

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 2379

December 8, 1980

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - FACES, INC. v. WEST ORANGE.
2. DISCIPLINARY PROCEEDINGS (Orange) - ALLOWED, PERMITTED AND SUFFERED LEWD PERFORMANCE UPON LICENSED PREMISES - LICENSE SUSPENDED FOR 30 DAYS.

issued by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange for the 1979-80 license term to Faces, Inc., t/a Creation for premises 414 Eagle Rock Avenue, West Orange, be and the same is hereby suspended for ten (10) days commencing 2:00 a.m. on Tuesday, March 4, 1980 and terminating 2:00 a.m. on Friday, March 14, 1980.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

FACES, INC.,)	<u>INITIAL DECISION</u>
t/a Creation,)	OAL DKT. NO. ABC 4255-79
)	AGENCY DKT. NO. 4393
Petitioner,)	Mun. Rev. #7447
)	
VS.)	
)	
MUNICIPAL BOARD OF ALCOHOLIC)	
BEVERAGE CONTROL OF THE TOWN OF)	
WEST ORANGE,)	
)	
Respondent)	

Counsel for Petitioner: Maurer and Maurer, Esqs., by Barry D. Maurer, Esq.

Counsel for Respondent: Matthew J. Scola, Esq.

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

This is an appeal to the Director of the Division of Alcoholic Beverage Control by Faces, Inc., t/a Creation from a decision rendered by the Municipal Board of Alcoholic Beverage Control of the Town of West Orange on July 23, 1979 and, according to the notice of appeal, embodied in a resolution and order dated August 7, 1979 which suspended petitioner's plenary retail consumption license #0722-33-017-001 for ten days, effective September 1, 1979, for the unlawful sale of alcoholic beverages to a minor of 17 years of age on April 7 and 8, 1979 in violation of N.J.A.C. 13:2-23.1(a).

The Director, by order dated August 15, 1979, stayed the order of suspension pending the determination of the appeal. The matter was filed as a contested case on October 1, 1979 and was scheduled for a hearing on November 20, 1979.

On November 19, 1979 I received a message that counsel for the petitioner had telephoned and advised that both sides had agreed to submit the case to me on the transcript of the hearing before the municipal issuing authority. Counsel for the petitioner asked for the right to submit a written memorandum in lieu of oral summation based on the record within ten days.

On November 20, 1979, I wrote both counsel and granted them the right to serve and file legal memoranda within ten days. I requested them, in order that I have a complete record, to forward me the transcript of a prior hearing of proceedings on a charge of serving another minor which counsel for the respondent, at the outset of the July 23, 1979 hearing, indicated was tried about a month before. He stated his adversary told him the defense would be the same, that petitioner's counsel had introduced the security precautions in the prior matter and that he had represented to him that the testimony on that point would be the same. Counsel for the petitioner stated below that counsel wished to have admitted in the proceedings below the testimony which had been recorded under oath at the prior hearing and which had been transcribed, as if it were given by the witnesses under oath at the hearing of the instant matter.

I concluded my letter by asking for a copy of the resolution appealed from.

On December 14, 1979 I wrote counsel and asked if I might hear from them with respect to my letter of November 20, 1979. To date, January 2, 1980, I have not heard from counsel. I therefore will now close the record and proceed with my initial decision. This matter should linger no longer, the suspension having been stayed by the Director on August 15, 1979 and counsel having had more than reasonable and adequate time to furnish me with what I requested. Additionally, my further review of the transcript of July 23, 1979 convinces me that the record is complete and in such a posture as to enable me to write my decision. *

The first witness was Phillip Scroi, III. He testified for the petitioner, out of order, with the consent of the respondent. He stated that he had testified at the prior hearing to the procedures which he, as the manager of security for Faces, employed in the area of age identification of people who sought to gain admission to the premises. He stated he recalled the evening of Saturday, April 7, 1979. He was on duty. He said the procedures which he had previously testified to concerning checking of age and identification were employed by him and his staff on the evening of April 7, 1979.

Barbara Kennedy was the respondent's first witness. She testified that she was seventeen years old and that she was that age on April 7, 1979. She stated she drove a Datsun 510 to Faces on April 7, 1979 accompanied by Marsha Levine, also seventeen, arriving at about 10:00 P.M. The man at the door checked her for proof when she entered. The proof she had was the temporary license of her sister, Debbie, who was nineteen at the time. She showed them the license. No one asked her for any other proof. No one asked her to sign any kind of a statement that she was of age.

The witness testified that Marsha had the license of a girl from Woodbridge and that no one asked her to sign any kind of a statement.

Ms. Kennedy stated that at first she had an iced tea with liquor in it and that later on in the night she had shots of Jack Daniels and beer. While at Faces the witness met Mark Porrizzo whom she knew. She had the shots and the beer with him.

*On January 7, 1980 a memorandum dated January 3, 1980 together with copies of certain documents was received from Matthew J. Scola, Esq., attorney for respondent. My decision had been written and was being typed. The material is out of time and will not be considered.

OAL DKT. NO. ABC 4255-79

She left Faces, she guessed, when it closed and she assumed she was very drunk. While she was driving home with Porrazzo with her she was involved in a car accident on Eagle Rock Avenue.

On cross-examination the witness identified a copy of a two page statement that she said she wrote on June 13, 1979. It was marked D-1 for identification.

She testified that she had a specific recollection of things that happened once she got to Creations on April 7, 1979. She had fake identification as to her age in the form of a temporary driver's license that belonged to her sister, Deborah, who was nineteen years of age.

Counsel for petitioner asked that a two page police accident report be marked for identification. It was marked as D-2.

The witness said she also had her own driver's license. Counsel referred her to the police report wherein, according to counsel, the officer indicated he recovered from her handbag a temporary duplicate driver's license issued to Barbara Kennedy who the police officers stated was twenty years old and that she also had in her possession an application for a duplicate driver's license issued to Deborah Kennedy and a birth certificate for Deborah. This refreshed her recollection and she said, "it was in my wallet". She said she took the temporary duplicate driver's license and the application for the duplicate from Deborah without her consent.

Counsel referred the witness to her statement, D-1. She stated that she bought Marsha and herself a drink. This was the iced tea which contained four different kinds of alcoholic beverages. The witness said it contained rum, vodka, and two other kinds of alcoholic beverages. They went to the dance floor where they had a few more iced teas. She also had the shot and the chasers with her friend Mark Porrazzo.

A Board member, Mr. Bini, asked the witness how much the iced teas cost and whether she remembered paying for any of them herself. She answered she thought they cost \$2.50 each.

Another member, Mr. Spinelli, asked her whether on April 7, 1979 she was asked to supply proof at the door. She answered, "yes". She showed them the duplicate driver's license.

Mark Porrazzo testified he met Barbara Kennedy at about 12:30 A.M. on April 8, 1979 at Faces. When he saw her she had beer. He was with her until 2:00 A.M. They had shots and Barbara had a few shots. The witness said he left with her. She was drunk when she left. After he left he got into an accident on Eagle Rock Avenue.

On cross-examination counsel for petitioner asked that a one page statement of Mark Porrazzo dated April 13, 1979 be marked for identification as D-3. It was marked. Shown a copy of the statement, the witness said it seemed to be a true copy of what he signed under oath. Actually, he marked it because his left wrist was in a cast. The witness admitted his statement referred to Barbara drinking a beer, although he did not know how

OAL DKT. NO. ABC 4255-79

many she drank, and not to her drinking shots of liquor. The witness stated the truth was what he testified to at the hearing, namely, when he saw her, she was drinking a beer and later they drank a few shots.

The final witness was Rosemary Gibbons. She testified to nothing relevant to the issue involved in the instant matter.

Both counsel rested their respective cases.

In summation, counsel for the petitioner stated that he had no proof in the form of a writing signed by the individual underage person who claims to have been served at the premises, which indicated that she swore under oath that she had demonstrated credentials showing she was 18 years of age or over, and that she was the person referred to in the credentials." He referred to the previous matter involving a similar charge and the testimony as to the method Faces employed to check age identification at the door. How people were admitted, "if it were a big crowd two people would check at once, what Faces looked for, "what was listed. The signs that were posted which advised people."

Counsel for petitioner stated that the Board was dealing with one issue, namely, "was a minor served an alcoholic beverage in that place, that night. I think the record based upon the evidence says yes."

Following a brief summation by counsel for the respondent the Board went into executive session and returned with a unanimous decision to give a ten day suspension for service of alcohol to a minor, commencing September 1, 1979. The meeting was adjourned.

Based upon my review of the transcript of the proceedings on July 23, 1979 I FIND the following facts:

1. That Faces, Inc., t/a Creation, is the holder of plenary retail consumption license number 0722-33-017-001.
2. That Barbara Kennedy was a patron of Faces, Inc., t/a Creation on April 7, 1979 and April 8, 1979, arriving at Faces at about 10:00 P.M. on April 7, 1979 and leaving on April 8, 1979 at about 2:00 A.M.
3. That on April 7, 1979 and April 8, 1979 Barbara Kennedy was a minor of the age of seventeen.
4. That Barbara Kennedy gained admittance to Faces on April 7, 1979 by showing the man at the door a temporary driver's license belonging to her sister, Deborah, who was nineteen years of age.

GAL DKT. NO. ABC 4255-79

5. That no one in authority at Faces asked Barbara Kennedy for any other proof.
6. That no one in authority at Faces asked Barbara Kennedy to sign any kind of a statement that she was of age.
7. That on April 7, 1979 and April 8, 1979, while a patron at Faces, Barbara Kennedy bought, was served and consumed alcoholic beverages, namely iced teas which consist of rum, vodka and two other kinds of alcoholic beverages as well as shots of Jack Daniels whiskey and beer.
8. That Barbara Kennedy was drunk when she left Faces at about 2:00 A.M. on April 8, 1979 from the alcoholic beverages that she had bought, was served and consumed over a period of approximately four hours at Faces.

In a matter such as this, my function is to make the necessary factual and legal determinations on the record before me. I must abide by the municipality's decision so long as its exercise of judgment and discretion was reasonable, Fanwood v. Rocco, 33 N. J. 404, 414 (1960).

In the instant matter, in my judgment, the decision of the respondent Board was reasonable. The charge is amply supported by the evidence. From the testimony of Barbara Kennedy buttressed by that of Mark Porrazzo and the comments of petitioner's counsel on summation in the transcript which I have reviewed and from which I have found the necessary facts, it is abundantly clear that the petitioner violated N.J.A.C. 13:2-23.1(a) which states that

"No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly to any person under the age of 18 years, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises."

and N.J.S.A. 33:1-77 which states that

"Anyone who sells any alcoholic beverage to a minor is a disorderly person; provided, however, that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the minor falsely represented in writing that he or she was 21 years of age or over, (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be 21 years of age or over, and (c) that the sale was made in good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually 21 years of age or over." Please see, however, N.J.S.A. 9:17B-1 et seq.

Please also see the Special Note concerning the defense provided by N.J.S.A. 33:-1-77 which is set forth at the conclusion of instructions on disciplinary proceedings in the appendix to the rules and regulations of the Division of Alcoholic Beverage Control, Title 13, Subtitle B, N.J.A.C. The Special Note reads:

"In disciplinary proceedings involving alleged sale of alcoholic beverages to a minor in violation of N.J.A.C. 13:2-23.1, the defense provided by N.J.S.A. 33:1-77 is available to the licensee. However, to establish the defense, it must affirmatively appear (a) that the minor falsely represented himself in writing to be of age; (b) that the minor's appearance was such that an ordinary prudent person would believe him to be of age; and (c) that the sale was made in reliance upon such written representation and appearance and in the reasonable belief that the minor was of age. Hence, it is not a defense that mere verbal inquiry may have been made as to the age of the minor or that the minor had verbally misrepresented his age or that the minor had displayed some document (such as a driver's license, county clerk identification card, birth certificate, or any other similar document) which represented his age as 18 or over. The representation in writing required by the Alcoholic Beverage Law is a writing made by the minor at or prior to the time of sale or service. Such writing must be signed by the minor in the presence of the licensee or his employee and one in which the minor gives his name, address, age, date of birth and, by signing the writing, makes a statement that he is making the representation as to his age to induce the licensee to make the sale. After the writing has been signed, the licensee should require that the person signing the representation adequately identify himself as that person and thus affirmatively avoid the acceptance of these representations from persons using fictitious names, addresses and ages. The signed representation should then be retained by the licensee."

Reference should also be made to State v. Conner, 149 N. J. Super. 319 (Mun. Ct. 1977).

Accordingly, I affirm in the decision, resolution and order appealed from, and I ORDER that the Director's order of stay of August 15, 1979 be vacated and I further ORDER that the plenary retail consumption license of Faces, Inc., t/a Creation, numbered 0722-33-017-001 be suspended for a period of ten days.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

2. DISCIPLINARY PROCEEDINGS - ALLOWED, PERMITTED AND SUFFERED LEWD PERFORMANCE UPON LICENSED PREMISES - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against	:	
	:	
	:	CONCLUSIONS
Redwood Cocktail Lounge, A Corp.	:	
18 So. Essex Avenue	:	AND
Orange, New Jersey	:	
	:	ORDER
Holder of Plenary Retail Consumption License No. 0717-33-055-001 issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange.	:	S-12,318
	:	X-42,430-F
-----	:	
Ned M. Rosenberg, Esq., Attorney for Licensee.	:	

Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

DATED: January 10, 1980 - Received: January 11, 1980

BY THE DIRECTOR:

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

Having carefully considered and assessed the entire record herein including the transcript of the testimony, the exhibits and the Initial Decision, I concur with the findings and conclusions of the Administrative Law Judge and adopt them as my conclusions herein.

Accordingly, I find the licensee guilty of the subject charges, set forth in the Initial Decision.

Accordingly, it is, on this 14th day of February, 1980,

ORDERED that Plenary Retail Consumption License No. 0717-33-055-001 issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange to Redwood Cocktail Lounge, A Corp. for premises 18 So. Essex Avenue, Orange, be and the same is hereby suspended for thirty (30) days commencing 2:00 a.m. on Monday, March 3, 1980 and terminating 2:00 a.m. on Wednesday, April 2, 1980.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

JOSEPH H. LERNER, DIRECTOR
OF THE DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,

COMPLAINANT

V.

REDWOOD COCKTAIL LOUNGE,
A CORP.,

RESPONDENT

INITIAL DECISION

OAL DKT. NO. ABC 4602-79

AGENCY DKT. NO. S12,318X 42430F

APPEARANCES:

Charles J. Mysak, Esq., Deputy Attorney General, for the Complainant

Ned M. Rosenberg, Esq., Friedman and Rosenberg, Esqs., for the Respondent

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

By notice dated August 8, 1979 the Director of the Division of Alcoholic Beverage Control sought to suspend or revoke license number 0717-33-055-001 held by the Redwood Cocktail Lounge, A Corp. based on the following charge:

"On Saturday, March 3, 1979, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you allowed, permitted and suffered a female person while performing on your premises for entertainment of your customers and patrons, to engage in conduct on your licensed premises of a lewd, indecent and immoral manner, and to commit and engage in acts, gestures and movements of and with her hands, legs and other parts of her body, in a manner and form having lewd, indecent and immorally suggestive import and meaning, in violation of N.J.A.C. 13:2-23.6."

Redwood pleaded not guilty to the charge by letter dated August 16, 1979 to the Director from Mr. Rosenberg, its counsel. The matter was filed as a contested case on October 18, 1979 and was heard and concluded on December 7, 1979.

At the hearing it was stipulated that the Redwood Cocktail Lounge located at 18 South Essex Avenue in Orange was being dealt with. All witnesses except William H. Brooks, the licensee, were sequestered.

OAL DKT. NO. ABC 4602-79

The first witness for the Director, Inspector W.M., testified that on Saturday March 3, 1979 he investigated allegations of a lewd dance by a go-go girl at the Redwood. He entered the premises about midnight and stated that as he entered there was an irregular shaped bar located to the right. Near the end of this bar located to the left was another barroom with an oval shaped bar. It was to the latter room that he went and sat near the end of the bar, close to the dance stage where he observed a female dancing. She was in her early twenties and wore a two piece dark purple bikini outfit. She had curly hair, was about 5 feet 7 and weighed about 125 to 130 pounds.

The witness said he observed the girl to be dancing on a stage to the right of the bar. He saw her remove the upper portion of her costume, her bra, and completely expose her breasts. She danced about the stage with her breasts bouncing and completely exposed to the patrons who numbered about twenty. The patrons yelled, "Take it off". During her performance the girl laid down on the dance stage and removed her lower costume, the panty portion. She threw the panty to the ground and she proceeded to grind her lower body about. She then moved up into a squatting position and placed and inserted an egg into her vagina. She stood up and danced with the egg in her vagina. A short time later she lay back down and moved up into a squat and slowly released the egg, catching it with her hand.

The patrons were noisy, yelling at her and, during the dance, they gave her several dollar bills. After the girl finished the performance, she put her costume on and left the stage. Her performance lasted about 30 minutes.

At about one o'clock the dancer returned to the stage. She again performed in the manner which the witness previously described. The patrons again gave her single dollar bills. One patron placed a dollar bill inside her costume when she had the costume on. The stage was close to the bar and the patrons seated at the bar were within close reach of the dancer.

During her second performance, after she had removed the egg from her vagina, she asked the barmaid, Bernice Ellis, for a glass. Mrs. Ellis was on duty behind the bar during the time that the witness was on the premises.

After the dancer removed the egg during her second performance she was given a glass by Mrs. Ellis. The dancer broke the egg and let it run into the glass.

At this point the witness had left his seat at the bar and was sitting at a table with agent P.M. and an unidentified male. The dancer came over to the table and stood on it. She stood right in front of the unidentified male's face and had her vagina area close to his mouth. The patrons yelled, "Eat it" but the patron did not respond to the pleas of the other patrons and the dancer moved back onto the stage and completed her performance.

OAL DKT. NO. ABC 4602-79

After she completed her performance at about 1:30 A.M. the two agents identified themselves to Mrs. Ellis and also to Barbara Jackson who was the barmaid at the bar in the front portion of the premises. They moved also to the go-go dancer who wanted to use the ladies' room. Mrs. Ellis informed them of the owner, William H. Brooks, to whom the witness spoke although he said P. M. spoke more to Mr. Brooks, asking him for the application and the employees list. The latter is called El-41A and neither of the barmaids' names were not on the list. Mr. Brooks was advised of the violation. He was also advised concerning the lewd activity which had taken place. P. M. carried the bulk of the conversation with Mr. Brooks.

David L. Valentine, the manager, was also advised of the lewdness violation.

Referring again to the dancer who asked to use the ladies' room and was given permission to do so, the witness said that during the time they were obtaining information from the employees and Mr. Brooks, the dancer evidently sneaked out of the premises. Mrs. Ellis did not seem to know who the dancer was.

On cross-examination, the witness said during the course of the investigation he had some beer. He said the barmaid could observe the entire barroom from the bar. He said most of the patrons were male. He believed there were women there also. He stated the crowd was not violent. It just responded to the dancer. He did not obtain the names of any other patrons. Mrs. Ellis was present as the barmaid the whole time that the witness was in the back bar.

On redirect examination the witness said he believed Mr. Brooks informed them that he was not aware of what was taking place because he was not in the room. The witness did not see Mr. Brooks in the room, only Mrs. Ellis. When Mrs. Ellis was advised of the nature of the violation, she did not say that it was not so.

On recross examination the witness said the dancer asked to go to the ladies' room in the back bar where she danced. The witness said he did not just stand and watch the ladies' room door.

P.M. testified that he is an inspector employed by the Alcoholic Beverage Control Division of the State Police. He said on the morning of Saturday, March 3, 1979 he investigated the Redwood with Agent W. M. P. M. entered about 12:10 A.M., approximately ten minutes after W.M. He entered the first room with a C shaped bar to the right, tended by Barbara Jackson. He then entered another room to the left which had an oval shaped bar, tended by Mrs. Ellis. He sat at the front of the bar near the go-go stand. He observed a female go-go dancer on the stage. At this point W. M. was seated on the other side of the bar. There were approximately 20 patrons. The dancer was already on the stage when he entered. He ordered a glass of orange juice from the barmaid. He described the dancer's first performance in a manner slightly different from W.M.'s description but, in no way, essentially different.

OAL DKT. NO. ABC 4602-79

The witness said he observed patrons give the dancer several dollar bills during the first performance. She departed the stage at about 12:30 and returned about 20 minutes later. He described her second performance substantially as W. M. had done and added that he saw the barmaid, Bernice, observe the dancer doing her second performance completely nude. The patrons were shouting, "Take it off", "Take it all off" and he saw them give the dancer dollar bills during her second performance also.

Toward the latter part of the second performance, the witness took a seat at a table, eight to ten feet from the stage. He was with W. M. and another unidentified male. The dancer was given a glass by Bernice, walked over to the table, broke the egg, stood over the table and placed her vagina in the face of the unidentified male. The patrons were yelling, "Eat it". The dancer returned to the stage and continued dancing. During both performances, the barmaid was behind the bar in a position to observe the dancer.

The agents then identified themselves to both barmaids, the dancer, the owner and the manager and advised them of the violation. The dancer said she wanted to go to the ladies' room and she was allowed to do so.

The witness said Mr. Brooks stated he was not aware that the performances described were taking place.

On cross-examination the witness said he wanted to question the dancer. He and W. M. left the door of the ladies' room unwatched. He stated Mrs. Ellis could have left the bar area because his back was turned toward her as he was facing the go-go girl.

The Director rested.

Edward L. Mercer testified he was a patron of the Redwood on Friday night, March 2, 1979 carrying over to March 3, 1979. He was in the back bar, to the left of the front bar, most of the time, arriving about midnight, staying until closing. It was rather crowded with men and women. There was a go-go dancer there that night. He recalled this particular evening because he was drinking with friends from the baseball team.

Mr. Mercer testified he noticed the go-go dancer dance but there was nothing unusual. She wore scanty attire, g-strings or pasties. At no time did he observe her dancing naked or performing any act that might be considered to be lewd. He said her attire might have been considered lewd by some people. He did not observe her lie down on the stage nor did he see anyone give her any gratuities. He saw her only on the stage.

On cross-examination the witness said the dancer wore go-go girls' g-strings, pasties. He said, "They're damn near nude, anyhow, when they come on the stage." She wore what go-go girls usually wear.

QAL DKT. NO. ABC 4602-79

The witness said while he was there he saw nothing he would consider offensive. He stated he saw no one pass a glass to the go-go girl.

David L. Valentine testified he is employed by Mr. Brooks and the Redwood Cocktail Lounge as manager of the lounge. He was so employed on March 2, 1979 to March 3, 1979. He stated the Redwood has go-go dancers on occasion. The direction he gives a go-go dancer when they first come in is that "we don't allow them to take off their clothes" and that they are to work for 30 minutes and be off for 30 minutes. He does not take their name, he gets them through the agency.

Mr. Valentine said he was present at the Redwood on March 2, 1979 and March 3, 1979. He worked both bars on the night in question, that is the front bar and the bar in the back room. He usually goes from the front bar to the back bar, usually about 15 minutes at the front and 15 minutes at the back. He was in the back bar while the go-go dancer was performing. For every show he guessed he was there at least 15 or 20 minutes. The girl was dressed with a top and the bottom, a bikini type, a little bra and little panties. She danced on a little movable stage, down about 8 feet from the bar. About 50 patrons were present. The girl was a regular go-go dancer. She just danced to music on the stage only.

About 1:40 A.M. the tall ABC agent asked him for the work sheet and the license.

Nothing out of the ordinary occurred that evening. He knew of no gratuities being given to the dancer. The latter made no requests of the barmaid Bernice who had been there all night.

On cross-examination the witness said he spent 20 minutes in the front and 20 minutes in the back until 2:00 A.M. From midnight until 2:00 A.M. there was approximately an hour he was not in the back.

He was aware that the establishment encountered difficulty with the ABC but he did not try to locate the go-go dancer.

When he was in the back room for 20 minutes he would closely watch the dancer, standing by the bar. He did not recall a glass on the stage.

The witness stated the taller agent did not advise him of the nature of the charges and he did not ask. Mr. Brooks informed him later in the day.

Bernice Ellis testified she was employed on March 2, 1979 and March 3, 1979 by William Brooks, the Redwood Lounge, as a barmaid. On the night in question she worked behind the back bar. There was a go-go dancer that night and about 50 or 60 people. When a dancer comes in, Mrs. Ellis shows them where to change.

QAL DKT. NO. ABC 4602-79

Mrs. Ellis testified the tall ABC agent used to be a patron of the Redwood. He arrived on March 3, 1979 about a half hour after his shorter partner who arrived about midnight. The shorter agent sat on the left hand side of the bar. He had several beers and then he switched to scotch. The tall one seated himself on the opposite side of the bar near the go-go stage.

The go-go dancer wore a bikini type bottom and a bra type top. She did not watch her perform. She never left the back bar that evening. The only request the dancer made of her was for a glass of juice during her break when she was sitting at the bar. She danced in a go-go cage on the left hand side of the bar. She did not dance elsewhere. The ABC agent did not discuss with her any possible charges or an ABC violation.

The witness said she saw the dancer leave the premises by walking right past the two ABC agents and out of the door in the front bar. The ABC agents were standing at the end of the back bar.

On cross-examination Mrs. Ellis said she glanced up at the dancer a few times. She said she did not know how many people were in the back bar on the evening of March 9, 1979. She had no reason to recollect.

The witness thought the dancer danced once after midnight for about 20 to 30 minutes. She shook and twisted. She supposed she crouched down but she did not know. She did not see her sit down on the stage.

Mrs. Ellis said the heavy set agent sat in one position all evening. She saw the taller agent standing by the go-go cage walk around to where the other gentleman was sitting. She served the heavy set agent four or five beers and two or three scotches on the rocks. She did not know by name, the people sitting on both sides of him nor what liquor they drank. The other agent had one orange juice.

The dancer took one break between midnight and 2:00 A.M. During her break she sat at the end of the bar and had a drink of orange juice. She left her glass on the bar. Mrs. Ellis said she did not see an egg. She said they do not have eggs in the bar. There was no egg in the bar on March 3, 1979.

At the conclusion of the evening the agents asked the witness what the name of the go-go dancer was. She said she did not know. At that time, the dancer was gone. She left her cage, went to the ladies' room, changed and departed without speaking to the agents. She had to pass the agents to get out the door.

William H. Brooks was the final witness. He is president and 98% stockholder of the Redwood Cocktail Lounge. He was at the Redwood the night of March 2, 1979 to March 3, 1979.

The witness stated that he has go-go girls occasionally, for special occasions. The girls come through the Lou Parks agency in New York. One does not get the name of the girl. They cannot promise any particular girl. A girl is sent for \$50.00 a night. He did not know the name of the girl who performed on March 3, 1979. He said you never get the girl's name, only a stage name.

OAL DKT. NO. ABC 4602-79

Mr. Brooks stated it was somewhat of a special occasion on the night in question. Redwood sponsors a softball team in a league with various other tavern sponsors. This was the beginning of the training season and March 3, 1979 was Redwood's night to host the players from some of the taverns, including some girls from a girl's softball team that Redwood also sponsors.

He said Mr. Valentine speaks to the go-go girls. He usually does not have to do so. The directions he gave Mr. Valentine to give the dancers is clothes on at all times and nothing vulgar.

At peak there were 60 to 65 patrons in the back room with about 10% women. After midnight, Mr. Brooks was situated in both the front and back portions of the premises. He said he was all over. He observed the go-go dancer dancing on the go-go stand. He said she was a very good dancer. She danced in no place except on the go-go stand.

Between midnight and 2:00 A.M. the witness said he was in the back bar approximately 45 minutes altogether. At the end of the night, at about 1:40 A.M., the tall agent identified himself and asked him if he knew what he had going on in the back room. The witness said he had a party going on and that he did not understand the agent's reference to the go-go girl. The agent told him the girl was dancing in a lewd, nude fashion. When they went into the back room he asked Mrs. Ellis where the go-go girl was and he was told she had gone. The witness said he then asked the agent what he was talking about. The agent stopped talking about it and asked to see his papers. Neither Jackson's nor Ellis' names were on the worksheet. No other charges were mentioned until after they started to do the paperwork. Mr. Brooks said the agent did not ask him the name of the go-go dancer.

On cross-examination the witness said he did not know the girl's stage name. He has telephone numbers for the agency and said it would be no trouble for him to get in touch with the agency for the identity of the particular dancer, if they kept records. He probably could have brought the girl to the hearing. He said the agent told him he had a violation in the back in the form of a girl dancing nude. He advised him of the nature of his concern. The witness said he questioned everybody and no one told him the girl danced nude or dispensed an egg through the means of her body. He was sure he spent at least 45 minutes in the back room the last two hours. At least an hour of that time he was not back there.

The hearing was closed.

It is evident that the resolution of the factual issues presented turns upon the credibility of the witnesses. The choice of accepting or rejecting the testimony of witnesses rests with the judge, the trier of the facts. A reasonable choice must be made, Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960).

QAL DKT. NO. ABC 4602-79

I have listened to the witnesses testify, have observed their demeanor, assessed their credibility and have reviewed the transcript of the hearing. I accept as credible the testimony of the Director's witnesses, W. M. and P. M., and I conclude that the Director of the Division of Alcoholic Beverage Control has proved his charge against the Redwood Cocktail Lounge by a preponderance of the believable evidence, Atkinson v. Parsekian, 37 N. J. 143, 149 (1962).

Factually, I FIND that:

1. On Saturday, March 3, 1979 for approximately 30 minutes from midnight to about 12:30 A.M., a female go-go dancer danced on a stage at the Redwood Cocktail Lounge in such a manner that, during her performance, she removed her bra and exposed her breasts to the patrons, that she lay down on the stage and removed the panty portion of her costume, that she ground her lower body about on the stage, that she moved into a squatting position and inserted an egg in her vagina, that she stood up and danced on the stage with the egg in her vagina, that she lay back down, moved up into a squat and slowly released the egg from her vagina, catching it with her hand.
2. At approximately 1:00 A.M. on March 3, 1979 the same go-go girl gave a second performance on the stage of the Redwood Cocktail Lounge that lasted about thirty minutes and during which she removed her bra and danced about the stage, that she lay down on the stage and removed her lower costume, that she danced nude, that she squatted and inserted the egg into her vagina, that she danced with it in her vagina, that she slowly released the egg from her vagina, catching it with her hand, that she asked the barmaid, Bernice Ellis, for a glass, that Bernice Ellis gave her a glass, that she broke the egg and permitted it to run into the glass, that she stood up on top of a table off the dance stage in front of a male patron with her vagina area right close to his mouth.
3. That during her performances the patrons yelled, "Take it off", passed her monetary gratuities and, during the second performance, while she stood on the table, the patrons yelled, "Eat it".
4. That Bernice Ellis was employed by William Brooks and the Redwood Cocktail Lounge on March 3, 1979 as a barmaid, and that she was present during both performances, that she observed the go-go dancer during her performances, that she responded to the dancer's request by giving her a glass during the second performance, thus aiding her in her act and that she took no measures to stop the dancer from performing in the manner previously found to be a fact but rather allowed and permitted her to so perform.

OAL DKT. NO. ABC 4602-79

5. That David L. Valentine was employed by William Brooks and the Redwood Cocktail Lounge on March 3, 1979 as manager, that for each performance by the dancer he was present for at least 15 or 20 minutes and that he allowed and permitted her to dance in the manner previously found to be a fact.
6. That on March 3, 1979 William H. Brooks was the president and 98% stockholder of the Redwood Cocktail Lounge, the employer of Bernice Ellis and David L. Valentine, that he paid \$50 for the services of a go-go dancer, that between midnight and closing he was in the back bar for about 45 minutes where the girl gave two performances and that he allowed and permitted the girl to perform in the manner previously found to be fact.
7. That at all times during the two performances Mrs. Ellis, Mr. Valentine and Mr. Brooks were agents, servants and employees of the Redwood Cocktail Lounge, a corporation, acting within the scope of their employment with the purpose of furthering their employer's business.

In my judgment, the charge of lewdness and immoral activity was amply supported by the evidence. In short, the dancer's performances were dirty exhibitions, revolting, lewd and immoral activity which the Redwood Cocktail Lounge allowed, permitted and suffered on its licensed premises. Bernice Ellis, the barmaid, was present the entire time the girl danced and she took no measures to stop the performances. It can reasonably be inferred that Mr. Valentine and Mr. Brooks were also both present while the girl danced for the erotic excitation of the patrons and that they did not move to stop her. Ellis, Valentine and Brooks allowed, permitted and suffered the dancer's lewd and immoral activity. Please see Davis v. New Town Tavern, 37 N. J. Super. 376 (App. Div. 1955), In re Club "D" Lane, Inc., 112 N. J. Super. 577 (App. Div. 1971).

Additionally, it is appropriate to cite In re Olympic, Inc., 49 N. J. Super. 299 (App. Div. 1958), cert. denied 27 N.J. 279 (1958), at page 305, for the proposition that "the licensee's responsibility is not dependent upon the doctrine of respondeat superior, nor upon his personal knowledge or intent or participation; he is not relieved even if the violations were contrary to his express instructions." And see N.J.A.C.13:2-23.28 which states that:

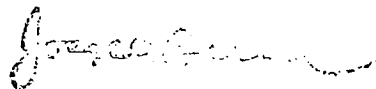
"In disciplinary proceedings brought pursuant to the alcoholic beverage law, it shall be sufficient, in order to establish the guilt of the licensee, to show that the violation was committed by an agent, servant or employee or the licensee. The fact that the licensee did not participate in the violation or that his agent, servant or employee acted contrary to instructions given him by the licensee or that the violation did not occur in the licensee's presence shall constitute no defense to the charges preferred in such disciplinary proceedings."

OAL DKT. NO. ABC 4602-79

In In re Club "D" Lane, Inc., supra, a 30 day suspension of a plenary retail consumption license was affirmed where the facts were that on January 14, 1969 two go-go dancers and on January 15, 1969 one such dancer supplied entertainment wearing transparent bibs and pasties covering only the nipples on their breasts. In the instant matter, although only one girl performed on one date charged, there were two performances in my judgment far more lewd and immoral than in In re Club "D" Lane, Inc. In my judgment, a suspension equal to that in Club "D" Lane should be imposed in the instant matter and I therefore ORDER that the license numbered 0717-33-055-001 of the Redwood Cocktail Lounge, A Corp. be suspended for a period of 30 days.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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



Joseph H. Lerner
Director