STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2361 July 28, 1980

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ITEM

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BULLETIN 2361

July 28, 1980

1. APPELLATE DECISIONS - TRESKY v. EVESHAM et als.

#4301
Charles Tresky,

Appellant,

v.

Mayor and Council of the Township of Evesham and John Weiss and Sandra Weiss,

Respondents.

ON APPEAL

CONCLUSIONS

AND

ORDER

Aberman and Herman, Esqs., by Alan J. Aberman, Esq., Attorneys for the Appellant.
William Ruggiero, Esq., Attorney for the Respondent - Mayor and Council.
Richard C. McDonough, Esq., Attorney for the Respondents - John and Sandra Weiss.

The appellant is an objector to the grant of a new Plenary Retail Consumption License by Resolution dated October 17, 1978 to respondents John and Sandra Weiss by the Mayor and Council of the Township of Evesham (Council). The Weiss' were selected from among thirteen (13) applicants following presentations by each of them, and deliberation by the Council relative to the merits of their respective proposals. The appellant is a taxpayer of the Township. None of the unsuccessful applicants filed appeals.

The Petition of Appeal sets forth in relevant part the objections as follows:

> 1. Resolution 182-78 fails to comply with the criteria of Ordinance 15-4-78 in that it fails to set forth any findings of fact showing that the award of the license was in the public interest;

2. The decision of the Township Council, embodied in Resolution No. 182-78, was not in the public interest and violates the criteria set forth in Ordinance 15-4-78 because the successful applicant proposed a facility which;

A. Is closer to other facilities similar in character than sites proposed by many other applicants;

B. Is far less convenient and accessible to citizens of Evesham than are other proposals;

C. Will generate far less in rateables than other proposals;

D. Will not service a majority of the citizens of the Town of Evesham; and

E. Will not offer substantial economic enhancement to the community.

3. The successful applicant failed to substantiate many claims of benefits, as required by Ordinance No. 15-4-78 and, further, misrepresented that it had obtained an easement from its proposed site to Main Street, Marlton.

The Council, in its Answer, denies the substantive allegations contained in appellant's Petition of Appeal, except that it admits that it initially failed to make findings of fact but did schedule a special meeting of the Council for that purpose. This resulted in the adoption of Findings of Fact, Resolution 227-78, dated December 5, 1978.

The respondents, John and Sandra Weiss, similarly deny those substantive allegations directed towards them in the appellant's Petition of Appeal.

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Ordinance 15-4-78 referred to above, was passed in order to establish objective criteria, and by which all applicants for this (and any new) license may be measured. The first relevant paragraph of the Ordinance states:

LEGISLATIVE INTENT AND PURPOSE

It is the intent of this Article to provide a set of Standards to be followed by the Township Council in its determination of the award of liquor licenses within the Township based upon an adequate finding that such an award of liquor licenses is within the best interests of the public and will not be to the detriment of the Township. Furthermore, the information required to be submitted pursuant to this Article is to enable the Township to determine the feasibility of a new and/or altered premises, resulting in the long-term benefit to the Township and serving the public interest.

GENERAL QUALIFICATIONS AND EVALUATORY STANDARDS

The Township Council hereby declares the following general standards to be applicable to the grant of any Plenary Retail Consumption License or any Plenary Retail Distribution License subject to applicable statutes and regulations of the Division of Alcoholic Beverage Control:

A. In reviewing an application for the award of any liquor license the Township Council shall act in the best interest of the public and

each resolution originally awarding any such license shall set forth findings of fact showing that the award of the license is in the public's best interest.

B. In evaluating the location of any proposed licensed facility, the Township Council shall consider the proximity of other facilities similar in character to the proposed facility in Evesham Township or surrounding municipalities.

C. In evaluating the potential public benefit to Evesham Township by the grant of a particular license the Township Council shall cause each applicant to substantiate any claim of benefit.

D. Nothing herein shall be deemed to prevent any applicant from submitting more detailed information than is required throughout this Article.

There follows several paragraphs setting forth public hearing provisions and discussions, supplemental information requirements such as drawings, surveys, etc., as well as requiring a statement that the facility is in compliance with the Zoning Code, or alternatively, what variances are required, and the type of sewage system proposed.

The appellant presented no witnesses, other than some of the Council members who voted upon the Ordinance outlining the criteria as stated hereinbefore, and, ultimately, the selection of the successful applicant, Weiss'.

Councilman Harry H. Wooden, Jr., who proposed the Ordinance setting out the criteria, testified that;

" . . . my intent, in proposing that sort of Ordinance and some of the specific language, was that we have guidelines or

> criteria, standards that were aimed at trying to make the applications and testimony that would be presented on behalf of them, contain enough material to corroborate items that frequently were presented in these matters as a matter of claiming, 'I'm going to provide the best tax rateable' or 'I'm going to provide the largest site or one that has the least traffic impact" to try to get the applicants to be put on notice, to provide enough information that we have a common base of information from which to judge all of them."

The applicants were each afforded a half-hour for their presentation and for answering questions from Council members. Each was heard, the presentations being made on two separate evenings. The applicants presented site plans or sketches, architectural renderings, and, some of them, models. They described their plans and/or presented data; in some cases calling upon architects, engineers, or other experts to testify in support of their particular proposal.

It was Wooden's opinion that in making the Council's selection the various criteria and requirements were kept in mind, and that Weiss' proposal best suited the Council. He further stated that in reaching his determination he used the aforementioned guidelines. His decision to vote for Weiss was based upon the sum total of the information contained in the plans, his own knowledge of the various areas of the Town, the sites, and planning information that he was aware of in connection with the various sites.

Councilman Leonard F. Colangelo testified that the basis for the Ordinance establishing the various criteria was to prevent a recurrence of the earlier (1976) award of a new license and the controversy and legal embroilments that followed.

At that time, he recollects that,

> " . . . it was suggested that since there was no guidelines or factors to consider that time, that the Council, to avoid

> that in the future, would adopt an ordinance which would be a law to be followed by the Council in evaluating any future applications, and all of the public would be aware of what those requirements are and would be set out . . . that was the purpose of our Ordinance, to set out criteria, specific criteria and to it a law of the Township."

Colangelo did not vote in support of the award to the the Weiss'.

Councilman Joseph Bush next testified, in essence corroborating Colangelo's prior testimony. He too, had voted against the award to the Weiss'.

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Initially, it should be noted that the decision whether or not a license should be issued rests within the sound discretion of the local issuing authority in the first instance. Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962); Fiory v. Ridgewood, Bulletin 1931, Item 1, and cases cited therein.

The Alcoholic Beverage Law, N.J.S.A. 33:1-1 et seq., contains no specific criteria which a local issuing authority must follow in its determination as to who amongst the various applicants will be selected. The Director of the Division of Alcoholic Beverage Control has issued no rule or regulation specifying the governing criteria.

It is, therefore, the responsibility of the local issuing authority to determine (within normal bounds of fairness and reasonableness) the ground rules, and then to act accordingly.

The evidence elicited clearly establishes that the Council, im promulgating the aforecited ordinance referred to in testimony, did so to prevent a repetition of the alleged unpleasant consequences of an earlier award by establishing guidelines and criteria or standards to be used henceforth

for all new licenses that may be issued by them. It was not intended to be the sole basis or criteria in the selection of the successful applicant.

It is a firmly settled principle that the Director's function on appeal is not to substitute his personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal view. Tumulty v. Dunellen, Bulletin 1487, Item 4; Central Jersey PSA et als v. Pohatcong and Falk's etc., Bulletin 1768, Item 2. Indeed, as the court stated in Lyons Farms Tavern, Inc. v. Newark et al, 55 N.J. 305:

> "The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record."

Lyons Farms then added this guiding principle (55 N.J. at P. 307):

> "Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue in these cases: Did the decision of the local board represent a reasonable exercise of discretion on the basis of evidence presented? If it did that ends the matter of review both by the Director and and by the courts . . ." (Emphasis Added)

The Director will not, therefore, substitute his judgment based upon his opinion of the various aspects of the appeal relating to the applicant's varied exterior appearance, relative desirability of one site as opposed to another, location, service to local citizens, the generation of tax revenues, zoning, traffic flow, etc., in the absence of a clear abuse of discretion, which I do not find.

The individual members of the municipal issuing authority are uniquely qualified to review and make appropriate sensible findings in these areas, by virtue of residence in the jurisdiction. There has been nothing presented by appellant to suggest that, in the selection process, the Council failed to consider these various factors.

The grant of a license is not a final definitive determination. It is conditioned upon compliance with all relevant municipal, county and state ordinances which may affect the particular license or location; whether or not specifically conditioned by the resolution awarding the license. However, it does constitute a final disposition of all factors referable to the Alcoholic Beverage Law, for which I find no basis to recommend reversal of the Committee's action.

The failure to make Findings of Fact at the time of the award was admitted by the Township in its Answer. It scheduled a special meeting for that purpose, and on December 5, 1978, adopted a Resolution to cure this oversight. There is no evidence that this failure was occasioned by a sinister motive. I find, as a fact, that it was an oversight which, when called to its attention, was corrected by the Council, thereby curing any possible defect prior to the de novo hearing.

The appellant has not established that the action of the Council was erroneous and should be reversed, as required by N.J.A.C. 13:2-17.6. Accordingly, I recommend that the action of the Council in granting the license to the Weiss' be affirmed, and that the appeal be dismissed.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the appellant pursuant to N.J.A.C. 13:2-17.14.

In his Exceptions, the appellant incorporates the arguments advanced in its written summation dated June 8, 1979. In essence, he argues that the Township Council failed to satisfy its obligation to come forward and introduce testimony in support of its action in awarding a license to the Weiss'.

I find that the said Exception has no basis in law or fact. Factually, the action of the Township Council was supported by a Resolution setting forth reasons for its action. Transcripts of the meetings of the Council, wherein applicants for the license presented their proposals, were introduced into evidence. Also, numerous other exhibits and testimony at the de novo hearing in this Division constituted substantial record, reasonably adequate, to determine the issues herein.

Legally, the burden is on the appellant to establish that the action of the Township Council constituted unreasonable action or a clear abuse of discretion, and should be reversed. N.J.A.C. 13:2-17.6. The record before me provides sufficient, credible evidence to conclude that the award of the license to the Weiss' was not arbitrary, capricious or unreasonable.

Other arguments which may be gleaned from the appellant's summation and Exceptions include: the alleged denial of discovery, alleged adverse evidentiary rulings, inadequate notice under N.J.A.C. 13:2-17.8, and miscellaneous factual arguments interpretive or critical of various individuals who testified at the Division. These Exceptions have either been identified and correctly resolved in the Hearer's Report, or are immaterial to the determination sub judice.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's Report and the written Exceptions filed thereto by the appellant, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 5th day of December, 1979

ORDERED that the action of the Mayor and Township Council of the Township of Evesham be and the same is hereby affirmed, and the appeal be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO EIGHT (8) MINORS - ADMINISTRATIVE LAW JUDGE FOUND TESTIMONY OF SIX (6) OF THE MINORS TO BE INCREDIBLE - DIRECTOR UPON REVIEW FOUND THEIR TESTIMONY TO BE CONFLICTING, AMBIGUOUS, VAGUE AND OFTEN UNRESPONSIVE - LICENSEE FOUND NOT GUILTY - CHARGE DISMISSED.

In the Matter of Disciplinary Proceedings Against: Jay Bee's Bar, Inc. Buena Hammonton Road Buena Vista Township PO RD-1, Vineland, NJ Holder of Plenary Retail Consumption License No. 0105-33-008-001 issued by the Township Committee of Buena Vista Township	CONCLUSIONS AND ORDER S-12,172 X-44,847-G

Licensee, pro se.

Initial Decision Below

Richard L. Voliva, Jr., Administrative Law Judge

Dated: October 23, 1979 - Received: October 25, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision Below were filed by the parties pursuant to N.J.A.C. 13:2-19.6.

When there is direct testimony of six individuals that they consumed alcoholic beverages at licensed premises, it is highly unusual to conclude, as did the Administrative Law Judge, that each person's testimony was incredible and, in effect, a fabrication. However, on the record before the Administrative Law Judge, which I have reviewed, I too, find that the testimony of the minors was conflicting, ambiguous, vague and often unresponsive. Thus, I must concur with the finding in the Initial Decision.

What particularly concerns me is the absence of testimony by the two school officials who entered the licensed premises on the date charged. In addition, the events subsequent to the incident were not developed. Why the Division did not produce these witnesses who presumably would testify as to their observations at the licensed premises has not been explained in the record. Clearly, the testimony of these independent witnesses was critical in a determination of this cause.

To reiterate, having carefully considered the entire record below, including the transcript of the testimony and the Initial Decision Below, I concur in the findings and recommendations of the Administrative Law Judge and adopt them as my conclusions herein.

Thus, I conclude that the Division has failed to establish the charge by a preponderance of the credible evidence presented, and I shall dismiss same.

Accordingly, it is, on this 5th day of December, 1979

ORDERED that the licensee be and is hereby found "not guilty" of the charge alleged and said charge be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

I/M/O DISCIPLINARY PROCEEDINGS)
VS. JAY BEE'S BAR, INC.)

INITIAL DECISION
OAL DKT. #ABC 1160-79

APPEARANCES:

John J. Degnan, Attorney General of New Jersey, by Deputy Attorney General David Griffiths, on behalf of the Department of Law and Public Safety, Division of Alcoholic Beverage Control

Phillip C. Daniels, Esq., on behalf of Jay Bee's Bar, Inc.

BEFORE THE HONORABLE RICHARD L. VOLIVA, JR., ALJ:

Jay Bee's Bar, Inc. is the holder of License Number 0105 33 008 001 issued by the Township Committee of the Township of Buena Vista. By notice dated April 2, 1979, and pursuant to N.J.S.A. 33:1-31, the Division of Alcoholic Beverage Control preferred the following charges against the Licensee:

> "On April 27, 1978, 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 eighteen (18) years, viz., Sherri T _____, age 14, Karla T_____, age 15, Jean S_____, age 15, Jennifer R_____, age 15, Susan C_____, age 16, Terri M_____,14, Toni M_____,age 17, and allowed, permitted and suffered the consumption of alcoholic beverages by said persons in and upon your licensed premises: in violation of NJAC 13:23.1."

By letter dated April 17, 1979, the Licensee/Respondent entered a plea of not guilty and requested a hearing. The matter was heard on September 12, 1979.

The charges allege a violation of N.J.S.A. 33:1-31, specifically, that alcoholic beverages were served to and consumed by persons under the age of 18 years in violation of N.J.A.C. 13:2-23.1(a). The testimony established that on the morning of Arpil 27, 1978 seven persons under 18 years of age were present upon the licensed premises. However, there is a dispute regarding what occurred at the bar. The issues are whether or not these persons were served and consumed alcoholic beverages.*

The Division produced six of the seven persons it contends were under the age of 18, were served and consumed alcoholic beverages while in the Licensee's premises on the morning of April 27, 1978.

Toni L. Marchesani testified she was 17 years of age on the date in question. On that morning she walked her sister to Buena High School because she had missed the bus. At approximately 8:00 a.m. the other persons, which she identified as those named in the charges, decided to skip school. First they all went to a diner called the "Hot Kup" to get coffee or cigarettes, then they walked across the street to the subject bar. They went into the bar at approximately 8:15 a.m. to make a call. The man behind the bar asked if they wanted a drink, but they did not reply. He then put "beers and shots" on the bar, which he got from behind the bar. She drank a beer. They did not pay for the drinks. The girls then listened to the juke box and played pool. A lady came into the bar at about 9:00 a.m. and told them to leave because the bar was not open. Two of the girls left. Shortly thereafter, the assistant principal came into the bar and told them to leave. The witness identified Vincent Jones as the man she contends served the drinks. She had never been in the bar previously.

Terri S. Marchesani testified that she was 15 years of age on the date in question. She missed her school bus that morning and her sister walked her to school. She and her

*NOTE: Respondent acknowledged that Vincent Jones was an employee of John B. Troxler, albeit the testimony indicated Mr. Jones never tended bar. Although it is moot, I conclude that Mr. Jones's employment was such that it satisfied the requirements of N.J.A.C. 13:2-23.28. Mazza v. Gavicchic 28 N.J.Super. 280, reversed on other grounds 15 N.J. 498 (1954).

friends decided to skip school at about 8:00 a.m. They first went to the "Hot Kup" diner. They sat at a booth, but she did not remember what else took place. Next they went to the bar to use the phone. Sue asked the bartender for a drink. At first he said no, but then asked them what they wanted. She asked for a beer, which was served in a bottle. Each of the girls, except maybe Jean, was served a beer and Sue and Jennifer were served shots. The beer may have been "Miller" or "Bud." The bartender told them not to tell anyone. She did not remember if he asked their age or for identification. He told them they did not have to pay for the drinks, but they had to leave prior to 9:00 a.m., before the lady arrived. Later a lady came in and told them to leave. The witness stated she had been in the bar a couple of times previously and had been served at no charge; however, she could not recall when. These other incidents also took place in the morning, after which she had gone back to school. She also identified the alleged bartender.

Susan A. Karrish was the next witness. On the date in question she was 16 years old. She testified that she and Sherri Berry had arrived at school together at approximately 8:00 a.m. After "hanging around" they decided to skip school. They first went to the "Hot Kup: to use the phone to call for a ride. They then went to the "bar" to use the phone. Once inside she went up to the bar and asked for a drink and potato chips, all the girls were sitting at the bar. The bartender asked them if they wanted a drink. She asked for a shot and it was served to her from behind the counter. All the girls were served. She also identified Vincent Jones as the bartender. She further testified that the bartender gave the girls money for the juke box. The girls also played pool. She used the telephone, but could not get a ride. She and Jenny Ross left before 9:00 a.m. On the way back to school they were caught by a Mr. Taylor. She testified that she had been to the bar on one or two prior occasions and had been served, after which she would go to school. Upon questioning by the administrative law judge she did not know the name of the bar.

The next witness was Jean Schlegle, who was 15 years of age on April 27, 1978. She recalled being in the school parking lot and deciding to skip school with the other girls. She was positive that she did not go to the "Hot Kup." She testified that the girls arrived at the bar around 8:00 a.m. At first they all sat at a table for approximately 15 minutes. Then they sat at the bar. The bartender, without any requests from the girls, put drinks on the bar. He put a bottle of beer and a styrofoam cup in front of her. He made no request for any identification. She did not drink the beer but the rest of the girls did drink beers and shots. They then played pool. On cross-examination she recalled a cleaning lady entering the bar and wiping the counter. She was unable to identify any of the women in the courtroom as the person who entered the bar on that morning.

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Mr. Taylor, the Assistant Principal, and Mr. Luisi, Director of Athletics, came into the bar and caught them. They walked back to school.

Karla Tronnello was 15 years of age on the date in question. She recalled the girls going straight to the bar. Some may have gone to the "Hot Kup" for cigarettes but she did not. They arrived at the bar at about 8:00 a.m. They sat at a table, played the juke box and talked. They were trying to get a ride. The bartender, who she identified as Vincent Jones, asked them if they wanted a drink. All of the girls except for Jean Schlegle said yes. The witness asked for a beer and he gave it to her. She said she did not have any money and the bartender replied that she did not have to pay for the drinks. They played pool. Sue and Jenny then left the bar. A lady came in and told the girls to leave. She was unable to identify anyone present in the courtroom as the same person. Mr. Taylor and Mr. Luisi came into the bar. The witness further testified that she had been at the bar on prior occasions with Sherri, Terri and Sue, and had been served. The bartender had told them not to tell anyone. She never asked why he was giving them free drinks.

The last witness for the Division was Sherri Berry, who was 14 at the time of the alleged incident. She recalled the girls decided to skip school. She and someone else went to the "Hot Kup" to get cigarettes and use the phone. They arrived at the bar at 8:15 a.m. She and Sue went to the phone. The others went to a table. The bartender gave them money for the juke box and the cigarette machine. They then went to the bar and without any questions being asked he served all of them beers and asked if they wanted anything else. She and Sue asked for whiskey and were served shots. They also played pool. Later Mr. Taylor came in and caught them.

Vincent Jones testified on behalf of the respondent. He stated that he had known Mr. Troxler, the owner of Jay Bee's Bar, Inc., for 10 or 15 years. A couple of years before the incident he approached Mr. Troxler about renting a room that was located off of the bar. Mr. Troxler rented the room to Mr. Jones for $48 per month and additional services. The additional services consisted of Mr. Jones cleaning up the bar each morning, which takes approximately two to three hours, seven days per week, and being on the premises during the late night/early morning hours for security purposes. Mr. Jones finishes his morning work between 8:00 and 9:30 a.m. At the time of the incident Mr. Jones was self-employed as a painter, he is presently employed by the Buena Board of Education. The witness further testified that Mr. Troxler's residence is in the same building. Mr. Troxler generally leaves for work about 6:30 a.m.

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Mr. Jones stated that he has never tended bar for Mr. Troxler, and has never been asked to do so. As far as the bar is concerned, the beer is kept in a walk-in box that is locked up when the bar closes at night. All the liquor is locked up underneath the counter to the side of the bar. Mr. Jones stated he has never had keys to these locks, and that only Mr. Troxler and the barmaid had keys. The beer and liquor are always locked up when he begins work in the morning.

Mr. Jones testified that on April 27, 1978, as was his custom, he first cleaned up the yard in front of the bar. He then took the trash through the bar and out the back door. At that point he heard the door at the front of the bar slam shut. He stated that occasionally the door does not close tightly and lock. When he came back into the bar he saw the girls. He told them they could not stay in the bar. They said they wanted to make a phone call. Some of the girls were sitting at a table on the right side of the bar. He continued to clean up the bar area. Approximately five to ten minutes later the barmaid, identified as Jean (who was present in the courtroom) came into the bar. He then went into his room. It was Jean's habit to arrive at the bar about 9:00 a.m. She unlocked the cabinets and put the liquor on the shelves. She would also open the cash register. On the morning in question, Jean went to his room to advise him that the "principal" was there and wanted to speak to him. He spoke with the "principal" who asked him if he knew the girls were under age and to do him a favor and keep them out of the bar. The girls did play the juke box and pool for a short period of time. He stated that he was not requested to and did not serve the girls any alcoholic beverages of any kind or anything else, as he was unable to do so. He testified that he had seen several of the girls on one or two occasions a couple of weeks earlier. At those times they came into the bar, made a phone call and waited for a car to pick them up. On one occasion he gave them change out of his pocket for a dollar bill for the cigarette machine. At no time did he serve them any drinks. On cross-examination Mr. Jones testified that he occasionally drank at the bar in the evening. Mr. Troxler always closes the bar, puts away the beer and liquor and locks the cabinets.

Delores Jean Anderson was the next witness presented on behalf of the respondent. She had been in the courtroom for the duration of the hearing. In April of 1978 she was employed as a barmaid by Mr. Troxler, and had been in that position for approximately five years. She left that position in June, 1978. She currently works for a pillow manufacturer, where she has been employed for the past 14 months. On the morning in question, she was on her way to Vineland, New Jersey to the Offices of the Division of Motor Vehicles. As she passed by the bar, she noticed

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the door was open. Because this was unusual she stopped at the premises. Upon entering the bar, she observed four girls. She later learned that there was an additional girl in the bathroom. Vincent Jones was in the back of the premises. She asked Mr. Jones what was happening and he advised her that the girls were making a phone call. She told the girls to leave. Shortly thereafter, two men came into the bar, one was wearing a high school jacket. They talked to Vincent, after which they told the girls to go back to school. One girl had been hiding in the dining room after coming out of the bathroom and Ms. Anderson told her to leave. The bar usually opened at 10:00 a.m. Sometimes Ms. Anderson arrived at 9:00 a.m. in order to meet suppliers, otherwise she generally arrived close to 10:00 a.m. On the morning in question she observed no bottles or cups of any kind on the bar or on any of the tables. Only ashtrays were on the counter. She further testified that only she and Mr. Troxler had keys to the walk-in box where the beer was kept and the cabinets under the side of the counter where the liquor was stored. Each morning she would unlock the locks, take the liquor from under the counter and put it on the shelves behind the bar. She stated that all the alcoholic beverages were under lock and key each and every morning when she came to work. Also, there was a cooler under the counter of the bar for beer, however, this machine was not working at that time and there was no beer in the cooler. She would finish work at about 7:00 p.m. when Mr. Troxler would take over the bar.

Minnie Day was the next witness. She was and is a close friend of Ms. Anderson, her next door neighbor. Because she was unable to work, it was her custom to go with Ms. Anderson to Jay Bee's Bar on a regular basis for company. She was there almost every day. On the morning in question she was riding in her own car because Ms. Anderson had to go to the Division of Motor Vehicles prior to work. When she arrived at the bar that morning she observed several "kids" leaving the bar. They were followed by two men, one of whom had on a blue school jacket. She was surprised at seeing the girls leaving the bar. Ms. Day stated she questioned Ms. Anderson concerning the girls and that Ms. Anderson had told her the same story as she had testified to earlier in the hearing. Ms. Day testified that she observed no liquor, bottles, or glasses on the bar. Further, she observed Ms. Anderson unlock the various locks and put the liquor out later that morning. She also stated the liquor was kept in boxes in the cabinet under the side of the bar and that both the liquor and the beer were under lock and key every day.

Jacob Haversham, Jr. testified on behalf of the respondent. I have disregarded his entire testimony.

The last witness on behalf of the respondent was its president and owner, John B. Troxler. He testified that he was not present when the incident occurred and had no direct knowledge of the facts. At his direction the bar opens at 10:00 a.m. every morning. On the date in question Ms. Anderson was employed as his barmaid and only she, other than himself, had keys to the beer and liquor. He closes the bar every night. All the beer was kept in a walk-in cooler at night and all the liquor was kept in boxes in a cabinet under the side of the bar. His procedure was to lock the walk-in cooler and the liquor cabinet. The locks are padlock type locks with keys. He leaves no bottles on the bar at night. There is a cooler under the bar which was broken on the date in question and contained no beer. He leaves the premises at about 6:30 a.m. to go to work in Vineland. He takes over operation of the bar about seven-seven-thirty p.m. Vincent Jones was employed by Mr. Troxler to clean up the bar every morning. Mr. Jones was never a bartender for him and did not have any keys to the alcoholic beverages. Mr. Troxler further testified that he keeps a daily inventory of the alcoholic beverages kept on the premises. It was his opinion he would be able to tell if there were a loss of six to seven bottles of beer. During the last two years there have been no such losses.

In disciplinary proceedings against liquor licensees the charges must be established by a preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 73 (1956); Freud v. Davis, 64 N.J. Super 242 (App. Div. 1960). The proofs presented by the parties in this matter concerning the delivery and consumption of alcoholic beverages are diametrically opposite. In order to overcome this apparent obstacle I have thoroughly evaluated the credibility of the witnesses. I was substantially more impressed with the testimonial candor of the witnesses presented on behalf of the respondent. The testimony consisted of definite recollections of the events that occurred on April 27, 1978, and was corroborated on all critical factors. It was more believable than that offered by the Division. I have considered all of the arguments made by the Deputy Attorney General concerning the credibility of the testimony on behalf of the respondent and find the arguments to be without merit. The testimony of the six witnesses presented on behalf of the Division was unconvincing. It consisted of vague recollections and basic contradictions as to what transpired inside the bar. The demeanor of the witnesses appeared to be less than candid, even though all juvenile proceedings had been completed prior to the hearing.

In addition, the Division has not presented sufficient credible evidence to establish the charges. Given the stated weaknesses in the Division's case, significantly more would be required in order to meet the burden of proof, even absent a defense by the respondent.

Therefore, after consideration of the entire record in this matter, I FIND that:

1. Jay Bee's Bar, Inc., is the holder of License No. 0105 33 008 001 issued by the Township Committee of the Township of Buena Vista.

2. Vincent Jones is an employee of the respondent.

3. On April 27, 1978, seven persons under the age of eighteen (18) entered upon the premises while Vincent Jones was cleaning up the bar.

4. The seven minors used the telephone, listened to the juke box and played pool.

5. The testimony presented on behalf of the respondent was significantly more credible than that presented on behalf of the Division.

6. Vincent Jones did not serve or allow the seven minors to consume alcoholic beverages in violation of N.J.A.C. 13:2-23.1(a).

7. The Division did not meet its burden of proof to establish the truth of the charges by the preponderance of the credible evidence.

It is, therefore, adjudged that the charges against Jay Bee's Bar, Inc. have not been proven by a preponderance of the credible evidence.

Therefore, I ORDER that the charges against Jay Bee's Bar, Inc. be dismissed. This Initial Decision shall not become final until forty-five (45) days after the effective date hereof, unless the agency head acts to affirm, modify, or reject same during the forty-five (45) day period, N.J.S.A 52:14B-1 et seq. and N.J.S.A. 52:14F-1, et seq.

I HEREBY FILE with Joseph H. Lerner, Director, Division of Alcoholic Beverage Control, my Initial Decision and the record in these proceedings.

Joseph H. Lerner
Director