on the sidewalk. So he pulled John by the vest, actually, and the guy could hardly stand up. He fell down and he pulled him with him. John was trying to get himself up but the guy was holding his vest and everything. When the customers came out it appeared like they were, appeared to be fighting, but they weren't. The guy fell on top of him himself. He looked like he was in a fight before he came in the place. That's why I didn't want to serve either of them, because he was really in bad shape.

Q Did you see anybody punch or kick anybody?

A No. Because I was out there during the time, during the whole incident. Everyone -- nothing

looked like nobody was being kicked, because when they were shoving on the ground, one guy fell down....

Q Was there any fight inside the tavern?

A None at all.

Q Was anybody pushed?

A There may have been a couple of words inside when John asked the guy to leave and when he gave him some lip. Like he gave me lip and called me names. I have to tell you this. John, Jr., he went to the ladies' room. He wasn't going to start nothing. When John came out he asked where his father was and when he was told that his father was outside -- John was really in the ladies' room at that time."

John Brown, Sr. (employed as a day bartender at the licensed premises) testified that he was in the barroom as a patron at the time of the alleged incident. He observed Marchitto and O'Brien enter the tavern, go to the other end and sit up against the wall. He heard the barmaid refuse to serve them drinks and tell them to leave. He heard no shouting or loud talking. He observed Marchitto and O'Brien go to the side exit. He turned again and saw that his son was not in the barroom. He went outside to look for his son. Not seeing his son outside, he turned to re-enter the barroom. Marchitto grabbed him by the shoulder. His son came out and said to Marchitto, "Take your hands off my father." Marchitto removed his hands from John Brown, Sr. and pulled at his son. They both lost their balance and fell on the sidewalk. There was no kicking. Massaker led Brown back into the tavern. Marchitto appeared to be drink.

On cross examination the witness asserted that he did not hear Marchitto direct obscene language at the barmaid.

John Brown, Jr. testified that he and his father were having a drink at one end of a seventy-foot long bar. Marchitto and O'Brien entered and walked past them. He heard the barmaid say that she was not going to serve them. Brown, Jr. then went behind the bar and said, "'You heard her, Richie [Marchitto]. She's not going to serve you because you look intoxicated. Get away.'" He entered the ladies' room and, upon coming out, he noted that Marchitto and O'Brien were not in the premises. He questioned the barmaid as to his father's whereabouts. She said, "'I suppose he went outside with those guys.'" He testified further, "I opened the door and I seen this guy. He had hold of my father. I said, 'Richie, leave him alone.' So I said, 'Let him go.' Down we go. So the other fellow, what's his name, right there -- he says, 'Come on, John. You're a businessman. Get inside.' With that, I went right back inside ...." Later he continued:

"Q When you went outside, how did you get mixed up with Richie?

A I asked the gentleman to get his hands off my father, which he did. Then he grabbed me. It was so quick in time, it wasn't more than two or three minutes and this whole thing was all over.

\* \* \* \* \*

Q That night did you have any argument?

A Not a word. Never said a word to the man. Just told him: You're not getting a drink; both of you better leave. I went to the ladies' room and came out.

Q When you went to the ladies' room had they left?

A They must have. I didn't see them when I came out of the ladies' room. They were gone."

On cross examination the witness testified as follows:

"Q When these gentlemen came in you were sitting with your father drinking?

A Yes, sir.

Q You recall how many drinks you had that evening?

A Maybe five or six, at least -- Sloe gin and club soda. I don't drink too heavy because I can't make it.

Q How were you feeling by this time?

A Gee, to my knowledge, I had a few drinks before I come here, that is Scotch, before I came here. This was Sloe gin.

Q When you were sitting there and they came in, did you hear any ruckus going on between them and the girl?

A I think I had heard the barmaid said, 'Look, I'm not serving you a drink. I tend bar here and I won't serve you.' The bar, it's not like this room. You could hear everything. It's a 70-foot bar. This must be 70 feet long."

The pertinent part of Rule 5 of State Regulation No. 20 reads as follows:

"No licensee shall engage in or allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy, indecent or obscene language or conduct, or any brawl, act of violence, disturbance or unnecessary noise ...."

The critical inquiry is whether in fact a brawl, act of violence, disturbance or unnecessary noise occurred in or upon the licensed premises. The determination of this issue presents a purely factual question. Obviously the Board concluded that an argument erupted between John Brown, Jr. (president of the corporate licensee) and Marchitto in the tavern itself and continued outside. I have carefully examined the transcript and am of the opinion that a sufficient disturbance occurred inside the licensed premises to warrant the Board's conclusion that Brown's conduct came clearly within the interdict of the above cited rule.

Moreover, in order to meet the burden required by Rule 6 of State Regulation No. 15, appellant must show manifest error and that the action of the Board was clearly against the logic and effect of the presented facts. That burden was not met here. Hudson Bergen County Retail Liquor Stores Association v. Hoboken et al., 135 N.J.L. 502 (1947).

I therefore conclude that the Board has established the truth of the charge by a fair preponderance of the credible evidence and that it acted reasonably thereon in reaching the determination that appellant was guilty of the said charge. Suppa v. Harrison, Bulletin 1783, Item 2; Greenberg v. Middlesex, Bulletin 1079, Item 5; Sussman v. Paterson, Bulletin 1817, Item 1.

Accordingly it is recommended that an order be entered affirming respondent's action, dismissing the appeal, and fixing the effective date of suspension which was stayed by the Director pending the entry of the order herein.

Conclusions and Order

No exceptions were taken to the Hearer's report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is on the 17th day of February, 1970,

ORDERED that Plenary Retail Consumption License C-227, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Hillcrest Tavern, Inc., t/a Hillcrest Tavern, Inc., for premises 194-196 Union Avenue, Paterson, be and the same is hereby suspended for twenty (20) days, commencing at 3:00 a.m. Tuesday, February 24, 1970, and terminating at 3:00 a.m. Monday, March 16, 1970.

RICHARD C. McDONOUGH  
DIRECTOR

("Topless" BARMAID WAITRESS)

- 2. DISCIPLINARY PROCEEDINGS - LEWDNESS (~~INDECENT ENTERTAINMENT~~)  
LICENSE SUSPENDED FOR 30 DAYS - DEFERRED EFFECTIVE DATE OF  
SUSPENSION.

In the Matter of Disciplinary Proceedings against )

Mrs. Jay's, Inc. )  
t/a Mrs. Jay's )  
909-911-913 Ocean Avenue )  
Asbury Park, N. J. )

CONCLUSIONS  
AND ORDER

Holder of Plenary Retail Consumption License C-5, issued by the City Council of the City of Asbury Park )  
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Anshelewitz, Barr Ansell & Bonello, Esqs., by Robert I. Ansell, Esq., Attorneys for Licensee  
Edward F. Ambrose, Esq., Appearing for the Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On July 10, 11 and 12, 1969, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., allowing, permitting and suffering a female, attired in the semi-nude, commonly referred to as 'topless', to act as a barmaid and/or waitress in and upon your licensed premises; in violation of Rule 5 of State Regulation No. 20."

The Division relied on the testimony of three ABC agents in substantiation of the charge.

Agent B testified that, accompanied by Agent O, he visited the licensed premises (containing a small service bar, a dining room, and a very large bar in the center, and having the appearance of a nightclub) on July 10, 1969 at 11 p.m. The agents sat at the main bar. The patronage was between twenty-five and fifty people. Two females, one of whom identified as Judy zeller, were tending bar.

Agent B's attention was drawn immediately to Judy because she "had a see-through blouse on which she didn't have any bra underneath." The blouse was received in evidence as Exhibit D-1. Upon being questioned as to the lighting at the bar, Agent B responded, "It was dimly lit in the place, but where the bar -- where she was working at was a pretty bright light on the cash register, in other words, when they rang up the money you could see fairly good." The questioning then proceeded as follows:

- "Q How much of her [Judy's] breasts did you see?  
A You could see the nipples plainly through the blouse, in other words, the blouse was tied with a bow, with a knot in the front, and you could see through it.  
Q And how much of the breast could you see?  
A The whole breast."

The agent was positioned across the bar approximately two feet distant from where Judy was standing. Judy wore nothing over the upper part of her body other than the aforementioned blouse.

On his next visit to the licensed premises on July 11 Agent B was accompanied by Agents O and R. They entered at 10 p.m. and positioned themselves at the bar. The patronage fluctuated from approximately fifty to one hundred people. Agent B remained at the bar from time of entry to midnight, at which time the agents departed from the premises. During this period of time Judy was observed waiting on the tables in the dining room. On numerous occasions it was necessary for Judy to pass to within ten feet of where Agent B was seated in order for her to go back and forth from the dining room to the service bar. During the two hours that Agent B was in the premises Judy was wearing the same see-through blouse that she had worn the night previous. She wore no other covering on her breasts.

Agents B and O revisited the licensed premises on July 12 at 10 p.m. and sat at the bar. The patronage consisted of approximately fifty to seventy-five males and females. The patronage increased to one hundred twenty-five at the height of activities. Judy was again observed waiting on tables approximately fifteen or twenty feet from where the agents were seated. The agent observed that Judy "had the same see-through blouse on and her breasts were exposed, and she had no bra on." Upon being questioned as to whether Judy was ever closer to him than fifteen feet, Agent B replied, "Yes, occasionally a couple of times I went over by the men's room and she had a tendency to walk by me to get drinks at the service bar to bring back to the tables." On each of the nights the bottom part of the blouse was tied tightly with a bow in front. He observed no movement of the breasts.

At approximately 11:30 p.m., accompanied by Patrolman Harvey J. Bolger of the local Police Department, Agents B and O approached Judy and identified themselves. The group proceeded to the kitchen area where Judy was informed of the alleged violation. Later, Alan Zeller (Judy's husband, who was employed as a service bartender) and Jeannette Wiener (known as Mrs. Jay, the major stockholder of the corporate licensee and an employee in the licensed premises) entered the kitchen. Both were informed of the alleged violation.

Mrs. Wiener informed the agents that "sometimes she sends this girl home to put a bra on. That she doesn't wear it and she didn't see anything wrong with it." Upon entry by the agents into the kitchen, Richard Wiener (a son of Mrs. Wiener and the manager of the licensed premises) was also informed of the alleged violation. He replied that "he was unaware that she was attired like that." In the presence of her husband, Patrolman Bolger and Agent B, Judy removed her see-through blouse. Her breasts were completely uncovered. Judy then put on a bra (which she had in her handbag) and another blouse (not a see-through) which was given to her by a female entertainer.

On cross examination Agent B testified that the entertainment furnished by the band and the go-go dancer on each occasion he visited the premises were not in anywise offensive. He described the place as being dimly lit. The lighting was furnished by overhead fluorescent lights. The only other lighting he observed were lights on each cash register containing a bulb approximately eight inches long with a shield covering the top, and spotlights used to light up the bandstand located at the open end of the U-shaped bar. The lighting was the same on each of the three nights he was in the premises. The blouses that Judy wore were the same each night and did not differ in color.

On each of the nights Agent B consumed beer. He did not on any of his visits become sexually excited or passionate by looking at Judy. He admitted being informed by Mrs. Wiener that, because it was fairly dark in the premises, the patrons could not see Judy's exposed breasts well. He also admitted being informed by Richard Wiener that he had no knowledge that Judy was working without wearing a brassiere. He averred that he informed Wiener that he could observe the absence of a brassiere when Judy was near the lights at the service bar.

Agent O testified that he accompanied Agent B in the investigation of the matter now on trial on July 10, 11 and 12, 1969. On July 10, 1969 he entered the licensed premises at 11 p.m. and sat at the bar. He observed Judy and another female tending bar. Judy was wearing the blouse that was received in evidence. His attention was attracted to Judy because, when she went to the cash register (a distance of approximately twelve feet from where he was positioned), he could observe through the light on top of the cash register that Judy's breasts were bare underneath the blouse.

Agent O revisited the licensed premises with Agents B and R on July 11 at 10 p.m., and he observed Judy waiting on tables six feet distant from where he was positioned. Judy was attired in the same blouse "and her breasts were exposed. There was no covering outside of the blouse." Judy was still in the premises when the agents left at midnight.

Accompanied by Agent B, Agent O re-entered the licensed premises on July 12 at approximately 10 p.m. and sat at the bar. Judy was again serving as a cocktail waitress. In response to the inquiry concerning his observations of Judy, Agent O testified "she had the same blouse on and she was waiting on the tables, and when she hit the light, I was able to observe she had no bra on and I could see her breasts completely."

Agent O's testimony concerning the confrontation which took place in the kitchen area on the night of July 12 corroborated Agent B's testimony.

Additionally, Agent O testified that, in his conversation with Judy, Judy said that "she saw nothing wrong with her attire, that she goes down the street that way!"

Allan Zeller (Judy's husband), upon being informed by Agent O that his wife was not properly attired, replied "he was aware of it, and she doesn't like to wear bras. He told her sometimes that she should put a bra on, she doesn't pay any attention. She works that way."

On cross examination Agent O testified that the premises were dimly lit. He first observed Judy was not wearing a brassiere when she entered the light of the cash register. He did not become sexually excited because of this observation. He recalled that, at the confrontation in the kitchen, Mrs. Wiener informed him that she instructed Judy to wear a brassiere.

Agent R testified that he accompanied ABC Agents O and B in the instant investigation on July 11, and corroborated their testimony with respect to Judy's attire.

Patrolman Harvey J. Bolger testified that, accompanied by ABC Agent O, he entered the licensed premises on July 12 at approximately 11:30 p.m. and met with Agent B. While he was at the head of the bar he observed Judy waiting on a table about ten feet distant wearing a blue see-through blouse. As she walked towards him in front of the bar, he observed all of Judy's breasts, including the nipples, without any covering except for the blouse. He was in the kitchen at the time that Judy removed her blouse to hand to the agents as evidence.

In defense of the charge, Richard Wiener (son of Jeannette Wiener) testified that he is in the employ of the corporate licensee as its manager. On July 12 he worked at the licensed premises until approximately 9 or 9:30 p.m. He returned to the licensed premises at approximately midnight due to a telephone call he received from his mother informing him that ABC agents were in the premises. Prior to leaving the premises on July 12, he had seen Judy in the performance of her duties as a waitress. He identified the blouse received in evidence as being the same blouse that Judy wore on July 12. He did not notice that Judy was not wearing a brassiere underneath the blouse.

Upon being questioned by the agents as to whether or not he knew that Judy was topless or bra-less, he responded that he was not aware of it. The licensee does not advertise anything in connection with the attire, or lack thereof, of its waitresses.

On cross examination, upon being queried as to whether or not he was informed by his mother or anyone else that Judy desired to work bra-less, Wiener replied, "I knew she was in the habit of going bra-less. I think there was an incident where she came in one evening, or one afternoon, and was bra-less, and it was my understanding she was told not to come in and work that way in the future, by my mother."

Because of the lighting conditions he did not detect that Judy was bra-less on the nights of July 10, 11 and 12, or that she was dressed differently from any other waitress. He made no special observation of Judy on any of those nights.

On redirect examination Wiener testified that the lighting in the bar area is furnished by three black strobe fluorescent tubes which cast a dim purple light. The light makes certain items of clothing glow. Spotlights are used to light up the bandstand and the platforms used by the go-go girls. They do not light up the surrounding areas. The four cash registers in the bar area have lights which cast light on the keys of the registers.

Mrs. Jeannette Wiener testified that she works in the dining room and from there goes into the night club, working at the cash register, checking the trays brought to her by five waitresses, until closing.

Judy had been employed at the licensed premises for four or five years. She identified L-1 in evidence as being a photograph of Judy in her usual attire. She could not tell by viewing the photograph whether or not Judy was wearing a bra. Upon being queried as to whether or not she ever observed that Judy was not wearing a bra, the witness replied, "she came in one day, worked behind the bar, and she wore a light colored top, like this with flowers on it, and I could immediately tell because you see with the lights, and had yellow and black, and white flowers, and I said, 'Judy, you can't work like that.' In fact, she didn't even own a bra. So my son went and got his wife to bring a bra down, and she left the bra and she put that bra on." She admonished Judy never to work without a bra because "I didn't want any trouble and I knew that -- you know, I just didn't want to start anything. Maybe the A.B.C. man would come in and maybe notice something that was wrong." This incident occurred approximately a month or two prior to the occurrence of July 12. Aside from this one incident, she did not observe Judy working without wearing a bra. Additionally she testified "on the floor, I would always say to her, 'Judy, have you got a bra on?' And she would say, 'yes.' And I got tired of asking her because as I say, the girls all wear these dark outfits, black or brown, that's their costume, with the mini-skirts."

Judy Zeller testified that she had been employed as a cocktail waitress at the licensed premises. She admitted wearing the blouse received in evidence occasionally, including July 12, and on "quite a few" other occasions, and wearing blouses similar to it, of different color, on other occasions in the licensed premises. She also wore a blouse sheerer than the one received in evidence on other occasions. On July 10, while tending bar, she wore bell-bottom slacks, a black-and-white blouse and a flesh-colored bra. She admitted wearing no bra on either July 11 or July 12, and "quite a few" other occasions.

Mrs. Wiener noticed that Judy was not wearing a bra one night "when I was working behind the bar. I came in with a blouse much more sheer than these, and she [Mrs. Wiener] told me to go put a bra on. So I put a bra on for a couple of nights. And then I went back out on the floor and then I took it off, and she never noticed."

Upon being asked to detail the conversation she had with the ABC agents at the confrontation in the kitchen of the licensed premises, Judy responded, "I asked them what was the matter and they said I was in violation of the liquor laws. I wasn't dressed properly. And I said, 'What's the matter with the way I'm dressed?' They said, you know, it's not proper. I said, 'Well, I dress like this all the time. I walk down the street like this, and I have never been arrested walking down the street like this.' They said they were sorry but that's the law. One of them asked me if Mrs. Wiener allowed me to work like this, and I said, 'No. She told me to wear a bra so I wore a bra a couple of times.' " Customarily she does not wear a brassiere, explaining that "they are uncomfortable."

On cross examination the witness asserted that, when tending bar on July 10, she was attired in bell-bottom slacks, a black-and-white see-through blouse with floral designs tied in the middle, and a full size flesh-colored (also known as a "nude") bra. A photograph of Judy, marked L-1, portraying the manner in which the blouse was worn, was received in evidence.

In rebuttal, Agent B testified that on July 10 Judy was not attired in a bra, "nude" or otherwise. Agent O asserted that Judy on July 10 was not wearing a bra that he "could see."

During the course of the hearing the attorney for the licensee moved that the Hearer visit the licensed premises and view the blouse and the manner in which it is worn under the same lighting conditions that prevailed on the dates in question. This Hearer reserved decision. I recommend that this offer of demonstrative evidence be rejected.

The courts have held in Sedlack v. General Motors Corp., 69 A.L.R. 2d 420, 253 F. 2d 116, that the admissibility of demonstrative evidence is largely within the discretion of the trial judge. We find the court in Hampton v. Rautenstrauch, 83 A.L.R. 2d 1260 (Mo.), 338 S.W. 2d 105, was in accord with this above statement. In Kunzman v. Cherokee Sils Co., 95 A.L.R. 2d 673, 253 Iowa 885, 114 N.W. 2d 534, the court held that the determination of relevancy and explanatory value of demonstrative evidence primarily rests within the discretion of the trial court.

I find, after reviewing the testimony of the various witnesses, that I was sufficiently enlightened pertaining to the factual complex, thereby rendering the use of demonstrative evidence unnecessary in the determination of this matter. In a somewhat similar situation this Hearer held to the same effect. See Re Play Pen Incorporation, Bulletin 1778, Item 5, affirmed by the Appellate Division in Play Pen Incorporation v. Div. of Alcoholic Beverage Control (1968), not officially reported, reprinted in Bulletin 1805, Item 1.

In adjudicating this matter I have also examined the various exhibits consisting of publications, periodicals, excerpts, etc., received in evidence at the request of the licensee's attorney during the course of the hearing.

Licensee contended (a) that the lighting conditions that existed in the licensed premises on the dates mentioned in the charge obscured a view of the breasts; (b) if the breasts were not obscured from view, that in itself did not constitute lewd and immoral conduct as charged; (c) the employee acted contrary to licensee's orders and therefore licensee was not responsible, and (d) the testimony of the ABC agents was not credible.

In answer to licensee's first and last contentions I find as a fact the upper part of Judy's anatomy was covered solely by a see-through blouse and that Judy's breasts were fully exposed to view in the lighting arrangement existing in the licensed premises and, therefore, Judy could be characterized as being topless on each of the dates mentioned in the charge. It is apparent to me that the ABC agents did not possess extrasensory powers of perception. What they observed could have been observed by anyone else having a normal power of observation. The testimony of Patrolman Bolger to the effect that he had a clear view of the waitress' breasts through the see-through blouse that she was wearing clearly corroborates the testimony of the ABC agents on this vital point. Additionally, Mrs. Wiener testified that she had on one occasion observed that Judy's breasts were uncovered except for a blouse. Mrs. Wiener's testimony reflects that she was aware of possible impending trouble if Judy was permitted to work accoutered in that manner and, in the exercise of sound judgment, she directed Judy never to work without a bra. Of course, Judy's explanation that she ordinarily does not wear a bra because she finds them uncomfortable is not relevant to the determination of the issues involved. Other females may find other items of apparel too uncomfortable or confining and attempt to work in costumes that would be even more revealing.

The licensee's argument that the Division has failed to prove that the waitress' attire without any further consideration constitutes lewd and immoral activity in accordance with contemporary standards lacks merit.

In New Jersey there is no conflict of authority in the law relating to the topless female in licensed premises. Vide, Re Play Pen Incorporation, supra.

The consistent enforcement of Rule 5 of State Regulation No. 20, since its promulgation in 1937, by all of the Division Directors has met with the approbation of the courts.

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 deciding 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 continuation 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 this rule (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 traffic 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). To hold otherwise, as Lucretius sagely observed, "the falling drops at last will wear the stone."

Conduct in a licensed premises, whether it be in the form of art, dress or speech, like morality in general, consists in drawing the line some place. To reason contra would be inviting the rule of the jungle to prevail.

Licensee's argument that its employee acted in disobedience of its instructions and therefore the licensee should not be held accountable therefor must also fail. Although the licensee was apparently sincere in its contention, none the less the argument is without merit. It is basic that a licensee is chargeable with the misdeeds of its employees. To rule otherwise would serve to emasculate the proper enforcement of the enactment and the rules and regulations and negate the salutary provisions thereof.

It is a well established and fundamental principle that a licensee is responsible for the misconduct of persons employed and is fully responsible for their activities during their employ on licensed premises. In re Olympic Inc., 49 N.J. Super. 299; In re Schneider, 12 N.J. Super. 449; Rule 33 of State Regulation No. 20. Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App.Div. 1951); F. & A. Distrib. Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961).

Finally, it may be well to point out that all licensees are charged with knowledge of the admonition of former Director Lordi expressed in Re Play Pen Incorporation (Bulletin 1778, Item 5), supra, as follows:

"... In passing, however, I wish emphatically to advise all licensees that so-called 'topless' female employees, whether entertainers or otherwise, and whether with pasties described by the Division agents or the larger ones described by the licensee's witnesses, will not be tolerated on licensed premises in this State..."

Accordingly, after considering the entire record and the various precedents cited, I am persuaded by the clear and convincing proof in this case that the charge has been sustained by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the charge.

Although there is no prior adjudicated record against the corporate licensee, the license formerly held by Jeannette Wiener (an officer and stockholder of the corporate licensee) in partnership with Morris Wiener (50% and 49%, respectively) for these same premises was suspended by the Director for fifteen days effective February 28, 1955, on gambling charges. Re Wiener, Bulletin 1053, Item 6.

It is further recommended that the prior record of suspension of license for dissimilar violation occurring more than five years ago be disregarded, and that the license be suspended for thirty days. Re Play Pen Incorporation, supra.

#### Conclusions and Order

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

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

Consequently, having considered the entire record herein, including the transcript of the testimony, the exhibits, the memorandum of counsel for the licensee, the Hearer's report and the exceptions and argument filed with reference thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Recent investigation by Division agents has disclosed that the licensed premises are presently not in operation. The report indicates that the licensee operates on a seasonal basis and the

premises usually open around the first of June. Thus no effective penalty can be imposed at this time.

Hence, the effective dates for the suspension will be fixed by the entry of a further order herein after the operation of the licensed premises shall have been fully resumed on a substantial basis.

Accordingly, it is, on this 17th day of March 1970,

ORDERED that Plenary Retail Consumption License C-5, issued by the City Council of the City of Asbury Park to Mrs. Jay's Inc., for premises 909-911-913 Ocean Avenue, Asbury Park, be and the same is hereby suspended for thirty (30) days, the effective dates of such suspension to be fixed by further order.

RICHARD C. McDONOUGH  
DIRECTOR

3. STATE LICENSES - NEW APPLICATION FILED.

American Corporation  
Rear 241 E. Blackwell Street  
Dover, N. J.

Application filed April 6, 1970 for place-to-place transfer of State Beverage Distributor's License SBD-141 to include additional space.



Richard C. McDonough  
Director