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 2308 January 10, 1979

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1. APPELLATE DECISIONS - A.H.S., INC. v. WALL TOWNSHIP.

A. H. S., Inc. t/a Royal Manor, Appellant, v. Township Committee of the Township of Wall, Respondent.	:	ON APPEAL CONCLUSIONS AND ORDER

Wilentz, Goldman & Spitzer, Esqs., by Warren W. Wilentz, Esq., Attorney for Appellant.
Mangini, Gilroy & Cramer, Esqs., by John Jay Mangini, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Township Committee of the Township of Wall (hereafter Committee) which, by Resolution dated August 22, 1978, suspended Appellant's Plenary Retail Consumption Lic. 1352-33-001-001, for premises designated as Royal Manor, located on State Highway No. 35 in Wall Township, for 312 days in consequence of a guilty finding on the following three charges:

1. Licensee permitted acts of violence to occur on the licensed premises on July 15, 1978, in violation of Rule 5 of State Regulation No. 20;

2. Licensee permitted premises to become a nuisance, in violation of the aforesaid regulation; and

3. Licensee permitted premises to become overcrowded; i.e., occupied by a number of persons in excess of the maximum specified by local Ordinance No. 18-1966.

Rule 5 of State Regulation No. 20 cited in the charge is now designated as N.J.A.C. 13:2-23.6.

Upon the filing of the appellant's Petition of Appeal, the Director of this Division, pursuant to N.J.S.A. 33:1-31, stayed the effective date of the suspension imposed by the Committee, by Order of August 23, 1978, pending determination of the appeal.

In its Petition of appeal appellant advances numerous arguments in support of its contention that it was denied a fair hearing, and that the conclusions of the Committee were contrary to the evidence adduced before it. As one example, it alleges that two of appellant's employees, who were indicted by the Grand Jury of Monmouth County, refused to testify on its behalf at the hearing before the Committee. An adjournment pending disposition of the criminal charges against the two employees was denied, which appellant contends restricted its right to a fair hearing.

However, the essential thrust of appellant's contentions is that the evidence advanced in support of the charges was insufficient, hence, the suspension imposed was invalid. The Committee vigorously denies appellant's contentions in its Answer, and avers that there had been ample competent proof produced before the Committee supportive of the charges.

The appeal de novo was heard in this Division, pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence, and to cross-examine witnesses. Additionally, transcripts of the hearings held by the Committee were filed with the Division in accordance with N.J.A.C. 13:2-17.8, and the items of evidence submitted therewith were made part of the file.

So that subsequent reference to testimony adduced before the Committee and at this Division is more clearly understood, the uncontroverted factual background leading to the charges made against appellant is as follows: the Royal Manor, the appellant's establishment, is a very large facility catering to hundreds of young people attracted by live modern music groups. In certain summer evenings, there are upward of thirty "floormen", or bouncers on duty merely to control the large crowds within the premises.

In consequence of certain difficulties faced by the municipality, the Committee renewed appellant's liquor license with certain special conditions imposed upon it, among which was a limitation of the number of persons who may occupy the licensed premises, to 746; with individual room limitations of 232 in the Disco room, 394 in the main room, and 120 in the back room.

CHARGE NO. 1

FACTUAL FINDINGS

On July 15, 1978 an incident occurred which resulted in the death by beating of a patron and the assault of another patron by an employee of the subject premises, one Skippy Lehman. The fighting took place in the presence of or near to the manager, John McDonald. McDonald refused to testify either before the Committee or at this hearing in this Division, but did give a statement to the police. This statement was placed into evidence before the Committee and contains the admission of the fighting and the comatose state of the deceased, before his death. Most of same was corroborated by the chief floorman, Brian McGovern, in testimony at this Division.

The foregoing factual findings are essentially uncontroverted, particularly as they are derived from the testimony of appellant's employees. Acts of violence did occur on the date of the charge for which no defense of consequence was interposed.

I therefore find that the first charge has been amply substantiated, and recommend that appellant be adjudged guilty of this charge.

CHARGE NO. 2

FACTUAL FINDINGS

Licensee was charged with having permitted premises to become a nuisance in violation of the pertinent regulation. In support of the charge, Sgt. James J. Leddy testified before the Committee that he is in charge of police records and, in that capacity, offered the records applicable to the appellant's premises for the past year. Sgt. Leddy was asked to enumerate the number of "incidents per month, from January through July, the incidents pertaining only, of course, to the Royal Manor". His response was "we have records of in January, there were eight; February there were 16; March there were 14; April there were 17; May there were 33, and June there were 36 and July there were 31".

Comparing the number of incidents reported for the subject premises during the period with the next or closest amount for any other establishment, Sgt. Leddy indicated that the subject premises had 232 incidents and the next closest establishment had 62.

In describing observations of incidents or conduct of patrons of appellant's premises, Patrolman Bart Cox testified that during the period of January 1978 through July 1978:

> I responded to calls from patrons of the Royal Manor in regards to purse snatching. I observed and (have) been involved with fist fights in the parking lot and on the Royal Manor property. I responded to motor vehicle accidents resulting either in damaged property or personal injuries. I have observed and arrested drunk and disorderly persons. I have responded to vandalism calls, assaults with weapons, parking violations and the using wreckers to remove the cars to a point of 30 a shift by myself alone, drug arrests on the Royal Manor property and the parking lot. I have observed the use of drugs prior to those arrests and I have been in the general area just as a deterrent and visible to patrons and visible to the general public. Motor vehicle violations, I have also responded to incidents where I was taken to the hospital at Jersey Shore for treatment as a result of fights. One incident I chased a motor vehicle high speed where ultimately the police car was totally damaged and destroyed and the replacement of glasses. I observed a large amount of debris in the area on the road, the parking lot property and the property surrounding thereto. I responded to personal and private property to remove cars at the request of the owners. I have observed a certain amount or limited amount of sexual activity in the parking lot of the Royal Manor and quite a few other offenses that I can't recall.

The Police Department provided the Committee with a computer print-out of police responses to appellant's establishment from January 1, 1978 to August 14, 1978. From July 28, 1978, the date of the renewal of license, to August 14th, the date of the hearing before the Committee, the information sheet reveals twenty-nine listed incidents, of varying degree of severity.

Testifying on behalf of appellant at the de novo hearing, Lois Kettle and Frank Caponegro averred that the management of the Royal Manor was most cooperative in attempting to remedy complaints that anyone might have concerning annoyance possibly

caused by patrons. Caponegro, who owns a motel next door to the Royal Manor, confirmed that at one time there was a problem caused by patrons who parked on his motel property and, calling attention to this problem, guards were assigned to patrol his property by the Royal Manor. Since then, there has been no significant problem.

Mayor Robert Jenkins called as a witness by appellant, testified that the Committee was aware of the problems to the community caused by the activities at and around the Royal Manor, hence, a maximum patron limitation was set, together with other conditions, as part of the license renewal. It was, by this means, hoped that the lessened number of patrons would decrease or eliminate the nuisance problems.

CHARGE NO. 3

FACTUAL FINDING

The licensee was charged that it permitted the premises to be overcrowded; i.e., occupied by a number of persons in excess of the maximum specified by local ordinance No. 18-1966.

Building Inspector and Code Enforcement Officer, Ralph Allen, testified before the Committee that the local ordinance, a copy of which was provided the Committee, limits occupancy to one person for every ten square feet of space. He further testified that he had made measurements of the subject premises, particularly the "disco room" which he found to have a working area of 2,315 square feet. Applying the Ordinance formula, the resultant maximum number of persons permitted in that room is 232.

Police Lieutenant Victor Herbert and Detective Sergeant Robert Clawson testified before the Committee and at this Division. Each described the methods used at the time several counts of patrons were made within the premises. On June 24, 1978, there were 753 persons within that "disco room", on June 25, 1978 the number was 322 and on July 16, 1978 there were 332.

Stationing detectives at the door of the room to count the entering or departing patrons, Lt. Herbert and Sgt. Clawson divided the room by a hypothetical line in the middle. Lt. Herbert counted those patrons on one side of the line and Sgt. Clawson counted those on the other. Each did so holding manual counters in their pockets.

On cross-examination, each officer admitted that during the counting patrons were moving about, dancing, entering and

leaving the room; hence, their respective counts must of necessity include some patrons more than once.

Testifying on behalf of appellant, Nancy Frank, barmaid, Benjamin Gant, bartender and Brian McGovern, Chief of the Floormen, vigorously denied that the "disco room" could hold 763 persons. They all agreed that, that many people could not fit into the room.

The above constitutes an analysis of the testimony and evidence adduced respecting the three charges. The testimony of many of the witnesses related to more than one of the charges, and there was an apparent interweaving of observations making up the factual matrix. Generally, the testimony was not as detailed as it could have been. For example, the details concerning the fatal beating and the assault upon the other patron were not spelled out as would be required in a criminal trial. There was, as indicated hereinabove, sufficient testimony with which to substantiate the charge relating to acts of violence.

I.

A liquor license is a mere privilege. No person is entitled as a matter of law to a liquor license. Paul v. Gloucester County, 50 N.J.L. 585 (E.&A. 1888); Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1935). Just as in the consideration of applications for the grant or renewal of licenses, so the continuance of such licenses must be vested in persons who are worthy of that privilege. The liquor business is one that must be carefully supervised and should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuance or operation of such licenses. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946). As the court said in In re 17 Club, Inc. 26 N.J. Super 43, 52 (App. Div. 1953):

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

In the exercise of that power, the Legislature invested the issuing authority with the power to suspend or revoke licenses, after hearing, for certain enumerated violations including violations of law or of State or local regulations. N.J.S.A. 33:1-31.

The burden of establishing that the action of the Committee was erroneous and should be reversed rests entirely with appellant. N.J.A.C. 13:2-17.6. The Director's function on appeal is to affirm the determination of the issuing authority unless he finds that their act was clearly against the logic and effect of the presented facts. Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E.&A. 1947).

The ultimate test in these matters is one of reasonableness on the part of the Committee, or, to put it another way, could the members of the Committee, as reasonable persons, acting reasonably, have come to their determination based upon the evidence presented. Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control, of the City of Newark, 55 N.J. 292, 303 (1970).

As there was a sharp conflict in some of the testimony, particularly relating to the counting of patrons within part of the licensed premises, it becomes a requirement that such testimony be evaluated upon observing the demeanor of the witnesses and giving weight to such testimony as is found to be credible. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself, and must be such as 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).

We are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449, (App. Div. 1951). Thus the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). The test of sufficiency of evidence in civil actions is probability, not possibility. Pabon v. Hackensack Auto Sales, Inc. 63 N.J. Super. 476, 490 (App. Div. 1960); Berger v. Shapiro, 52 N.J. Super. 94, 100 (App. Div. 1958) aff'd, 30 N.J. 89 (1959).

As to evidence introduced the court has stated that:

> The quantum of proof in a criminal trial is different from and higher than that in proceedings before an administrative agency. In the former, the proof must establish guilt beyond a reasonable doubt; in the latter, it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove beyond a reasonable doubt.

In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971)

Further, the court determined in Davidson v. Fornicola, 38 N.J. Super. 365, 371 (App. Div. 1955):

> In exacting proof by the preponderance or greater weight of the evidence, the law does not prescribe the necessary quantum of the overweight or the degree of excess of its superiority in credibility. A preponderance is attained where the evidence in its quality or credibility destroys and overbalances the equilibrium.

Applying the foregoing principles to the evidence presented in the instant matter, both before the Committee and at this Division, it is patently clear, and I so find, that the competent evidence is overwhelming in support of the charges.

As to the first charge, as hereinabove indicated, there was virtually no refutation of the charge, and, to the contrary, the charges were borne out by testimony of appellant's witness.

As to the charge which relates to the allegation that the appellant permitted and suffered the licensed premises to become a nuisance, the crucial aspect of the evidence here presented was the record of police incidents which occurred after the license was renewed with the special conditions imposed. The repeated objection to the presentation of such evidence was grounded on the belief of appellant that, since the license had been renewed two weeks before the incident arose which gave rise to the charges, the appellant could not be guilty of maintaining a nuisance.

The applicable regulation, N.J.A.C. 13:2-19.2 provides for the preferment of charges respecting incidents having taken place prior to renewal as follows:

> Any license or permit may be suspended, cancelled or revoked for proper cause, notwithstanding that such cause arose prior to the transfer or extension of the license, or during the term of a prior license held by the licensee or his predecessor in interest, or during the term of a prior permit held by the permittee.

Additionally, Mayor Jenkins was asked to explain the rationable behind the renewal of the license with special conditions.

> First off, the renewal of the license or even the possible consideration of the revocation, I believe the entire Governing Body felt that it was a drastic step, that it was a very serious thing, the revocation. We felt that the overcrowding conditions that existed at the Royal Manor precipitated many of the other problems that occurred there, i.e., the parking problems that existed around the Manor, the overbearing traffic problems that existed there, the numbers of police calls to the establishment, and also the nuisance aspects of this to the neighbors, the fact that many neighbors were bothered by patrons of the Royal Manor. It was our feeling that if we could in some way institute a number of things to control overcrowding, control the parking, we can then control the situation, and besides the conditions on the license we also imposed additional no-parking restrictions in the vicinity of the Royal Manor to keep the patrons in the parking lot and off the surrounding streets.

It is apparent that the measures taken by the Committee to ameliorate the nuisance were insufficient since the conditions described in the police reports and testimony persisted.

The charge relating to the overcrowding gave rise to the sole issue where the testimony advanced by the Committee and that posed by the appellant was in substantial conflict. The count made by the police officers was admittedly inaccurate in the sense that the methods used by them allowed for duplicate counting. However, the maximum number of persons permitted to be in the subject room at one time was 232. Granted the possibility of some of the persons within the room moving from one side of the median line to the other, and, hence, being counted twice, it is hardly likely that an error in the count would involve a miscalculation of more than a hundred.

Additionally, it is noted that there was no testimony offered by appellant substantiating its count of patrons within the subject room at any time. Testimony offered on its behalf consisted merely of opinion that the number charged by the police count was in error because there is generally not that many people there at that time. In the absence of any proof as to the method used by appellant's employees to effectuate a count, and the results of such counts as may have been taken, it can only be concluded that the denial of the police count is merely conjectural.

II.

In an extensive memorandum furnished by appellant, the several contentions which were advanced before the Committee and at the hearing in this Division were repeated at length.

Appellant contended throughout the hearings before the Committee and thereafter at the hearings in this Division that the Committee's attitude indicated it to be completely prejudiced against it. Appellant cites testimony of the Mayor which contained the admission that, following the death of the patron, which occurred at the Royal Manor, he and the Committee directed municipal counsel to seek closure of the premises through injunctive relief. That admission referred to the attempt by the Committee to abate what it considered to be a public nuisance.

Thus, concludes appellant, the Committee's subsequent action in sitting in judgment of the appellant was erroneous in that the Committee was by that time filled with prejudice. Admittedly prejudice is an emotional resolve difficult to define. However, Judge Frank in In Re J.P. Linahan, 138 F. 2nd 650 (2nd Cir. 1943) commented about it thusly:

> Democracy must indeed fail unless our courts try cases fairly and there can be no fair trial before a jury lacking in impartiality and disintrestedness. If, however "bias" and "impartiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices. ....Interests, points of view, preferences are the essence of living. Only death yields complete dispassionateness, for such dispassionateness, signifies utter indifference.

The Committee's obligation to hear the charges brought against appellant is statutorily mandated. N.J.S.A. 33:1-31. A public hearing was held. The appellant was present, represented by counsel, and full opportunity was afforded the parties

to present evidence. Additionally, the hearing was transcribed, as herein indicated, and the objections raised by appellant were reviewed by the Committee. In short, there is no procedural deficiency that could be ascribed to prejudice.

Appellant urges that the doctrine of res judicata or collateral estoppel be applied to the finding by the Committee following the renewal of appellant's license. In short, as the license had been renewed, any condition or situation which was later used to base the charges against the license should be suppressed. The appellant considers that the action of the Committee revolved solely about the prior situation and does not recognize that the record reveals numerous incidents which occurred after the renewal.

The Resolution adopted by the Committee as well as the specification of the charges each contain, as an attachment designated as Schedule "A", a list of the incidents which occurred at appellant's premises, and which lists the following incidents which occurred between the date of renewal of license and the evening when the patron's death occurred:

June 30 - stolen hubcaps
July 1 - stolen wallet
July 1 - stolen wallet and keys
July 1 - $160 stollen from car
July 2 - possession of marijuana
July 2 - possession of marijuana
July 2 - grabbing of female
July 2 - assault by patron
July 3 - fighting
July 3 - fighting
July 3 - fighting
July 3 - fighting
July 3 - fighting
July 3 - stolen wallet
July 8 - stolen hubcaps
July 14 - vehicle vandalized

The record does not reveal if the incidents designated as "fighting" were separate or if they involved all five individuals named, at one time. In any event their totality reflects acts of violence.

Appellant maintains that, prior to the hearing before the Committee, it retained an investigator and instructed him to obtain copies of the material possessed by the police which could be used at a hearing. Apparently the material

requested was not furnished to the investigator. In consequence, appellant contends that it could not properly defend the charges made against it. However, all of the material used was available to it on August 17, 1978 and from thence on to September 6, 1978 the date of the hearing in this Division. Certainly, in that three week period, ample opportunity was afforded to adequately complete its investigation.

Appellant next contends that the Committee has not satisfied the burden of persuasion that the cause of death is in any way attributable to the action of the licensee. If, by this contention, appellant believes that, because none of the corporate owners or officers were present the night of the patron's death, the licensee is absolved from responsibility; such contention is patently spurious. It is a well established and fundamental principle that a licensee is responsible for the activities of employees during the employment upon the licensed premises. N.J.A.C. 13:2-23.28; In re Olympic, Inc., 49 N.J. Super. 299 (App. Div. 1958); In re Schneider, supra.

Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact it has been held that a licensee is not relieved even if the employee violates his specific instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951); F & A Distributing Co. v. Div. of Alcoholic Beverage Control, 36 N.J. 34 (1961)

Appellant has maintained a continuous objection to the introduction of what are described as "computer print-outs" listing the myriad of incidents surrounding appellant's premises. While the print-out is merely a naked listing of such incidents, there was submitted to the Committee and introduced into evidence the specific police reports of each one of the incidents. Each police report carries the designation of the officers who responded, and each of these police officers were available to testify on subpoena of the parties. The police reports, as well as the print-out, were testified to as being official police records by Sgt. James J. Leddy. Rule 63 (16) of New Jersey Rules of Evidence permits such admission as exception to the hearsay rule.

Citing 2 Davis, Administrative Law Treatise, Sec. 14.10 (1958), appellant relies on the "residuum rule" as a basis for the requirement that a reviewing court set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial. In the same section Davis evaluates the residuum rule at pg. 293 as follows:

> As soon as the residuum rule and the alternative to the rule are understood, the reasons against the rule become overwhelming-so overwhelming as to give rise to the question whether courts that have given lip service to the residuum rule have done so on the basis of misunderstanding instead of through an exercise of informed judgment.

In any event, for reasons hereinabove set forth, the quantuum of evidence introduced together with its quality is more than sufficient to serve as a basis upon which to arrive at a conclusion. Monarch Federal S&L Ass'n v. Genser, 156 N.J. Super. 107 (Chan. Div. 1977).

The burden of establishing that the actions of the local issuing authority, on appeal to the Director of this Division, is erroneous and should be reversed rests entirely upon appellant. N.J.A.C. 13:2-17.6. I find and conclude that appellant has not met that burden.

III.

Upon the filing of this appeal, the Director by Order of August 23, 1978, stayed the effective date of the suspension pending its disposition.

The penalty imposed, i.e., 312 days commencing August 23, 1978, was not challenged by appellant either in its Petition of Appeal or at summation as being unduly harsh and excessive. Despite the absence of such contention, it should be here noted that the adjudicated cases are legion which hold that the penalty to be imposed in disciplinary proceedings instituted by local issuing authorities rests within its sound discretion in the first instance, and the power of the Director to reduce or modify it on appeal should be exercised sparingly and only where such penalty is manifestly unreasonable and clearly excessive. Harrison Wine and Liquor Co., Inc. v. Harrison, Bulletin 1296, Item 2; Emersons Ltd. of West Orange v. West Orange, Bulletin 2263, Item 2.

It has been recently held that a one hundred and fifty (150) days suspension was an appropriate penalty where a death of a patron resulted from a brawl which occurred within the licensee's premises. Azcuy v. Union City, Bulletin 2274, Item 3. In another matter, a hundred and fifty (150) days suspension, less remission for plea entered, where a death resulted from a fight among patrons, was affirmed on appeal

to this Division. Emersons Ltd. of West Orange v. West Orange, supra. Certainly where, as here, a death resulted to a patron on the licensed premises while in custody of employees of the appellant, the Committee took a cynical view of appellant's alleged efforts to manage its establishment and eliminate the manifold problems it created. In short, a severe penalty, short of revocation, was considered just.

It must be assumed that the Committee considered the impact of a closure of appellant's premises for a protracted period upon its nearly one hundred employees. However, it has been long since held that certain liquor regulations may and ofttimes result in individual hardships, but where larger social interests justify a restrictive policy, private individual interests must give way. Dal Roth Inc. v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246, 255 (App. Div. 1953).

The power of the Director of this Division to reduce the suspension on appeal is confined to cases where the suspension is manifestly unreasonable. Sventy & Wilson, Inc. v. Pt. Pleasant Beach, Bulletin 1930, Item 1; Pom Bon, Inc. v. Cliffside Park, Bulletin 1897, Item 1. Unreasonable action is considered as arbitrary and capricious.

> In the law, "arbitrary" and "capricious" means having no rational basis. Bicknell v. United States, 422 F. 2nd 1055, 1057 (5 Cir. 1970). The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to to guarantee that acts of government will be grounded on established legal principles. See Canty v. Bd. of Education, City of New York, 312 F. Supp. 254, 256 (D.C.S.D.N.Y. (1970). Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (Citations ommitted)

Bayshore Sewage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (Chan. Div. 1973).

The basic premise is that a penalty imposed by an issuing authority will not be reduced in the absence of it being arbitrary, unreasonable or capricious. The penalty imposed herein is none of these.

CONCLUSIONS AND RECOMMENDATIONS

As hereinabove indicated, I find that the proofs amply support the conclusions reached by the Committee. Each of the charges have been established by a fair preponderance of the credible evidence. The appellant has failed to establish that the action of the Committee was erroneous and should be reversed N.J.A.C. 13:2-17.6. The penalty imposed was consonant with the gravity of the charges.

Therefore, I recommend that the stay of the effective dates of the suspension granted by the Director's Order be immediately vacated, that the action of the Committee be affirmed, and the appeal herein be dismissed.

I further recommend that the suspension imposed by the Committee of three hundred and twelve days be reimposed without delay, particularly in view of the constant risk to police officers who have been making almost daily calls to the establishment.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the appellant, and written Answers thereto were submitted by respondent, pursuant to N.J.A.C. 13:2-17.14 (formerly Rule 14 of State Regulation No. 15).

In its Exceptions, the appellant asserts that the conduct of the proceedings before the Township Committee was unduly prejudicial to its rights. At the outset, it is noted that the function of a de novo appeal in this Division is to eliminate, where possible, procedural effects below and afford a reconsideration to ascertain whether the evidence before the Township Committee was sufficient to justify its action. Cino v. Driscoll, 130 N.J.L. 535 (E. & A. 1943); Twin Manor, Inc. v. Asbury Park, Bulletin 2087, Item 2.

I find no partiality, prejudice or bias in the record to support a finding that the appellant was denied a fair hearing. The determination sub judice must be judged on the proofs ad-

duced, and, as such, the proceedings before the local issuing authority has been the subject of a complete review in this Division. For the aforestated reasons, and those contained in the Hearer's Report discussing this contention, I find this Exception to be without merit.

In its next Exception, the appellant argues that the Hearer failed to rule on its legal argument that incidents which occurred prior to the renewal of its license for the 1978-79 term were improperly considered by the Township Committee and barred by the doctrines of res judicata and collateral estoppel.

Factually, there is no support for the advanced doctrines. The Township Committee, in its discretion, chose to impose special conditions on renewal of license, in lieu of instituting disciplinary proceedings or denying renewal of license. It gave the appellant what it considered another opportunity to prove its fitness to operate the licensed premises in a lawful manner. When subsequent events proved that such measures were insufficient to protect the public interest, the Committee properly reconsidered its earlier policy determination.

This is not a situation where a factual determination was initially made in licensee's favor and was subsequently relitigated adversely to him. In such circumstances, I find no basis to invoke the doctrines of res judicata or collateral estoppel. See Lubliner v. Bd. of Alcoholic Bev. Con., Paterson, 33 N.J. 428 (1960).

See also N.J.A.C. 13:2-19.2 which provides in relevant part that a license may be suspended " . . . notwithstanding that such cause arose . . . during the term of a prior license held by the licensee . . . "

Therefore, I reject this Exception as devoid of basis in law or fact. The consideration of pre-renewal and post-renewal incidents was proper. A penalty based upon both categories was correct.

Appellant restates, as an Exception, arguments advanced at the hearing as to the competency and effect to be accorded "computer print-outs" of police incidents, as well as the application of the "residuum rule."

The Administrative Procedure Act permits the introduction of hearsay evidence, N.J.S.A. 52:14B-10. However, hearsay evidence alone may not be the basis upon which a determination is made. As stated in Weston v. State, 60 N.J. 36, 51 (1972):