

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

BULLETIN 1870

August 8, 1969

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1. APPELLATE DECISIONS - BERNIE FELDMAN'S LIQUOR STORE, INC.
v. BAYONNE.

BERNIE FELDMAN'S LIQUOR)
STORE, INC.,)
Appellant,) ON APPEAL
) CONCLUSIONS
) AND ORDER
v.)
MUNICIPAL COUNCIL OF THE CITY)
OF BAYONNE,)
Respondent.)

Feinberg, Dee & Feinberg, Esqs., by William M. Feinberg, Esq.,
Attorneys for Appellant
James P. Dugan, Esq., by Nathan Zinader, Esq., Attorney for
Respondent Municipal Council
Frank J. Ziobro, Esq., Attorney for Bayonne Tavern Owners
Association and Bayonne Package Stores Assn.,
et als., Objectors
Samuel J. Davidson, Esq., Attorney for Hudson-Bergen Package
Stores Association, an Objector

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal challenges the action of the respondent Municipal Council of the City of Bayonne (hereinafter Council) which by resolution and order dated February 27, 1969 suspended appellant's plenary retail distribution license for "an indefinite period" effective March 3, 1969, for premises 454 Broadway, Bayonne. The resolution sets forth the following:

"WHEREAS, hearings were held by the Municipal Council of the City of Bayonne on the propriety of Alfred Tarasiewicz, Robert Salkowski and Richard Salkowski to be stockholders in Bernie Feldman's Liquor Store, Inc., the holder of Plenary Retail Distribution License No. D-2, doing business at 454 Broadway, Bayonne, New Jersey; and

"WHEREAS, the following determinations are hereby made by the Municipal Council of the City of Bayonne;

1. That 50% of the stock of the aforementioned corporation was conveyed to Alfred Tarasiewicz, 25% of the stock of said corporation was conveyed to Robert Salkowski, and 25% of the stock of the said corporation was conveyed to Richard Salkowski.

2. That said stockholders intend to operate the business of the said corporation under the tradename of 'Shop-Rite Liquors of Bayonne.'

3. That the operation of 'Shop-Rite Liquors of Bayonne' will be a business attended by concentrated advertisement of low-priced liquors for sale by 'Shop-Rite Liquors of Bayonne.'

4. That such marketing practices will result in a substantial increase in the sales volume of 'Shop-Rite

Liquors of Bayonne,' which will compound the already existent traffic and parking problem in the area of the operation of 'Shop-Rite Liquors of Bayonne.'

5. That such marketing practices will promote intemperance in the City of Bayonne.

6. That on October 31, 1968, Alfred Tarasiewicz and Robert Salkowski, on behalf of a corporation wholly owned by the aforementioned stockholders, to wit, 454 Broadway, Inc., filed an application for the transfer of Plenary Retail Distribution License of Bernie Feldman's Liquor Store, Inc., No. D-2.

7. That the aforesaid application did contain false statements in material respects pertaining to the beneficial interest of persons mentioned therein in other liquor licenses and in respect to a prior denial of an application by said Alfred Tarasiewicz for a liquor license in the Borough of Franklin, New Jersey.

8. That on October 7, 1968, Alfred Tarasiewicz filed another application, on behalf of himself and the other stockholders mentioned herein, for the transfer to them of the Plenary Retail Distribution License No. D-2 held by Bernie Feldman's Liquor Store, Inc.

9. That the aforesaid application of October 7, 1968, did also contain the false statements set forth in the application of October 31, 1968.

10. That the aforesaid stockholders do not qualify as stockholders of Bernie Feldman's Liquor Store, Inc., the holder of Plenary Retail Distribution License No. D-2, by reason of the statute made and provided for in such cases, and by reason of the Rules and Regulations of the Alcoholic Beverage Control Commission of the State of New Jersey.

11. That the following is considered in the best interest of the City of Bayonne:

"NOW, THEREFORE, BE IT RESOLVED, That the Plenary Retail Distribution License of Bernie Feldman's Liquor Store, Inc., License No. D-2, is hereby suspended for an indefinite period and until the aforementioned stockholders divest themselves of all of the corporate stock held by them in the said corporate license to Bernie Feldman's Liquor Store, Inc.; and, be it further

"RESOLVED, That this suspension shall be effective March 3, 1969."

In its petition of appeal appellant alleges that the action of Council was erroneous for the following reasons: (a) the Council lacked jurisdiction to conduct the hearing resulting in the suspension, (b) the Council lacked authority to suspend for the assigned reasons, (c) its action was unsupported by the evidence and was contrary to law, (d) no charges were served upon the appellant as required by R.S. 33:1-31, (e) the action of the Council was improperly motivated and resulted from pressure from local liquor dealers associations "to prevent the utilization of the name Shop-Rite in conjunction with the sale of alcoholic beverages in the City of Bayonne."

Council's answer denies the substantive allegations of the petition and sets forth in a separate defense that its action was "a reasonable exercise of discretion and a proper exercise of statutory jurisdiction in this matter."

Answers to the same effect were filed by Hudson-Bergen Package Stores Association and Bayonne Package Stores Association. The answer of Bayonne Package Stores Association was joined by nine individuals and Bayonne Tavern Owners Assn. as impleaded objectors.

Upon the filing of the appeal the Director entered an order staying the Council's order of suspension pending determination of the appeal.

This is an appeal de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for Council to present testimony under oath and cross-examine witnesses. However, since a critical jurisdictional issue was involved, no testimony was presented.

The facts which were established by stipulation of counsel and by the introduction of certain exhibits into evidence are as follows: The appellant is a plenary retail distribution licensee which has operated under this license for many years in this municipality. Its license was regularly renewed for the current licensing period.

On December 9, 1968 Robert Salkowski, Richard Salkowski and Alfred Tarasiewicz acquired the corporate stock of the appellant and, pursuant to Rules 11, 12 and 13 of State Regulation No. 2, duly published notice of said change and filed proof of publication with the City Clerk of Bayonne. Immediately thereupon, the Bayonne Package Stores Association and the Bayonne Tavern Owners Association made written requests of the Council for a public hearing to determine the qualifications of these new stockholders. On December 19, 1968 Council adopted a resolution fixing January 3, 1969 for a hearing on the question of the qualifications of the said stockholders. The said resolution reads as follows:

"WHEREAS, pursuant to the Rules and Regulations of the New Jersey Alcoholic Beverage Control Commission and the statutes made and provided for in such cases, notice was given to the Municipal Council of the City of Bayonne that on December 9, 1968, a change occurred in the stockholdings of Bernie Feldman's Liquor Store, Inc., a corporate holder of plenary retail distribution license No. D-2; and

"WHEREAS, formal objection to the qualifications of the transferee stockholders, Alfred Tarasiewicz, Robert Salkowski, and Richard Salkowski, having been filed with the City Clerk; now, therefore, be it

"RESOLVED, That this Council shall hold a hearing on the objections filed, on the third day of January, 1969, at 1:00 p.m. at the Council Chamber in City Hall, Avenue E and 30th Street, Bayonne, New Jersey; and be it further

"RESOLVED, That notice of said hearing be sent to the person or persons filing said objections and to the corporate stock transferees as aforesaid."

The hearing was held on January 3 over the objection of the attorney for appellant to both the jurisdiction of the Council over the subject matter proposed herein and to areas of inquiry pursued by counsel for the objectors. Specifically, appellant maintained that "as a result of the lack of the required statutory notice of these charges none of these charges (which are in any event immaterial) should be considered", citing R.S. 33:1-31. Following the said hearing Council adopted the aforementioned resolution which, as noted, "suspended for an indefinite period and until the aforementioned stockholders divest themselves of all of the corporate stock held by them in the said corporate license to Bernie Feldman's Liquor Store, Inc."

The attorney for Council argues that these proceedings

were not disciplinary proceedings against the license, but were merely proceedings brought to determine the qualifications of the stockholders who must qualify as original licensees for an original license as the new stockholders are not as yet considered as having been granted a license and, therefore, cannot be treated as licensees or having any interest in the license. It admits that neither the local issuing authority nor the Division of Alcoholic Beverage Control has jurisdiction over stockholders under R.S. 33:1-24. However, Council advocates that the authority to suspend the license of the appellant is embraced within R.S. 33:1-24 and R.S. 33:1-25. R.S. 33:1-24 in its applicable part provides:

"It shall be the duty of each other issuing authority to receive applications for such licenses as such other issuing authority is authorized to issue; to investigate applicants and to inspect premises sought to be licensed; to conduct public hearings on applications"

R.S. 33:1-25 states in its applicable part:

"In applications by corporations [for a license] the names and addresses of, and the amount of stock held by, all stockholders holding one or more per cent (1%) of any of the stock thereof, and the names and addresses of all officers and of all members of the board of directors must be stated in the application, and if one or more of such officers or members of the board of directors would fail to qualify as an individual applicant in all respects, except as to citizenship, residence or age, no license of any class shall be granted." (Under-scoring added.)

And further:

"... All statements in said applications required to be made by law or by rules and regulations shall be deemed material, and any person who shall knowingly misstate any material fact, under oath, in said application shall be guilty of a misdemeanor. Fraud, misrepresentation, false statements, misleading statements, evasions or suppression of material facts in the securing of a license are grounds for suspension or revocation of the license." (Underscoring added.)

It is abundantly clear, therefore, that these sections deal with applications for a new license or for a renewal of an existing license. They do not apply to instances where a change of ownership of stock or a transfer of stock takes place during the term of the said license.

Of course, Council is given broad powers under R.S. 33:1-35 to "make, or cause to be made, such investigations as he or it shall deem proper in the administration of this chapter and of any and all other laws now or which may hereafter be in force and effect concerning alcoholic beverages...." This section also authorizes the issuing authority to examine under oath any and all persons whatsoever and compel by subpoena the attendance of witnesses and the production of books, records, papers and documents of any person or persons. Under the authority of this section the Council was fully authorized to conduct the hearing on January 3,

1969, and obtain such evidence as it felt necessary in the investigation of the present status of the applicant's license.

However, once having determined that it had evidence which may form the basis of a disciplinary action to suspend or revoke the said license, it was required to proceed in the manner prescribed by R.S. 33:1-31. That section in its pertinent part provides:

"Any license, whether issued by the director or any other issuing authority, may be suspended or revoked by the director, or the other issuing authority may suspend or revoke any license issued by it, for any of the following causes:

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

* * * * *

g. Any violation of rules and regulations;

* * * * *

j. For any other cause designated by this chapter.

"No suspension or revocation of any license shall be made until a 5-day notice of the charges preferred against the licensee shall have been given to him personally or by mailing the same by registered mail addressed to him at the licensed premises and a reasonable opportunity to be heard thereon afforded to him."

The authorization in the aforementioned sections to conduct investigations and public hearings does not empower the local issuing authority to suspend or revoke a license without complying with the procedure outlined in R.S. 33:1-31 and State Regulation No. 16. There is no authority given to the local issuing authority to summarily suspend or revoke a license other than through the procedure as hereinabove set forth.

I therefore find that in the matter sub judice the appellant was not served with a specification of charges in disciplinary proceedings. Thus the appellant was not statutorily afforded due process and a fair opportunity to meet the said charges. The fact that witnesses were produced at the hearing before Council upon objections raised by the objectors herein does not relieve Council of its statutory obligation in this respect. The evidence obtained at such hearing may serve as a basis for its preferment of charges in disciplinary proceedings. Failure to proceed in the statutory manner renders its order of suspension invalid. See Tyler's Country Club, Inc. v. Woodbridge, Bulletin 1311, Item 1; 111 Park Street Corporation v. Orange, Bulletin 1859 Item 2; Drozowski v. Sayreville, 133 N.J.L. 536 (Sup.Ct. 1946).

In Pepe & Ferrazano v. River Vale, Bulletin 1198, Item 2, involving the same jurisdictional issue, the local issuing authority renewed the applicant's license and, in the same resolution, suspended the license for thirty days "for conduct in the operation of the premises heretofore, which, in the opinion of the Township Committee, is not in the best interest of the community." On appeal to the Director the appellants alleged that the action of the Township Committee was erroneous because no charges were ever served by the respondent upon the appellants. The Director held that the suspension imposed may not be viewed as a condition within the meaning of the term as used in R.S. 33:1-32. Cf. Hoffman v. Orange and DeLascia, Bulletin 598, Item 7.

Council and the objectors repeatedly assert that these proceedings are not really disciplinary proceedings. As the attorney for the objectors stated in argument at this plenary de novo hearing

on appeal, "this is a proceeding against the stockholders, not against the license." The simple answer to this assertion is that, as the attorney for Council readily admits, Council has no statutory authority to proceed against the stockholders; its only authority is with respect to the license. As I stated hereinabove, Council operated under the misconception that its hearing on objections to the qualifications of the stockholders of an existing license authorized it to proceed as though it were considering an application for a license under R.S. 33:1-25. The fact is that it was not so authorized in the present factual context. In other words, it sought to convert an investigative hearing to a disciplinary action without authorized statutory compliance.

It should be noted, furthermore, that there is no question of "discretion" involved since the authority of Council is clearly limited by statute. Since the statute prescribes a specific course and procedure where the license is sought to be suspended or revoked, an arbitrary or summary suspension without compliance therewith denies the appellant his due process, i.e., the opportunity to answer specific charges duly served upon it. Fanwood v. Rocco, 59 N.J. Super. 306, at p. 316. In Fanwood the court cited decisional illustrations where the issue involved was one of law and not of discretion. Where the court found that the local issuing authority misapplied the statute, it unhesitatingly reversed.

The owner of a liquor license acquires through its investment therein an interest which is entitled to the protection of the law, and may not, upon considerations of simple fairness, be taken from him capriciously or arbitrarily. Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462 (App. Div. 1955); Drozdowski v. Sayreville, supra; Yates v. Mulrooney, 245 App. Div. 146, 281 N.Y.S. 246 (1935). Municipal authorities do not have unlimited authority to revoke or suspend licenses, but must comply with statutory requirements. Bivona v. Hock, 5 N.J. Super. 118, 121 (App. Div. 1949); Drozdowski v. Sayreville, supra.

I therefore conclude that the action of Council in ordering the conditional suspension of appellant's license without complying with the procedural requirements as delineated hereinabove is invalid and of no effect.

It is accordingly recommended that the action of Council be reversed, without prejudice to its right to institute disciplinary or other proceedings in compliance with procedural statutory prerequisites.

Conclusions and Order

No exceptions to the Hearer's report were filed by the parties herein, pursuant to Rule 14 of State Regulation No. 15.

Exceptions to the Hearer's report were filed by the Bayonne Tavern Owners Association and the Bayonne Package Stores Association, objectors.

After careful consideration of the entire record, including the transcript of testimony, the memoranda submitted by the attorneys herein, the exhibits, the Hearer's report and the exceptions taken thereto, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 19th day of June, 1969,

ORDERED that the action of respondent Municipal Council of the City of Bayonne, in ordering the conditional suspension of appellant's license without complying with the procedural requirements, be and the same is hereby reversed.

JOSEPH M. KEEGAN
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - PROCUREMENT FOR PROSTITUTION - SALE TO A MINOR - UNQUALIFIED EMPLOYEE - LICENSE SUSPENDED FOR 210 DAYS.

In the Matter of Disciplinary Proceedings against)

GAIL MCCARTHY)
t/a Gold Key)
7100 Bergenline Avenue)
North Bergen, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Consumption License C-40 issued by the Municipal Board of Alcoholic Beverage Control of the Township of North Bergen)

Krivit & Krivit, Esqs., by Maurice M. Krivit, Esq., Attorneys for Licensee
Edward F. Ambrose, Esq., Appearing for the Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"1. On Saturday night, October 12 into Sunday morning October 13, 1968, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you, through a person employed as a bartender on your licensed premises, made offers to male patrons and customers thereon to procure a female employed as an entertainer on your licensed premises to engage in acts of illicit sexual intercourse and/or in acts of illicit perverted sexual relations with them, and, in furtherance of those offers made arrangements with and procured the aforementioned female employee to engage in acts of illicit sexual intercourse and/or in acts of illicit perverted sexual relations with said patrons and customers as aforesaid; in violation of Rule 5 of State Regulation No. 20.

"2. On Saturday night, October 12 into Sunday morning October 13, 1968, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Concetta ---, age 18, and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20.

"3. On Saturday night, October 12 into Sunday morning October 13, 1968, and prior thereto, you employed and allowed, permitted and suffered the employment in and upon your licensed premises of a person under the age of twenty-one (21) years, viz., the aforesaid Concetta ---, age 18, contrary to and in violation of Rule 3 of State Regulation No. 13."

Two Division agents (D and B) participated in the investigation which resulted in the preferment of the charges.

Agent D testified that accompanied by B, he entered the licensed premises (characterized as a small night club) on the evening of October 12 and sat at the L-shaped bar at the left of the entrance. He observed at the bar approximately five males and three females (two of whom were dressed in go-go apparel and later identified as Concetta --- and Nancy ---). He observed Concetta and Nancy perform on the go-go stage. A male identified as James F. Murray was tending bar. The females were seated at the bar immediately to the left of the agents and the males were positioned immediately to the right of the agents.

After testifying that Murray appeared to be carrying messages between the males and the females, Agent D stated:

"I overheard Mr. Murray telling [Nancy] she should go with these three males seated to the right of Agent B, that one of the males would go for twenty dollars, to go with them, and she in turn questioned him as to--'Well, what are the other two males going to do?' and he replied, 'You don't have to be afraid. I know them. Nothing is going to happen with you. One of them is going to go with you upstairs.' The one he was referring to was a male of oriental extraction, I think Chinese.

* * *

I know that. I know he was Chinese. He said, 'You should go upstairs with this one, the Chinese male, and the other male would wait for you downstairs and drive you back to the premises when you are done.' One of the males said he was not going, and Mr. Murray was going to give to the male Nancy's phone number to contact her at some later time to make an appointment to see her."

Murray went to the males and "told them to put their coats on and go outside, 'She will follow you. She will meet you outside.'" The agent observed Murray speak with Nancy. Nancy then went to the rear of the premises and put on a dress over her go-go attire. The three males departed from the premises and shortly thereafter Nancy also departed from the premises.

While Murray was pouring the agents another drink, Agent D asked him, "what is the story with the girl just left here? Is she action?" Murray replied, "Yes. She is action but she doesn't go for any less than twenty dollars." Upon being asked by the agent whether or not he was receiving a part of the money paid to Nancy, Murray replied, "No, I don't get anything out of it. I do fix a lot of my friends with [Nancy]." When Agent D mentioned that he did not have an apartment nearby, Murray replied, "She will go to a motel with you."

Nancy returned to the barroom at approximately midnight, after having been gone from the premises from forty-five minutes to an hour, and proceeded to the rear of the premises. Murray informed Agent D that Nancy would have to perform prior to leaving the premises. Nancy ascended the stage and commenced performing her go-go routine. When Agent D questioned Murray as to how long Nancy's performance would last, Murray went to the rear of the premises and motioned to Nancy to descend from the stage. Upon completion of the song being played, Nancy conversed with Murray at the end of the bar. Agent D did not hear the conversation; however, he observed Murray point to the two agents and observed the female look at the agents. Murray returned to the agents and said, "Put your coats on and wait outside the premises." Agent B questioned Murray concerning the location of motels and Murray gave directions to three motels in the immediate area. The agents left the premises, followed shortly thereafter by Nancy.

Not obtaining accommodations at any of the three motels recommended by Murray, the agents and Nancy returned to the licensed premises, arriving at 12:50 a.m. Upon being informed that the agents were unable to rent a room, Murray asked Agent D, "Do you still want to go?" After he responded in the affirmative, Murray made a telephone call, returned to the agents and stated that arrangements were made at the Fountain Motel. Murray conferred with Nancy at the rear of the premises, returned to the agents and directed them to wait outside, saying "She will meet you out there."

The agents left the premises and were joined by Nancy outside. Arriving at the Fountain Motel at approximately 1:15 a.m., Agent D entered and informed the clerk, "Jimmy had sent me over." The clerk assigned Agent D a room. D returned to the car where he had left Nancy and accompanied Nancy to the room. Upon entry, Agent D gave Nancy two "marked" ten dollar bills which she put in her purse. Nancy disrobed completely. Shortly thereafter, Agent B, accompanied by members of the local police department, entered the room and recovered the two marked bills from Nancy's purse. At 1:45 a.m. the agents returned to the licensed premises and identified themselves to Murray.

Despite and exhaustive cross examination, Agent D's testimony did not vary. Additionally, the agent denied that when he questioned Murray concerning Nancy's availability, Murray said, "You got the wrong boy. You are in the wrong place."

It was stipulated that the testimony of Agent B, who accompanied D to the licensed premises, would be the same as that offered by D on direct examination.

On cross examination, Agent B testified that he had no difficulty overhearing the conversation between Murray and the three males concerning the arrangements involving Nancy. There was no attempt at secrecy.

Agent D initiated the conversation had with Murray concerning the arrangements which are the subject matter of Charge 1. Murray was positioned across the bar from the two agents at the time of the conversation. Although there was no attempt at secrecy, Agent B doubted that anyone else was "within earshot" of the conversation.

In defense of the charges, James F. Murray testified that he was regularly employed as a steamfitter since the year 1958 and

that he also tended bar at various licensed premises. He had never tended bar at the premises in question until October 12, 1968. On the night prior to October 12 the licensee had requested him to "fill in the next night for her because she had to go to a wedding of some kind and wouldn't be in until late in the evening." He opened the barroom for business on October 12 at approximately 8:00 p.m. He recalled seeing Agents D and B in the barroom at "about 9:30, a quarter to 10."

The licensee had informed him that the regular go-go dancer would not be in on the night of October 12 and that "another girl was coming in to audition." Nancy and Concetta came in together at approximately 9:00 p.m. He was not acquainted with either. Both females auditioned for the first time during the time the agents were in the premises.

Murray denied conversing with three males concerning obtaining a female for the purpose of prostitution. No one departed from the barroom either with Nancy or at about the same time. She left the premises on only one occasion (alone) to go across the street to eat. She was gone fifteen or twenty minutes. The three males did not leave the premises until a "considerable amount of time" had elapsed from the time that Nancy had gone out to eat.

Murray denied making arrangements with Nancy to engage in intercourse with the agents. Upon being questioned by one of the agents concerning the "possibility of doing something with the girls," he replied, "No, nothing to do with any of the girls; they are just here to audition, and they will be leaving." When pressed further by one of the agents to procure the females for them, Murray responded, "You clowns got the wrong place. This is a clean-run place. We don't go for any of that stuff in here. I would like you to leave." Thereafter Agent B left the premises for approximately fifteen minutes. Agents B and D had more drinks before they departed. He denied informing the agents that Nancy "gets a minimum of twenty dollars." He informed a patron that the dancers are paid \$20, \$22.50, \$25 a night for dancing, if hired. Finally, he denied having knowledge of arrangements having been made for Nancy to go to a motel.

On cross examination, the witness testified that he had patronized the licensed premises periodically "maybe a couple of months" prior to October 12. He was not employed by the licensee subsequent to October 12. He reiterated his denial of arranging for Nancy to engage in intercourse with a male or males.

The licensee, Gail McCarthy, testified that she had operated the licensed premises "a little over four years." On the night of October 11 she asked Murray whether or not he could tend bar for her on the following night because she desired to attend a wedding and Murray indicated his willingness to tend bar. She informed him that she would return to "close up" the barroom. Further, she informed Murray that she had arranged with two females to audition for go-go dancing and she wanted his opinion as to whether or not they were qualified for the position. Additionally, she instructed him concerning the operation of the business, "to keep things clean and running smoothly."

The licensee returned to the barroom at approximately 1:30 or 2:00 a.m. She had no knowledge of what had transpired in the premises that night. This was the first evening that Murray "ever came behind the bar and worked." It was the first occasion that Nancy or Concetta were in the premises other than to apply for employment.

On cross examination, the licensee asserted that she did not compensate Murray for his employment on the night in question. Concerning Nancy and Concetta, the arrangements were that they were merely to be auditioned on the night of October 12; they were not to be compensated for that night; they were to be compensated only for the evenings that they were actually employed.

John Horner testified that he frequently patronized the licensed premises since Miss McCarthy became its proprietor. On the night of October 12 he entered the barroom at approximately 10:30 or 11 o'clock. He did not overhear any conversation between Murray and the two Division agents; however, he did observe that Murray "got a little upset." He characterized the licensed premises as catering to a neighborhood patronage and "it is run very nice." He had never seen Nancy and Concetta in the barroom prior to October 12.

On cross examination, this witness asserted that he remained in the licensed premises an hour. He did not pay attention to what was occurring among the agents and the bartender or any of the other patrons. He heard no conversation.

Anthony Giordano testified that he frequented the tavern regularly ever since it was operated by Miss McCarthy. On October 12 he entered the licensed premises at approximately 9:45 p.m. and remained until "almost closing." He had never seen Murray tending bar in the tavern prior to October 12, nor had he seen Nancy or Concetta until the night in question. He then testified as follows:

"Q Did you observe anything unusual going on that night in that tavern?

A Not up until the time I saw a little outburst on Jimmy [Murray] 's part, and later on when he came to give me a drink I said, 'What happened?' because I am acquainted with Jimmy. He told me a couple of guys wanted to get fixed up with the girl. They came in and bought drinks. 'I don't know who they are, what they are, why they should be asking me all this.' He left off, and that is it. He went about his business. I didn't try any more."

He had never observed "anything wrong in the place."

In rebuttal, the agents denied that Murray said to them that they were in the wrong place and that he wanted them to leave.

Preliminarily, it should be observed that in matters of this nature 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 v. Davis, 64 N.J. Super. 242 (App.Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control, not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented herein, 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.

As to Charge 1

Applying these principles, I am convincingly persuaded that the more probable version and the truth lie in the testimony offered by the agents. I am satisfied that the bartender (whom I find to be a part-time bartender) made arrangements and actually procured a female on the licensed premises to engage in illicit sexual intercourse as charged. Although the Division witnesses were subjected to an intensive cross-examination by competent counsel for the licensee, their testimony remained unshaken. I am strongly persuaded that the bartender procured the female and followed this up by arranging for a location in which to engage in the immoral activity.

An additional basic principle is worthy of emphasis. In disciplinary proceedings the licensee is fully accountable for all violations committed or permitted by his servants, agents or employees. Rule 33 of State Regulation No. 20. Cf. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

I am of the opinion that a fair evaluation of the evidence clearly and reasonably preponderates in favor of a finding of guilt as to the first charge, and I so find.

As to Charges 2 and 3

When Agent D entered the licensed premises on October 12, he observed that the female identified as Concetta and who was attired in a go-go outfit presented a youthful appearance. In addition to observing Concetta perform on the stage, he also observed her seated at the bar and consume a beverage that was in front of her. Thereafter, the agent overheard Concetta order a screwdriver, saw Murray prepare the drink (a beverage containing alcohol), place it in front of Concetta and saw Concetta consume a portion of the drink. Upon being questioned by Agent D as to her age, Concetta, at first, maintained she was 21 years of age and displayed what appeared to be a genuine birth certificate indicating that she was 21 years of age. Later, Concetta stated to the agent that she was 18 years of age.

Additionally, Concetta admitted to Agent D that she did not secure an employment permit. Agent D testified that a check of the Division records revealed no employment permit issued to Concetta.

The licensee submitted testimony to the effect that Concetta was not employed upon the licensed premises on the dates mentioned in the charges, that she was on the premises solely to audition. No payment was made to Concetta for her dancing.

The Division was unable to locate Concetta for the purpose of subpoenaing her to testify at the hearing. Thus, proof of age of the alleged minor was not established by the Division.

In order to sustain a finding of guilt as to these charges, I must be satisfied that the Division has sustained the burden of

proving that Concetta had not attained her statutory maturity. Further, in order to sustain a finding of guilt as to the third charge, I must be satisfied that the Division has sustained the burden of proving that Concetta was an employee within the context of Rule 3 of State Regulation No. 13.

After considering the testimony adduced herein, it is my view that there appears to be a lack of sufficient probative proof to find the licensee guilty of the second and third charges. It is, therefore, recommended that the licensee be found not guilty of the said charges and that they be dismissed.

Licensee has no previous record of suspension of license. Were the bartender in the instant case a full time employee, or a part time employee hired on recurring occasions, I would have no hesitancy in recommending outright revocation as being the proper penalty. However, a careful consideration of the circumstances involved impels me to recommend that the license be suspended for two hundred ten days. Re Starr and Rose, Bulletin 1528, Item 1; Re B & N Tavern, Inc., Bulletin 1574, Item 1; Re Tiny's Bar & Grill, Inc., Bulletin 1718, Item 1.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 18th day of June, 1969,

ORDERED that Plenary Retail Consumption License C-40, issued by the Municipal Board of Alcoholic Beverage Control of the Township of North Bergen to Gail McCarthy, t/a Gold Key, for premises 7100 Bergenline Avenue, North Bergen, be and the same is hereby suspended for the balance of its term, viz., until midnight June 30, 1969, commencing at 3:00 a.m. Wednesday, June 25, 1969; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3:00 a.m. Wednesday, January 21, 1970.

JOSEPH M. KEEGAN
DIRECTOR

3. RECAPITULATION OF ACTIVITY BY QUARTERLY PERIODS FROM JULY 1, 1968 THROUGH JUNE 30, 1969

| | 1st Quarter | | | 2nd Quarter | | | 3rd Quarter | | | 4th Quarter | | | Total |
|---|-------------|------|-------|-------------|------|------|-------------|------|------|-------------|-----|------|-----------|
| | July | Aug. | Sept. | Oct. | Nov. | Dec. | Jan. | Feb. | Mar. | Apr. | May | June | |
| ARRESTS: | | | | | | | | | | | | | |
| Total number of persons arrested | 43 | | | 54 | | | 35 | | | 39 | | | 171 |
| Licensees and employees | 25 | | | 23 | | | 26 | | | 20 | | | 94 |
| Bootleggers | 18 | | | 30 | | | 9 | | | 19 | | | 76 |
| ABC Agent impersonator | - | | | 1 | | | - | | | - | | | 1 |
| SEIZURES: | | | | | | | | | | | | | |
| Motor vehicles - cars | 4 | | | 2 | | | 1 | | | 1 | | | 8 |
| - trucks | - | | | 1 | | | - | | | 2 | | | 3 |
| Stills - 50 gallons or under | 2 | | | - | | | 2 | | | - | | | 4 |
| Alcohol - gallons | 7.62 | | | 40.12 | | | .60 | | | - | | | 48.34 |
| Mash - gallons | 106.125 | | | - | | | 1,225 | | | - | | | 1,331.125 |
| Distilled alcoholic beverages -gallons | 38.51 | | | 402.25 | | | 11.28 | | | 5.99 | | | 458.03 |
| Wine - gallons | 34.88 | | | 340.13 | | | 10.297 | | | 16.86 | | | 402.167 |
| Brewed malt alcoholic beverages - gallons | 96.10 | | | 355.72 | | | 92.03 | | | 593.96 | | | 1,127.81 |
| RETAIL LICENSEES: | | | | | | | | | | | | | |
| Premises inspected | 2,183 | | | 2,507 | | | 2,503 | | | 2,442 | | | 9,635 |
| Premises where alc. bev. were gauged | 1,792 | | | 1,920 | | | 2,051 | | | 2,006 | | | 7,769 |
| Bottles gauged | 28,200 | | | 30,950 | | | 33,038 | | | 31,747 | | | 123,935 |
| Premises where violations were found | 471 | | | 548 | | | 546 | | | 579 | | | 2,144 |
| Violations found | 616 | | | 804 | | | 801 | | | 878 | | | 3,099 |
| Unqualified employees | 213 | | | 220 | | | 155 | | | 241 | | | 829 |
| Application copy not available | 47 | | | 83 | | | 106 | | | 103 | | | 339 |
| No Form E-141-A on premises | 275 | | | 344 | | | 262 | | | 254 | | | 1,135 |
| Form E-141-A incomplete | - | | | - | | | 91 | | | 94 | | | 185 |
| Other mercantile business | 4 | | | - | | | 3 | | | 2 | | | 9 |
| Disposal permit necessary | 13 | | | 10 | | | 12 | | | 9 | | | 44 |
| Prohibited signs & practices | 6 | | | 5 | | | 5 | | | 4 | | | 20 |
| Improper beer taps | - | | | - | | | - | | | 1 | | | 1 |
| Other violations | 68 | | | 142 | | | 167 | | | 170 | | | 547 |
| STATE LICENSEES: | | | | | | | | | | | | | |
| Premises inspected | 82 | | | 57 | | | 45 | | | 51 | | | 235 |
| License applications investigated | 25 | | | 21 | | | 27 | | | 35 | | | 108 |
| COMPLAINTS: | | | | | | | | | | | | | |
| Complaints assigned for investigation | 1,187 | | | 1,223 | | | 1,290 | | | 1,379 | | | 5,079 |
| Investigations completed | 1,205 | | | 1,259 | | | 1,274 | | | 1,334 | | | 4,972 |
| Investigations pending | (227) | | | (230) | | | (198) | | | (247) | | | (247) |
| LABORATORY: | | | | | | | | | | | | | |
| Analyses made | 211 | | | 363 | | | 388 | | | 276 | | | 1,238 |
| Refills from licensed premises - bottles | 112 | | | 213 | | | 252 | | | 198 | | | 775 |
| Bottles from unlicensed premises | 29 | | | 30 | | | 19 | | | 15 | | | 93 |
| IDENTIFICATION: | | | | | | | | | | | | | |
| Criminal fingerprint identifications made | 24 | | | 19 | | | 9 | | | 13 | | | 65 |
| Persons fingerprinted for non-criminal purposes | 1,417 | | | 1,002 | | | 991 | | | 1,845 | | | 5,255 |
| Ident. contacts made w/other enforce. agencies | 884 | | | 658 | | | 804 | | | 1,230 | | | 3,576 |
| MV ident. via N.J. State Police teletype | 2 | | | 2 | | | 1 | | | 3 | | | 8 |
| DISCIPLINARY PROCEEDINGS: | | | | | | | | | | | | | |
| Cases transmitted to municipalities | 22 | | | 14 | | | 13 | | | 23 | | | 72 |
| Violations involved | 24 | | | 14 | | | 14 | | | 23 | | | 75 |
| Sale to minors | 8 | | | 9 | | | 7 | | | 14 | | | 38 |
| Sale during prohibited hours | 12 | | | 5 | | | 6 | | | 7 | | | 30 |
| Failure to close premises dur. proh. hours | 2 | | | - | | | 1 | | | 1 | | | 4 |
| Single instance of other violations | 2 | | | - | | | - | | | 1 | | | 3 |
| Cases instituted at Division | 95* | | | 70* | | | 105* | | | 88* | | | 358* |
| Violations involved | 107 | | | 86 | | | 123 | | | 100 | | | 416 |
| Possessing liquor not truly labeled | 13 | | | 8 | | | 21 | | | 18 | | | 60 |
| Sale to minors | 17 | | | 10 | | | 23 | | | 7 | | | 57 |
| Sale during prohibited hours | 14 | | | 11 | | | 5 | | | 15 | | | 45 |
| Beverage Tax Law non-compliance | 9 | | | 4 | | | 19 | | | 10 | | | 42 |
| Permitting lottery activity on premises | 13 | | | 7 | | | 10 | | | 9 | | | 39 |
| Permitting immoral acty. on premises | 3 | | | 5 | | | 6 | | | 6 | | | 20 |
| Fraud in application | 5 | | | 4 | | | 4 | | | 4 | | | 17 |
| Permitting lottery & bookmaking acty. on prem. | 4 | | | 5 | | | - | | | 6 | | | 15 |
| Sale below filed price | 1 | | | 3 | | | 4 | | | 5 | | | 13 |
| Unqualified employees | 3 | | | 3 | | | 4 | | | 2 | | | 12 |
| Permitting misc. gambling on premises | 4 | | | 4 | | | 4 | | | 2 | | | 14 |
| Hindering investigation | 3 | | | 2 | | | 3 | | | - | | | 8 |
| Fraud and front | 2 | | | 2 | | | 1 | | | 2 | | | 7 |
| Permitting bookmaking activity on premises | 2 | | | - | | | 2 | | | 2 | | | 6 |
| Permitting hostess activity on premises | - | | | 2 | | | 2 | | | 1 | | | 5 |
| Failure to close prem. during prohibited hrs. | 3 | | | 2 | | | - | | | - | | | 5 |
| Retailer-to-retailer sales | 4 | | | - | | | - | | | - | | | 4 |
| Unauthorized transportation | - | | | 2 | | | 1 | | | 1 | | | 4 |
| Delivery w/o bona fide invoice | - | | | 2 | | | 1 | | | 1 | | | 4 |
| Permitting lottery, bookmaking & misc. gamb. on prem. | - | | | 1 | | | - | | | 2 | | | 3 |
| Purchase from improper source | 1 | | | 1 | | | 1 | | | - | | | 3 |

*Includes eight cancellation proceedings - licenses improvidently issued by reason of conviction of licensees and officers of licensees of crimes involving moral turpitude.

| | 1st Quarter | | | 2nd Quarter | | | 3rd Quarter | | | 4th Quarter | | | Total |
|--|-------------|------|-------|-------------|------|------|-------------|------|------|-------------|-----|------|--------|
| | July | Aug. | Sept. | Oct. | Nov. | Dec. | Jan. | Feb. | Mar. | Apr. | May | June | |
| DISCIPLINARY PROCEEDINGS (CONTINUED) | | | | | | | | | | | | | |
| Cases instituted at Division (Continued) | | | | | | | | | | | | | |
| Permitting foul language on premises | | 1 | | 1 | | | - | | | - | | | 2 |
| Employee working while intoxicated | | - | | - | | | - | | | - | | | 2 |
| Perm. bookmaking & misc. gamb. on prem. | | - | | 1 | | | - | | | - | | | 1 |
| Perm. lottery & misc. gamb. on premises | | - | | - | | | - | | | - | | 1 | 1 |
| Single instance of other violations | | 5 | | 6 | | | 10 | | | 6 | | | 27 |
| Cases brought by municipalities on own initiative and reported to Division | | | | | | | | | | | | | |
| Violations involved | 43 | | | 34** | | | 61 | | | 53 | | | 191** |
| Sale to minors | 27 | | | 17 | | | 29 | | | 24 | | | 97 |
| Sale during prohibited hours | 2 | | | 2 | | | 15 | | | 9 | | | 33 |
| Permitting brawl, etc. on premises | 7 | | | 9 | | | 10 | | | 2 | | | 23 |
| Failure to close prem. during prohibited hours | 3 | | | 1 | | | 6 | | | 2 | | | 12 |
| Conducting business as a nuisance | 3 | | | 2 | | | 2 | | | 4 | | | 11 |
| Unqualified employees | 1 | | | 1 | | | 4 | | | 4 | | | 10 |
| Permitting gambling on premises | - | | | 3 | | | 3 | | | 2 | | | 8 |
| Hindering investigation | - | | | - | | | 4 | | | 1 | | | 5 |
| Permitting minors on prem. unaccomp. by parents or guardians (local reg.) | - | | | - | | | - | | | 2 | | | 2 |
| Employing persons w/o ID cards (local reg.) | - | | | - | | | - | | | 2 | | | 2 |
| Fraud and front | 1 | | | 1 | | | - | | | - | | | 2 |
| Employer working while intoxicated | - | | | 2 | | | - | | | - | | | 2 |
| Permitting immoral activity on premises | - | | | - | | | - | | | 2 | | | 2 |
| Single instance of other violations | 7 | | | 4 | | | 7 | | | 8 | | | 26 |
| HEARINGS HELD AT DIVISION: | | | | | | | | | | | | | |
| Total number of hearings held | 148 | | | 116 | | | 135 | | | 133 | | | 532 |
| Appeals | 22 | | | 21 | | | 20 | | | 13 | | | 76 |
| Disciplinary proceedings | 100 | | | 57 | | | 89 | | | 68 | | | 314 |
| Eligibility | 17 | | | 23 | | | 10 | | | 26 | | | 76 |
| Seizures | 4 | | | 5 | | | 6 | | | 6 | | | 21 |
| Tax revocations | 2 | | | 10 | | | 10 | | | 19 | | | 41 |
| Applications for license | 3 | | | - | | | - | | | 1 | | | 4 |
| STATE LICENSES AND PERMITS ISSUED: | | | | | | | | | | | | | |
| Total number issued | 5,326 | | | 5,241 | | | 3,076 | | | 23,049 | | | 36,692 |
| Licenses | 633 | | | 7 | | | 10 | | | 11 | | | 661 |
| Solicitors' permits | 130 | | | 93 | | | 137 | | | 2,615 | | | 2,975 |
| Employment permits | 1,448 | | | 950 | | | 798 | | | 4,236 | | | 7,432 |
| Disposal permits | 213 | | | 198 | | | 143 | | | 217 | | | 771 |
| Social affair permits | 1,243 | | | 1,402 | | | 1,039 | | | 1,374 | | | 5,058 |
| Wine permits | 48 | | | 694 | | | 10 | | | - | | | 752 |
| Miscellaneous permits | 795 | | | 677 | | | 468 | | | 1,571 | | | 3,511 |
| Transit insignia | 705 | | | 801 | | | 336 | | | 11,396 | | | 13,238 |
| Transit certificates | 111 | | | 161 | | | 136 | | | 1,629 | | | 2,036 |
| OFFICE OF AMUSEMENT GAMES CONTROL: | | | | | | | | | | | | | |
| Licenses issued | 14 | | | 67 | | | 340 | | | 230 | | | 651 |
| State Fair licenses issued | 176 | | | - | | | - | | | 36 | | | 212 |
| Premises inspected | 1,265 | | | - | | | - | | | 95 | | | 1,360 |
| Premises where violations were found | 72 | | | - | | | - | | | 6 | | | 78 |
| Number of violations found | 96 | | | - | | | - | | | 7 | | | 103 |
| Enforcement files established | 86 | | | 55 | | | 9 | | | 21 | | | 171 |
| Disciplinary proceedings instituted | 1 | | | - | | | - | | | - | | | 1 |
| Violations involved | 2 | | | - | | | - | | | - | | | 2 |
| Operating controlled game | 1 | | | - | | | - | | | - | | | 1 |
| Deceptive practices | 1 | | | - | | | - | | | - | | | 1 |

JOSEPH M. KEEGAN
 Director of Alcoholic Beverage Control
 Commissioner of Amusement Games Control

Dated: July 17, 1969

**Includes one cancellation proceeding - license improvidently issued by Director.

