

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

January 15, 1968

BULLETIN 1772

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1. APPELLATE DECISIONS - BUCKLEY v. WALLINGTON.

Geraldine Buckley,)

Appellant,)

v.)

Mayor and Council of the)
Borough of Wallington,)

Respondent.)

On Appeal

CONCLUSIONS and ORDER

Richard J. Mullarkey, Esq., Attorney for Appellant
Robert D. Gruen, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Mayor and Council of the Borough of Wallington (hereinafter respondent) whereby it revoked appellant's 1966-67 plenary retail consumption license issued for premises 457 Paterson Avenue, Wallington, by a vote of five of the six members of the Council (one member thereof being absent) after appellant had been found guilty of the following charges:

- "(1) Making false statements on your application for a Plenary Retail Consumption License as to the ownership of the licensed business, in violation of R.S. 33:1-25, and in further violation of State Regulation #12 (A.B.C.), Rules 1-6;
- (2) Serving alcoholic beverages to a person under twenty-one (21) years of age in violation of State Regulation #20, Rule 1;
- (3) Permitting acts of violence and disturbances to take place on the licensed premises in violation of State Regulation #20, Rule 5;
- (4) An actual owner of the licensed premises has been convicted of illegal gambling activities in violation of State Regulation #13, Rule 1;
- (5) The named licensee is not in actual control of the business."

In her petition of appeal appellant contends that the action of respondent was erroneous for the following reasons:

- "a. The licensee was denied the right to counsel at her hearing.
- b. Neither James Buckley nor Sam Alberti have any interest whatsoever in the ownership of the licensed

- business nor did the hearing bring out any clear cut evidence of such ownership.
- c. The licensee did in fact have control over the operation of the licensed premises, contrary to the allegations of the governing body.
 - d. It was not the policy of the licensee to knowingly serve alcoholic beverages to persons under the age of twenty-one years, nor did the licensee serve alcoholic beverages to a person, to wit, Richard Collora, and such fact was denied by witnesses for the licensee at the hearing.
 - e. The licensee never at any time served alcoholic beverages to a Miss Demanda and in fact the allegation was neither incorporated in the original charges nor testified to at the hearing.
 - f. Any acts of violence and/or disturbance which may have taken place on the licensed premises were not allowed or permitted by the said licensee, and any disturbance which may have occurred was not the fault of the said licensee.
 - g. As previously alleged, one Sam Alberti is not an actual owner of the licensed premises, has never been employed by the licensee and further was never convicted as alleged by the governing body."

Respondent's answer denies the allegations contained in appellant's petition of appeal and avers that "Appellant was granted full right to be represented by counsel and as aforesaid the initial hearing was adjourned by the Respondent in order to grant that right to the Appellant."

When the appeal was filed an order dated June 20, 1967, was entered by the Director staying respondent's order of revocation pending the determination of this appeal. Thereafter, by stipulation of the attorneys for the respective parties, the stay of revocation was vacated by further order of the Director dated July 26, 1967. On August 16, 1967 the case was heard at this Division, at which time an application was made by appellant's attorney for reinstatement of the stay of revocation previously vacated. In compliance therewith, an order dated August 17, 1967, was entered by the Director staying the revocation of appellant's license.

The appeal herein was heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before respondent was received in evidence and, in addition, testimony was presented by appellant in accordance with Rules 6 and 8 of State Regulation No. 15.

Chief of Police Andrew H. Palko testified before respondent that appellant's establishment "is a very troublesome spot in our Borough and rumors and talk as to what goes on in the place; it needs constant policing and it's been nothing but trouble." He stated that, when appellant visited his office to complain about her husband's threatening to kill her, she said she would like to sell the business. With reference to the various incidents which allegedly occurred at the licensed premises, he stated that Captain Janiec would give a record thereof.

Captain Edward Janiec testified that in December 1966 he took a complaint on behalf of appellant that her husband had threatened to kill her. During the interview she discussed the

ownership of the licensed business, stating that she was the owner and that her father had a 33-1/3 per cent. interest in the license because he had loaned her money equivalent to that share. She further stated that there was trouble with her husband on some nights in so far as the collection of the receipts was concerned. Captain Janiec further testified that appellant's husband ran the business and that she was seldom in the establishment. He also stated that appellant informed him that her husband "had all the go-go girls, permitted them to dance with customers, causing trouble; and they went out with men for money." She advised Captain Janiec, according to his testimony, that she had discussed the sale of the licensed premises with her husband and father and that the sale was agreeable to all. The witness was familiar with an altercation which had taken place in the early morning of April 26, 1967, when one Louis Seda had been injured. He stated that he had interrogated Seda at the hospital with reference to same.

Lieutenant Edward Flejzor testified that at approximately 4 a.m. on January 1, 1967, upon being notified that someone had been injured at appellant's premises, he dispatched three police officers to the scene. They returned with one Richard Collora who was injured at the licensed premises. At headquarters Collora first identified Robert Porro, who was also at headquarters and who was employed as bartender at appellant's premises, as the person who had served him a bottle of beer but then he (Collora) changed his mind concerning the identification. Porro denied that he had served beer to Collora. Lieutenant Flejzor further testified that on May 6, 1967, a call came in from the East Rutherford police that there was trouble at appellant's premises and that a woman had been injured and taken to the hospital. It turned out that it was the appellant who had been injured by glass from breaking a window.

Patrolman Edward Skorupa testified that, in response to a call on May 6, he proceeded to appellant's premises and upon his arrival in the area thereof he observed an East Rutherford police car parked on a side street; that he noticed Mr. & Mrs. Buckley in the car and saw that her right hand was bleeding. Skorupa thereupon asked the police officer to take her to the hospital for medical attention. His investigation disclosed "the window on the west side of the building in the corner was busted, and it had blood on it and also blood on the ground. I also found a purse in front of the building" which belonged to appellant.

Officer Stanley Remiszewski testified that he was directed to go to appellant's premises on January 1, 1967, and when he reached the place he observed a fight in progress; that, as a result of the fight, one of the participants (whom he identified as Collora) was injured and taken to police headquarters. He observed that Collora was bleeding on the head and body, and also he detected that his breath smelled of alcohol. Officer Remiszewski was told by a couple of members of the armed services that the trouble originated inside appellant's premises.

Remiszewski also testified that on another occasion he was summoned to appellant's premises because of an argument between a young man and his girl; that he broke up the argument and escorted the male from the licensed premises. He observed that the girl was hysterical and was informed that her boy friend "beat her up, smacked her in the mouth and threw her sister to the ground." Remiszewski further testified that he noticed red marks on her face and scratches on her throat.

The witness also testified that he was on desk duty on April 26 when a call came in concerning a brawl involving a man who was hit with an ash tray. He had other occasions to go to appellant's licensed premises in his normal police rounds "where I was ordered by the Chief to check the Jade East [appellant's premises] every morning at 3 a.m. and make sure that the place is cleaned out; and I had been working nights for a long time and there were quite a few occasions where I had to open the door and chase them out."

Sergeant Anthony Barnas testified in corroboration to the January 1 incident when Robert Collora was injured in a brawl on the licensed premises.

Robert L. Porro testified that he was employed as manager of appellant's premises and was tending bar on April 26 when an argument between appellant and her husband "resulted in an accident that wasn't meant to be." He has been employed since October 18, 1966, when appellant opened the liquor establishment; that at the time of his employment both appellant and her husband discussed the question of salary with him and thereafter, although he took instructions from appellant's husband, they were mainly from appellant. He stated that at the beginning appellant was in the premises every night but became sick and then came to the licensed premises about four nights a week. Porro further testified that James Buckley (husband of appellant) works on Friday and Saturday night and also substitutes for him if he could not be present at any time during the week. Porro also stated that Sam Alberti (appellant's father) visits the tavern only occasionally, the last time being about a month ago.

David Scardella testified that he was employed as a part-time bartender from October 1966 until March 1967; that he was hired by James Buckley to work approximately four days a week, usually on Wednesday, Friday, Saturday and Sunday nights; that he (Scardella) was on duty on the evening of December 31-January 1 and served a bottle of beer to Collora but, when he found that Collora was a minor, he repeatedly requested him to leave; that James Buckley directed him to serve certain female minors, which he did believing that his job would be in jeopardy if he refused; that, although appellant had instructed him not to serve minors in the establishment, her directive was overruled by her husband; that on New Year's Eve, while he was mixing drinks, there was a scuffle which resulted in Collora's being ejected from the premises by Porro; that thereafter Collora returned with two servicemen and a tussle ensued after which Collora was taken to the hospital for medical care; that on another occasion during a scuffle at about 3 a.m., in an attempt to go between the participants Buckley was struck and appeared to be unconscious; that prior to the struggle Buckley had a gun in his possession but, after he had been injured, the gun disappeared. Scardella further testified that he considered James Buckley his boss and, although at one time appellant discharged both Porro and him, nothing happened "because she wasn't the boss;" that he received his pay for services from Buckley or Porro "and then it got to the point where you deducted out of the register and you mark it down on a pad;" that appellant told him her father Sam Alberti was a partner in the business and "the profits were to be shared; he was to take his third after the initial loan had been paid back to him."

Louis Seda testified that, while seated at the bar at 3 a.m. on April 26, 1967 at appellant's licensed premises, appellant also was seated at the bar talking to other persons while her husband was mingling with the customers; that appellant and her husband became involved in an argument and Buckley started throwing things across the bar; that no effort was made by anyone to restrain Buckley; that he threw a shot-glass and then an ash tray which struck Seda on the right side of his head resulting in a laceration that required twenty-two stitches, hospitalization for two days, and confinement to his home for approximately two weeks.

Richard Collora (nineteen years of age) testified that at appellant's tavern on January 1, 1967, he was refused service of beer by Robert Porro (the bartender) because he was unable to present identification as to his age; that his twenty-one-year-old friend purchased beer, took the bottle outside where both consumed the contents; that, when he was refused service, an argument started and in the fight which followed he was injured and subsequently taken to a hospital for medical attention. Upon interrogation concerning his condition, Collora stated that he was intoxicated as he had been drinking at a party at his home previous to going to appellant's licensed premises.

Appellant testified that she is the sole holder of the license; that part of the purchase price came from a joint savings account, and the remainder from an inheritance; that she hired Robert Porro to be manager of the tavern and discussed with him what his wages and hours should be; that she hired employees and, when Scardella was discharged, she told her husband to let the man go; that Scardella was fired "because he started drinking heavily behind the bar and a lot of people were telling me about this, and he started taking his pay out of the register at night for his night's work, and he wasn't supposed to do that. He was supposed -- I was supposed to give him the money at the end of the week, and the register was always short;" that her husband had no interest in the license but worked on the licensed premises a few nights a week; that, because she became ill, she lived with her sister but went to the premises on Saturdays to obtain money which was over and above the amount paid for expenses; that she had never made any agreement with anyone to share any of the profits from the business; that before she became ill she was at the premises on most occasions and that her husband was occasionally employed there; that she spoke to Captain Janiec in December 1966 concerning the signing of a complaint against her husband but did not recall stating to him that her father had a one-third interest in the license; that she did tell him it was her intention to incorporate the business and, when that was done, her father "would be a thirty-three and one-third percentage partner;" that printed cards announced that her father, Robert Porro and her husband were hosts at the premises; that, since her father had been in the tavern business and had a lot of friends, she wanted his name on the cards so that people would patronize her place of business; that her father never worked on the licensed premises but came there on Saturday nights on a few occasions with friends; that, when Captain Janiec told her to sell the business, she did not think he had any authority in this regard; that, when questioned concerning assertions made by Scardella, appellant testified that, because he was fired, he was attempting to get even with her.

Samuel Alberti (father of appellant) denied lending money to his daughter but stated that, being her guardian, he advanced money which belonged to her for the purpose of purchasing

the license in question. Alberti further testified that he was never arrested or convicted for any gambling activities.

As to Charge 1, it appears from the testimony of Captain Janiec that, during a discussion concerning the ownership of the license, appellant stated that her husband, her father and herself each had a one-third interest in the license and that she was intending to sell the licensed business after she had discussed it with her husband and father and it was agreeable to all concerned. The testimony of David Scardella also indicated that appellant had asserted to him that the profits were to be shared with her father after the money he had invested in the business had been paid to him. According to Scardella, appellant stated that her father was entitled to one-third of the profits realized at the tavern. Scardella also stated that he was hired by James Buckley (husband of appellant) and that he considered Buckley to be the boss of the licensed premises.

Although appellant contended that she is the sole owner of the license and presented a cancelled check in the sum of \$2,500 in part-payment for the license, the check in itself did not in any way indicate that this money had been used to buy the license or the business conducted thereunder. I am satisfied from Captain Janiec's testimony that appellant related a truthful story to him with reference to the ownership of the license. It is improbable that a licensee would make this admission were it not a fact.

As to Charge 2, it is also established that a minor, nineteen years of age at the time, was sold a bottle of beer in the licensed premises. Scardella, who was one of the bartenders on New Year's Eve, admitted that he had made the sale to the minor in question.

With reference to Charge 3, there has been considerable testimony as to acts of violence and disturbances on the licensed premises. On New Year's Eve or New Year's Day Richard Collora had engaged in a brawl on appellant's premises in which other persons participated and, as a result, Collora was seriously hurt and required medical attention. Again, on April 26 Louis Seda, a patron at appellant's tavern, was seriously hurt when an ash tray thrown by appellant's husband found its mark on the side of Seda's head, necessitating his hospitalization. Again, on May 6 appellant, after observing her husband speak to one of the entertainers, was badly cut when she shattered a window pane with her purse. Furthermore, there is evidence of a fight in the licensed premises wherein appellant's husband had displayed a gun, was knocked unconscious from a blow by an unknown assailant and, according to Scardella, the gun had surreptitiously disappeared from Buckley's pocket while he lay on the floor. It is apparent from the above related incidents that the tavern had been operated in an improper manner.

In so far as Charge 4 is concerned, there is no evidence presented that Sam Alberti had ever been convicted of illegal gambling activities.

With reference to Charge 5, the evidence discloses that James Buckley actually operated the licensed premises. Directives given by appellant were at times countermanded by her husband. In Scardella's opinion, Buckley had control of the premises in that he paid the salary out of the profits of the business for Porro's services in addition to Scardella's services and that, at one time when appellant discharged Porro and himself, they remained at work at the establishment.

It must be borne in mind that the license had been transferred to appellant in October 1966. Thus, within a short period of time many serious incidents had occurred, most of them from actions of appellant and her husband. It is obvious from the deportment and conduct of the licensee and her husband that neither was fit to operate or be employed in a liquor licensed establishment. The privilege of selling alcoholic beverages at retail, which is granted to the few and denied to the many (Paul v. Gloucester County, 50 N.J.L. 585), must be exercised in the public interest. It is apparent by the manner in which these premises had been conducted that appellant has demonstrated a shocking lack of appreciation for and understanding of the fundamental decencies and proprieties in the operation of the licensed premises.

Judge Jayne, speaking for the court in In re 17 Club, Inc., 26 N.J. Super. 43, 52 (App. Div. 1953), said:

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

It is significant that appellant did not contradict the testimony of the police officers concerning the various incidents, mostly serious, that had occurred in the licensed premises. The only testimony produced by appellant and Sam Alberti in the main concerned the so-called ownership in the liquor license. I am not impressed by the testimony given either by appellant or her father in this matter. There is no doubt that the incidents occurred because of the careless and slipshod manner in which the place was conducted.

The measure or extent of penalty to be imposed in a disciplinary proceeding rests within the sound discretion of the issuing authority and will not be disturbed on appeal unless the evidence clearly shows an abuse of discretion. Bacus v. Guttenberg, Bulletin 1332, Item 4. Under the circumstances, after careful examination of all the evidence and exhibits produced herein, I am satisfied that appellant is guilty of Charges 1, 2, 3 and 5 preferred in this matter. In so far as Charge 4 is concerned, there has been no evidence to substantiate said charge. I find that, under the circumstances appearing herein, respondent's revocation of appellant's license was neither unreasonable nor did it constitute an abuse of discretion which would warrant reversal of its action. I therefore recommend that the action of respondent be affirmed and that the appeal herein be dismissed.

Conclusions and Order

No exceptions were taken to the Hearer's report pursuant to Rule 14 of State Regulation No. 15.

It appears that on May 25, 1967, respondent denied a request by appellant's attorney for a thirty-day adjournment of the hearing of the charges filed in this matter and proceeded to hear them that evening. The record discloses that the date originally scheduled for the hearing was May 17, 1967; but when appellant advised that she had no attorney, respondent, on her application, adjourned the case to May 25 to give her an opportunity

to retain a legal representative. However, it was impressed upon appellant that the matter would be heard on May 25 and that no further adjournment would be considered. On May 25 an attorney accompanied appellant to the hearing before respondent. When his application for a thirty-day delay was denied, he refused to participate in the hearing but announced that he was acting only as an adviser to appellant.

I am satisfied that respondent's action under the circumstances at the time was reasonable and in no way prejudicial to appellant. Moreover, since the instant appeal was heard de novo with opportunity for appellant to produce any testimony which she deemed pertinent to the case, appellant's rights have been fully protected.

Having carefully considered the entire record herein, including the testimony taken, the exhibits introduced in evidence and the Hearer's report, I concur in the Hearer's findings and conclusions and adopt them as my conclusions herein. I find that appellant has failed to sustain the burden (Rule 6 of State Regulation No. 15) of establishing that the action of respondent was erroneous and should be reversed.

Accordingly, it is, on this 14th day of November, 1967,

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

ORDERED that Plenary Retail Consumption License C-40, issued by the Mayor and Council of the Borough of Wallington to Geraldine Buckley for premises 457 Paterson Avenue, Wallington, be and the same is hereby revoked, effective immediately.

JOSEPH P. LORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - HOSTESS ACTIVITY - LICENSE SUSPENDED FOR 40 DAYS.

In the Matter of Disciplinary Proceedings against)

Hector (Harry) Neim t/a Mata Hari Lounge 363 Lakeview Avenue Clifton, N. J.,)

CONCLUSIONS and ORDER

Holder of Plenary Retail Consumption License C-46, issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton.)

-----)

Louis R. Cerefice, Esq., Attorney for Licensee Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

B THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

At the hearing held herein licensee pleaded not guilty to the following charges:

- "1. During the early morning hours of Saturday, March 18, 1967, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to persons under the age of twenty-one (21) years, viz., Carolina ---, age 19, Dorschima ---, age 19, Lucille ---, age 20 and Geraldine ---, age 20, and allowed, permitted and suffered the consumption of alcoholic beverages by such persons in and upon the licensed premises; in violation of Rule 1 of State Regulation No. 20.
- "2. On Friday night, February 24 and on Friday night, March 17 into early morning hours of Saturday, March 18, 1967, you allowed, permitted and suffered females employed on your licensed premises to accept beverages and food at the expense of or as a gift from customers and patrons; in violation of Rule 22 of State Regulation No. 20."

Subsequent to the termination of the hearing the licensee admitted guilt of Charge 1 and pleaded mitigating circumstances. Therefore I shall confine this report to a discussion of the issues incident to the disposition of Charge 2.

Agent S testified that, accompanied by Division Agents R and Se, he arrived in the vicinity of the licensed premises on February 24 at approximately 9 p.m. He and Agent R immediately entered the licensed premises (which he characterized as having the appearance of a night club, containing a large main bar, a smaller bar, tables and chairs, a dance area and an elevated bandstand). Both agents positioned themselves at the far end of the bar near the kitchen. Agent Se entered the licensed

premises approximately twenty minutes later and positioned himself at the opposite end of the bar, near the front door, approximately fifty feet distant.

Two men identified as "Billy" and "Joe" were tending bar. Matthew Alite, also known as "Matty", was acting in a managerial capacity. In addition to tending bar, Alite also positioned himself on the patrons' side of the bar, socializing with the patrons.

When the agent was questioned as to whether he observed Se "in the company of anyone", he replied, "he was in the company of Mr. Alite, Matty, and later on in the company of a female singer." He referred to the unidentified female as a "singer" for the reason that "she had entertained with the band, and during the intervals she moved about the premises." Additionally, he observed Se, Alite and the female singer drinking together and in conversation with each other. He observed the female perform "about three times." He did not know what she was drinking nor who paid for the drinks. Se left the tavern at approximately 11:15 p.m. and S about a half-hour later.

On March 17 Agents S and R entered the licensed premises at approximately 10 p.m. and positioned themselves "at the left center of the bar at the rear end." Se entered shortly thereafter and "placed himself at the end of the barroom near the kitchen a little further up, about ten or fifteen feet." The questioning proceeded as follows:

- "Q What was the entertainment?
 A The entertainment was furnished by a group named Mario and the Flips, and a female singer named Beverly Weber.
 Q What did you see her do or hear her do?
 A She sang. While the band entertained she sang several songs.
 Q Where was this entertainment from?
 A From the bandstand."

Alite, Harry Neim (the licensee) and a male identified as Mr. Sparrow were tending bar. At approximately 11 p.m. the agent observed "the female entertainer, Beverly Weber, had one of her breaks" with some of the members of the band, and converse with Se. He then observed Se request Alite to serve Miss Weber a drink. Alite prepared a cocktail, placed it in front of Miss Weber and took payment from Se's money which was on the bar. Miss Weber consumed the drink. He then observed Se request Alite to prepare a sandwich for Miss Weber. Alite went to the kitchen, prepared a sandwich and placed it in front of Miss Weber. Alite took payment for the sandwich from Se's money on the bar. Miss Weber consumed the sandwich.

After more entertainment Miss Weber returned to her position next to Se. R requested Alite to serve Miss Weber a drink. Alite "prepared a similar type drink and brought it over to Miss Weber and placed it in front of her and pointed down to Agent R indicating it was on Agent R, and she lifted her glass in acknowledgment." R paid for the drink. After taking a sip of the drink, Miss Weber brought her drink to Agent R and began conversing with Agents S and R. Thereafter she was called to the bandstand by the band leader and left her position at the bar.

S and R identified themselves to Alite and Neim and asked them into the kitchen. In the kitchen Miss Weber admitted drinking an alcoholic beverage and added, "I don't hustle. I don't bother people to buy drinks." She admitted receiving a sandwich purchased for her by Se.

On cross examination the agent admitted that he did not check the payroll records of the licensee and did not know whether or not Miss Weber was on the licensee's payroll.

On redirect examination the agent testified that Miss Weber changed her attire between sets in a room to the rear of the bandstand, which he called a dressing room. He described her attire as "formal" and he expressed an opinion that she was dressed in the manner of an entertainer and not as a patron. Prior to singing, the band leader (Mario Pizuto) introduced Miss Weber. During the time the band entertained, she remained on the bandstand.

It was stipulated that Agent R's testimony would be the same as the testimony given by Agent S.

Agent Se testified that on February 24, 1967, he participated in the investigation of the licensed premises with S and R and they preceded him in entering therein. He entered the licensed premises at approximately 9:20 p.m. and positioned himself approximately eight to ten stools to the right of the other agents. During the two hours the agent remained in the premises, a group known as "Mario and the Flips", consisting of four males and a female, entertained on the stage. The female was dressed "as an entertainer." He observed the female emerge from a room he knew to be a dressing room for female entertainers and go on the stage. The master of ceremonies introduced her prior to her performance. She sang two and a half sets, each set lasting "perhaps 30, 35, 40 minutes."

Alite came to Se's position at the bar. Subsequently he "called over" the female entertainer and introduced her to Se. In Alite's presence and at Se's request the female entertainer ordered a drink. Upon service of the drink by the bartender, the entertainer consumed it. Se paid for the drink. After additional conversation, the female ordered another drink, payment of which was taken by the bartender from the agent's money lying on top of the bar. After consuming part of the second drink, she returned to the stage.

On March 17, 1967, Agents Se, S and R again collaborated in the investigation, arriving at the licensed premises at approximately 10 p.m. Se entered first, followed shortly thereafter by S and R. Upon entering, Se took a position near the front door and later changed his position so that his "hand could touch the kitchen door." In either position Se was approximately five stools removed from S and R. Entertainment was provided by the same group, that is, Mario and the Flips, consisting of four males and Miss Beverly Weber. Referring to the entertainment provided by Miss Weber, the testimony revealed the following:

- "Q Over what period of time did you see her entertaining?
A I caught her entertainment for two and a half sets.
Q Over what period of time?
A Half-hour sets, so perhaps going into two hours.

Q What kind of entertainment did she perform in each set?

A She sang songs. The MC would say, 'She is going to sing such and such song', and she would sing that song. When singing a song she would do like a dance on the stage.

Q What do you mean?

A Along with the guitar player or drummer she would be dancing and singing. She also had slow numbers also.

Q Have you told us how she was attired?

A She was attired as an entertainer. She changed also on the three occasions I saw.

Q Did you see where she came from upon each change?

A Yes, sir. From the same room I mentioned prior, which was the female entertainers' room. I call it the female entertainers' room because that is where clothing was hung. The female who entertained that night entered and she would depart from there with another costume right on the stage."

Alite was tending bar. After one of the sets Miss Weber sat next to Se, at which time Se requested Alite to serve her a drink. Miss Weber ordered an alcoholic beverage, known as a stinger, of Alite. Alite prepared the drink, placed it in front of Miss Weber and took payment therefor from Se. Miss Weber consumed the drink. He then heard Alite say to Miss Weber, "The fellow over there [referring to ABC Agent R] is buying you a drink." Miss Weber received another stinger which she "toasted" to R. He observed Alite go to R's position at the bar and "something occurred with money." Thereafter Miss Weber requested Se to buy her a ham sandwich. Se asked Alite "if he made ham sandwiches" and, upon receiving an affirmative response, Se requested Alite to make a sandwich for Miss Weber. Alite went into the kitchen and emerged therefrom with a sandwich "on a little paper tray", placed it in front of Miss Weber and received the sum of \$1.50 from Se in payment therefor.

On cross examination Se testified that the room he saw the female entertainer enter contained gowns hung on hangers, a mirror, mascara, make-up and other items.

In defense of the contested charge, the licensee Hector (Harry) Neim testified that he hired Mario and the Flips. They play musical instruments. Neim did not hire a vocalist. Referring to Miss Weber, the question revealed the following:

"Q Tell us about how this girl came about to sing.

A This girl is a very good friend of Mario. She came up and asked Mario if, you know, she could work out with him, she wants to get back in the business. Mario asked me. I said, 'All right. I don't care. It doesn't make any difference to me.' She asked if she can bring clothes in our office. We don't use the office. We have an office there with a big desk. She used this as a so-called dressing room, but everybody was in there. Everybody can go in there. It isn't locked."

In response to the question, "Do you ever have any other people volunteer to sing?", the licensee responded:

"Especially with Mario, that is one of his mannerisms. If any of his friends come into the place he calls them up to the stage and introduces them. Usually on Sunday, there must be at least six or seven different people Mario knows go up there and do things, sing and acts."

The witness added that Mario did not in anywise compensate the various entertainers.

On cross examination the licensee testified that he contracted in writing for "just Mario and the Flips." He had seen Miss Weber and other females entertain on occasions prior to March 17, 1967. Prior to March 17 he had given Miss Weber permission to use the dressing room.

Additional cross examination adduced the following:

"Q Any time she performed with the band it was with your consent and your knowledge?

A Yes.

Q This was not a spontaneous thing where she went up with the band and sang one number and that was it?

A No. We usually left that to Mario.

Q In other words, she was part of the group?

A No sir.

* * * * *

Q You did accept her as an entertainer for the entertainment of your customers and patrons?

A The only reason I let her go up was because Mario asked me to."

Matthew Alite, who was employed as a bartender by the licensee, testified that Se requested him to make the sandwich for his (Se's) consumption. He did not know what happened to the sandwich. His testimony continued as follows:

"Q With respect to the girl singing, have you ever seen any other girls go up on the stand with Mario and the Flips?

A Mario knows many other groups. A lot of people go up and sing and tell jokes and everything else.

Q As far as you know, was any girl hired to sing in the Mata Hari Lounge?

A Not to my knowledge. I don't do anything. Harry Neim does that. He is the owner."

Mario Pizuto testified that his group entertained at the licensed premises on the nights in question and that, although Miss Weber sang there occasionally while his band played, he had never employed her to entertain at any time. Referring to the occurrence of March 17-18, he testified that, when Miss Weber asked him over the telephone "All right if I come down and sing a few numbers?", he responded, "Certainly." When the witness was asked, "Do you ever have anybody else sing a few numbers? Patrons?", he responded, "Many occasions, yes."

Again referring to the night of March 17-18, the witness testified that Miss Weber sang "quite a few" numbers with the band "for free" and that she brought dresses with her, "she dresses up." He saw Miss Weber drink; however, she purchased her own drinks. He was positive that Miss Weber was not employed either by him or by the licensee.

In adjudicating this matter I observe preliminarily that, in evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud and Pittala v. Davis, 64 N.J. Super. 242 (App.Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic

Beverage Control (App.Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented in this proceeding, the credibility of witnesses must be weighed. Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App.Div. 1961).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I have carefully reviewed, considered and analyzed the testimony of the ABC agents and the testimony of the witnesses produced by the licensee, and have observed the demeanor of all the witnesses. I am amply convinced that a female entertainer accepted beverages on each of the two dates mentioned in the charge and that a female entertainer accepted food on the second date mentioned in the charge, all at the expense of or as a gift from customers or patrons as charged.

The attorney for the licensee argued that no evidence was adduced by the Division that the female entertainers were actually employed by the band or by the licensee upon the licensed premises, and that the singing was spontaneous and therefore there was no violation of Rule 22 of State Regulation No. 20, which reads as follows:

"No plenary or seasonal retail consumption licensee shall allow, permit or suffer any female employed on the licensed premises to accept any food or beverage, alcoholic or otherwise, at the expense of or as a gift from any customer or patron."
(Underscoring mine)

The testimony concerning the unidentified female who sang with the band on February 24 indicates that she sang at least two and a half sets, each set lasting a minimum of thirty minutes. She was dressed as an entertainer and emerged from a dressing room to go on stage.

The testimony concerning Miss Weber makes it crystal clear and unarguable that her entertaining was not of a spontaneous nature, that her offer to sing on the night of March 17 was accepted in advance by the band leader, and that she brought her own dresses because "she dresses up." It should be noted that it was conceded that Miss Weber sang at the licensed premises on occasions prior to March 17, 1967.

The argument that she was not remunerated for her services and therefore could not be considered an employee is untenable and has been consistently destroyed in our adjudicated cases. The question of compensation is irrelevant to the determination as to whether or not she was a female "employed", as charged. Re Jacobs, Bulletin 935, Item 3; Re O.K. Corral, Inc., Bulletin 1718, Item 2; Freud and Pittala v. Davis, supra.

In Kravis v. Hock, 137 N.J.L. 252, the court considered this very issue. In that case it was alleged that certain

females employed on licensed premises were engaged as independent contractors. In considering the matter of employment the court stated (at p. 255):

"... Webster defines the word 'employ:' 'To use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose.' The Commissioner, since the adoption of this regulation in November, 1940, has consistently construed the word 'employed' as used in said regulation to embrace 'all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship.' Such a construction seems to be a logical one. Our courts have held that administrative interpretations of long standing given a statute by the official charged with its enforcement will not be lightly disturbed by the courts. Mr. Justice Perskie has emphasized this judicial determination in *Cino v. Driscoll* (Supreme Court, 1943), 130 N.J.L. 535, 540, where he said:

'Moreover, the legislature charged with the knowledge of the construction placed upon the Alcoholic Beverage Law, as evidenced by these rules, has done nothing to indicate its disapproval thereof. Cf. *Young v. Civil Service Commissioner*, 127 N.J.L. 329; 22 Atl. Rep. (2d) 523 ...'"

I therefore find that the females who entertained on the dates mentioned in the second charge are employees within the intendment of Rule 22 of State Regulation No. 20 and their conduct is the responsibility of the licensee. It is a well established and fundamental principle that a licensee is responsible for the misconduct of his employees 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. Division of Alcoholic Beverage Control*, 36 N.J. 34 (1961).

After reviewing the entire record, I recommend that the licensee be found guilty of the second charge. (As heretofore indicated, the licensee belatedly pleaded guilty to the first charge.)

The licensee has no prior adjudicated record of suspension of license. Hence I further recommend that the licensee be suspended on the first charge for twenty days (*Re Beacon Manor Hotel, Inc.*, Bulletin 1474, Item 7), without remission for the plea entered subsequent to the hearing (*Re Triple Lake Ranch, Inc.*, Bulletin 1676, Item 3), and on the second charge for twenty days (*Re Fletcher & Kiel*, Bulletin 1750, Item 2), or a total of forty days.

Conclusions and Order

Written exceptions to the Hearer's report and argument thereto were filed by the licensee's attorney, 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. Additionally, I find that the penalty recommended is not unreasonable and conforms with the minimum penalty assessed in similar cases.

Having considered the entire record herein, including the exceptions filed, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 21st day of November, 1967,

ORDERED that Plenary Retail Consumption License C-46, issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton to Hector (Harry) Neim, t/a Mata Hari Lounge, for premises 363 Lakeview Avenue, Clifton, be and the same is hereby suspended for forty (40) days, commencing at 3:00 a.m. Wednesday, November 29, 1967, and terminating at 3:00 a.m. Monday, January 8, 1968.

JOSEPH P. LORDI
DIRECTOR

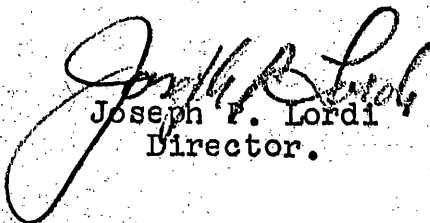
3. DIRECTOR OF DIVISION - DESIGNATION OF ACTING DIRECTOR.

January 10, 1967

TO THE STAFF:

Effective January 10, 1968 I have resigned as Director of the Division of Alcoholic Beverage Control to accept appointment as Prosecutor of Essex County.

Effective the same date, Deputy Director Emerson A. Tschupp is designated as Acting Director of the Division of Alcoholic Beverage Control, pursuant to R.S. 33:1-35.


Joseph P. Lordi
Director.