

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

BULLETIN 2414

October 6, 1981

TABLE OF CONTENTS

ITEM

1. DISCIPLINARY PROCEEDINGS (New Brunswick) - SALE OF AN ALCOHOLIC BEVERAGE TO A PERSON ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED FOR 25 DAYS.
2. COURT DECISIONS - SHOWCASE LOUNGE, INC. - DIRECTOR AFFIRMED.

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

BULLETIN 2414

October 6, 1981

1. DISCIPLINARY PROCEEDINGS - SALE OF AN ALCOHOLIC BEVERAGE TO A PERSON
ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary	:	
Proceedings against	:	S-12,404
	:	H-7079-142
Showcase Lounge, Inc.	:	OAL DKT. No. ABC 0137-80
12 Easton Avenue	:	
New Brunswick, N. J.	:	
	:	CONCLUSIONS
Holder of Plenary Retail Consumption	:	and
License No. 1214-33-090-002 issued	:	ORDER
by the Mayor and Council of the City	:	
of New Brunswick.	:	

A. Kenneth Weiner, Esq., Appearing for Licensee.
Kenneth I. Nowak, Esq., Deputy Attorney General, Appearing for Division.

Initial Decision Below

Hon. Geneva Stanford, Administrative Law Judge
Dated: June 10, 1980 - Received: June 11, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision below, with supportive argument, were filed on behalf of the Division pursuant to N.J.A.C. 13:2-17.14.

In the Exceptions, it is contended that the Initial Decision recommending the dismissal of the Judge herein be reversed because the Administrative Law Judge "simply failed to apply the law to the facts of this case".

I have carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Initial Decision, and the Exceptions filed on behalf of the Division to the said Initial Decision, and conclude that the arguments contained in the said exceptions are meritorious and should be sustained. I, therefore, reject the conclusions of law and recommendations contained in the Initial Decision, for the reasons set forth infra.

I make the following findings of fact and conclusions of law with respect to the subject charge:

ABC Inspectors C and N entered the subject premises on September 16, 1979 at about 1:30 A.M. pursuant to a specific assignment to investigate alleged sales and service to apparently or actually intoxicated patrons in the said premises. These Inspectors were operating in an undercover capacity as part of a team engaged in a project to reduce alcohol-related fatalities and injuries through the Division initiated "Intoxicated Patron Assistance Program". This program consists of teams, each of which numbers six members.

two of whom are the undercover Inspectors stationed inside the premises as observers, two are uniformed State Police who remain on the outside of the premises, and two personnel from the State Department of Health, who are known as ATRA personnel.* The Inspectors seated themselves at the bar and made observations of the patrons. During this period, go-go girls were performing on a ramp.

Shortly after they arrived, they focused their attention on a male sitting three stools to their left. This male, later identified as Charles Simon, was drinking beer. According to the testimony of Inspector C, Simon was "very unsteady on the stool and almost fell off the stool several times and his elbow was slipping..." he "had trouble bringing the drink from the bar to his lips, he would spill it" his eyes were "bloodshot", "dilated" and "red".

When Inspector C tried to engage Simon in conversation, Simon was incoherent, and his speech was "slurred...totally incoherent". He also had a strong odor of alcohol on his breath. Inspector N described Simon's physical demeanor as "swaying, bopping, weaving" while sitting on the stool, and he confirmed that Simon "had difficulty finding his lips" with the beer.

In the opinion of both Inspectors who have had many years of experience in undercover work in liquor licensed premises, Simon was definitely intoxicated. Their opinion was confirmed by the two State Police officers who were stationed outside of the premises who immediately entered the premises together with the two ATRA personnel. Thus, six persons observed and confirmed the condition of Simon.

It has been held that the average witness of ordinary intelligence, even lacking special skills, knowledge and experience, but who has had the opportunity of observation, may testify whether a person is sober or intoxicated. Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Tisler Corp., Bulletin 2356, Item 1. See also State v. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960).

The bartender, Lynn Saunders, testifying on behalf of the licensee, acknowledged that he knew Simon from his previous contacts with him in these premises and that Simon is a "derelict". He stated that he has often escorted Simon out of the bar when he came in drunk. He admitted that on the date charged herein, Simon was feeling "quite mellow".

Saunders knew of Simon's drinking habits; however, he continued to permit Simon to drink beer not because he was not intoxicated, but merely because he was not creating a loud commotion. Saunders asserted that Simon "was not intoxicated enough to be removed from the bar". He reasons that if

* Under the "Alcohol Treatment and Rehabilitation Act" (ATRA) N.J.S.A. 26:2B-7 et seq. ATRA personnel are authorized to detain patrons in liquor licensed premises who are apparently or actually intoxicated, and escort them either to a detoxification center for treatment, or to their home; but in no event were the patrons permitted to enter into and operate their own motor vehicle after leaving the premises. This was the procedure followed in the instant matter.

(a patron) "passed out, staggering and drunk...roudy with their fellow patrons causing trouble..." that patron is ordered to leave the premises. However, if someone is quietly sitting, minding his own business as he drinks, then Saunders would leave him alone regardless of how many drinks he consumed, or of his state of intoxication.

It is clear that Saunders's main concern was to maintain order and control. Thus, he served persons who were intoxicated so long as they were not "drunk" i.e. which he associated with being loud and boisterous, causing problems.

It is crystal clear that the subject regulation prohibiting the sale to persons apparently or actually intoxicated is concerned with more than mere orderliness in a tavern; it is equally concerned with the safety of the patrons when they leave the tavern and the potential injuries or fatalities which may occur when such intoxicated patron thereupon operates his vehicle. It is the licensee's statutory duty to deny the sale or service to a person who appears to be intoxicated, and not merely when he becomes roudy or causes a disturbance.

It is incomprehensible and, indeed, disquieting that the Administrative Law Judge would recommend a dismissal of this charge where there has been substantial testimony by the Inspectors in support of the charge, coupled with an acknowledgement by the bartender that the patron was intoxicated. Saunders seems to imply that Simon may have already consumed alcoholic beverages before he entered the premises. That is no defense. The duty of the bartender in that instance becomes even greater, for he should have been even more circumspect in serving such patron.

In the adjudication of this matter we are guided by the firmly established principle that disciplinary proceedings against the liquor licensees are civil in nature, and not criminal, and, thus, 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, Supra. In a business so highly sensitive as the traffic of liquor, the Director is charged with the exercise of constant vigilance in the enforcement of the Alcoholic Beverage Law and the Rules and Regulations pertaining thereto. A relaxation from the requirements of the provisions of the Alcoholic Beverage Law, N.J.S.A. 33:1-1 et seq. and the Rules and Regulations of this Division would be contrary to their intentment, and against the dictates of sound public policy. Re Club Aquarius, Inc., Bulletin 2028, Item 2; Cf. Jeanne's Enterprises, Inc. v. Division of Alcoholic Beverage Control, 93 N.J. Super. 230 (App. Div. 1966), Aff'd 48 N.J. 359 (1966).

I find that the charge herein has been established by a fair preponderance of the credible evidence, indeed, by substantial evidence, and I find the licensee guilty thereof. I shall suspend the subject license for 25 days.

Accordingly, it is, on this 16th day of July, 1980,

ORDERED that Plenary Retail Consumption License No. 1214-33-090-002 issued by the Mayor and Council of the City of New Brunswick for premises 12 Easton Avenue, New Brunswick be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. Monday, July 28, 1980 and terminating 2:00 a.m. Friday, August 23, 1980.

Joseph H. Lerner
Director

In the Matter of:)	<u>INITIAL DECISION</u>
)	
SHOWCASE LOUNGE, INC.)	OAL DKT. NO. ABC 0137-80
12 Easton Avenue)	AGENCY DKT. NO. S-12,404
New Brunswick, New Jersey)	

APPEARANCES:

Kenneth I. Nowak, Esq., Deputy Attorney General
on behalf of the Division of Alcoholic Beverage
Control

A. Kenneth Weiner, Esq., on behalf of the licensee,
Showcase Lounge, Inc.

BEFORE THE HONORABLE GENEVA STANFORD, A.L.J.:

This is a hearing concerning the alleged violations
by petitioner of N.J.A.C. 13:2-23.1(b) which provides that

"No licensee shall sell, serve, deliver or
allow, permit or suffer the sale, service
or delivery of any alcoholic beverage
directly or indirectly to any person actu-
ally or apparently intoxicated or permit
or suffer the consumption of any alcoholic
beverage by any such person in or upon the
licensed premises."

Petitioner is the holder of plenary retail license #1214-33-090-
002 located in New Brunswick, New Jersey.

Said violation allegedly occurred on September 16, 1979.
Petitioner was served with notice of an alleged violation on
October 9, 1979 and an answer and plea of not guilty was filed
with the Director of the Division of Alcoholic Beverage Control
on October 23, 1979. The matter was then transmitted to the
Office of Administrative Law for determination as a contested
case pursuant to N.J.S.A. 52:14F-1, et seq. A hearing was held
on March 18, 1980.

The issues of the hearing are whether or not on
September 16, 1979 the petitioner sold, served, delivered and
allowed, permitted and suffered the sale, service and delivery

OAL DKT. NO. ABC 0137-80

of an alcoholic beverage directly or indirectly to a person actually or apparently intoxicated and/or allowed, permitted and suffered the consumption of an alcoholic beverage by such person in or upon the licensed premises. The State presented two witnesses, L.C. and A.N., Inspectors of the Division of Alcoholic Beverage Control.

Inspector L.C. testified pursuant to the ATRA Program further defined as the Alcoholic Treatment and Rehabilitation Act, funded by the Federal Government through the State Police, he entered the premises of Showcase Lounge in the company of Inspector A.N. The purpose of the program and the visit being to determine the presence of intoxicated patrons in the licensed premises. The program was designed as a preventative measure to forstall intoxicated persons from driving for their own safety and that of the general public.

Inspector L.C. testified that entry was made into the establishment at approximately 1:30 a.m. He described the premises as being exceptionally large, containing a large oval bar with a go-go ramp behind the bar. Upon entry, go-go girls were in the process of performing. The two Inspectors took seats at the end of the bar nearest to the entrance and ordered drinks from the barmaid. His recollection was that he ordered a rye and gingerale.

Upon entry, his attention was focused on an elderly gentleman seated approximately 3 stools away sipping beer from a glass with a partially filled bottle of beer in front of him on the bar. In describing his ability to function, Inspector L.C. testified the elderly gentleman seemingly had great difficulty. He, in bringing a glass to his lips would spill the contents, he elbows would slip from the bar, and his head would wobble. All in all, manifesting all of the indicia of intoxication. During the course of the evening, he had occasion to speak to the gentleman, whom later was identified as Charles Simon. He went to the men's room, and on his return, he attempted to engage the gentleman in conversation. The Inspector described his speech as slurred and responses to questioning as incoherent. In effect, he would not understand anything that Mr. Simon said. At the time, being only a foot away from Mr. Simon, he was in a position to smell his breath which evinced a strong odor of alcohol. His eyes were bloodshot, in effect dialated.

Last call for drinks occurred approximately 1:50 a.m. After discussion with Inspector A.N. concerning the lack or state of sobriety of Charles Simon, the witness left the premises called in the two uniformed troopers and two ATRA technicians. The troopers took custody of Mr. Simon, who was subsequently transported to the Edison State Police Barracks.

OAL DKT. NO. ABC 0137-80

After identifying himself to Lynn Saunders, bartender and manager of the Showcase Lounge and Marilyn Ehrlich, stockholder in the Corporation, the contents of Mr. Simon's glass was seized and transported to the Division's laboratory chemist for analyzing and evidentiary purposes.

The bottle and accompanying chemist's certified report were then entered into evidence, A, 58, 364 Case No. 870 79 142, as R-1 and R-1A.

Inspector L.C. concluded direct examination by stating, based on his ten-years experience as an inspector with the Alcoholic Beverage Control, investigating intoxication cases, it was his opinion that Mr. Simon was intoxicated.

On cross-examination, Inspector L.C. stated that the ATRA group had visited several bars during the course of the evening in New Brunswick and Middlesex County on a similar detail.

While both he and Inspector A.N. had ordered rye whiskey and gingerale, he specifically did not drink the alcoholic beverage nor to his knowledge did Inspector A.N.

The witness conceded that he and Inspector A.N. were conversing about the go-go girls, but denied any comments were made in more than a conversational tone. He admitted, while he had been attempting to engage Mr. Simon in conversation, loud music was playing on and off.

He did not additionally inquire of Mr. Simon as to whether or not he was suffering from any physical or mental defects. The witness indicated, while the lights may have been dim, he ascertained the condition and redness of Mr. Simon's eyes by utilizing his troopers' flashlight.

The witness conceded further when the duo entered the bar, the beer was already in front of Mr. Simon and he at no time saw the individual being served during the Inspectors' stay. Inspector L.C. acknowledged Inspector A.N.'s report did not reflect Mr. Simon's elbows as sliding off the bar in contradiction of his own statement.

On redirect-examination, the witness affirmed, as an inspector under the ATRA program he would not be permitted to drink while conducting an investigation.

Inspector A.N. corroborated his presence with Inspector L.C. on September 16, 1979. He indicated on cross-examination, although he had been an Inspector for twenty years, the evening in question, was his first occasion to perform ATRA duties. In

OAL DKT. NO. ABC 0137-80

reference to Mr. Simon and in characterizing his physical condition, Inspector A.N. indicated he particularly found Mr. Simon's lack of muscular control as being descriptive of inebriation. He described Mr. Simon's neck as appearing to be made of rubber, wherein his head would nod up and down, similar to little dolls in the rear windows of cars.

Additionally, Mr. Simon, while not spilling the beer, seemingly had difficulty finding his lips with the glass. Mr. Simon's speech he corroborated, was slurred and in effect, results in no speech at all. In Inspector A.N.'s words, Mr. Simon was actually mumbling. A strong odor of alcohol emanated from his person. His eyes were bloodshot and bleary. Subsequent to the identification of the Inspectors and their purposes for being at the establishment, Inspector A.N. had an opportunity to see Mr. Simon walk. His gait was described by Inspector A.N. as being very, very unsteady.

In speaking to Mr. Saunders after the ATRA team had taken Mr. Simon under protective custody, Mr. Saunders had indicated to him that he had only served Mr. Simon two beers.

After speaking with Mrs. Erlich, the principal in the Corporation of Showcase Lounge, Inc., Mr. Simon was turned over to the ATRA team and the evidence of the beer was seized for evidential purposes.

Inspector A.N. corroborated the fact that Mr. Simon was not served any alcoholic beverage during the period they were in the establishment. That in fact, Mr. Simon was there upon their arrival.

Inspector A.N. indicated although both of the Inspectors had ordered alcoholic beverages, that neither of them had drank the contents. It was their usual procedure to dump alcoholic beverages, and he in fact had dumped it on the floor. Although he was not certain whether or not Inspector L.C. duplicated this procedure, he indicated that they were instructed to do so while functioning with the program under normal operations.

He concluded cross-examination by indicating it was his first participation under the ATRA program and he had only been on the premises of Showcase Lounge on that one occasion.

Questioned by the Court in light of the statement that Mr. Simon was incoherent or unintelligible as to precisely how identification was effectuated, Inspector A.N. indicated that Mr. Simon had some sort of identification on him but he wasn't really sure what it was at the time. Perhaps it might have been a wallet.

OAL DKT. NO. ABC 0137-80

At the conclusion of Inspector A.N.'s testimony, the State rested.

The licensee call Mr. Lynn Saunders. Mr. Saunders indicated that he had been employed in the capacity of a bartender at the Showcase Lounge for approximately five months, although he had worked as a bartender at other establishments for approximately 5 years. His hours on the particular night in question was from 6:00 p.m. until closing, and in fact he was no longer employed at the Showcase Lounge.

His recollection was that Inspector L.C. and A.N.'s entrance preceded the entrance of Mr. Simon by some twenty minutes. "Charley" whom he referred to in personalized fashion, (referring to Mr. Simon) in Mr. Saunders' words, could be characterized as a derelict or a "wino". That in fact, he had occasion to encounter Mr. Simon 4 or 5 nights a week over a period of seven months. That he had conversed with him on numerous occasions. And, although Mr. Simon's speech could not be characterized as evidencing a speech impediment, for the most part consistent with the demeanor and characteristics of a derelict, he tended to ramble and in many instances being incoherent was demonstrative of a norm for Mr. Simon.

The bar that night, as Mr. Saunders recalled, was quite full. In fact, perhaps more than 35 patrons attested to by Inspectors L.C. and A.N. were present.

The bar, contrary to the testimonies of the two Inspectors, was not oval, but was in fact a rectangular bar, having square corners made from pine slabs with slanting edges. The surface of the bar consisted of urethane surface with a plastic coating, but had in fact no lip around the outer edges to support ones' elbows.

Referring back again to Mr. Simon's physical characteristics, Mr. Saunders testified that although he was not aware of any physical infirmities regarding Mr. Simon's leg, that his ambulating walk indicated that his legs weren't too good.

When Mr. Simon arrived, according to Mr. Saunders, he came in, sat down and requested a Budweiser. Mr. Saunders stated, he gave Mr. Simon his Bud and placed his change upon the bar. He could recollect no slurred speech or experiencing any problem understanding what Mr. Simon wanted. Mr. Saunders indicated that over a period of time, he had numerous occasions to observe Mr. Simon around town.

OAL DKT. NO. ABC 0137-80

Additionally, he had several occasions to observe Mr. Simon in an inebriated state. He was therefore in a position to make a distinction. He described Mr. Simon when under the influence or evidencing intoxication, was pretty loud, he would holler at the go-go girls and be more or less obnoxious.

The evening in question Mr. Saunder testified, Mr. Simon was just the opposite. He was quiet, subtle, simply sat there observing the girls and drinking his beer. Mr. Saunders indicated that because of the numerous patrons in the establishment he did not actually stand in front of Mr. Simon and watch him drink. As far as Mr. Simon's elbow sliding off the bar, Mr. Saunders indicated "Charley" rarely sat with his elbows on the bar. His usual manner of sitting was in a slouched position, his elbows resting on his thighs in a slouching posture. He, too, described "Charley" as being approximately 60 years of age. His recollection was that he had served Mr. Simon perhaps one or two beers, but he was certain that he did not give him a glass, because "Charley" was not in the habit of drinking beer from a glass.

Mr. Saunders averred that his experience as a bartender spanning some five years, provided him with sufficient experience to observe patrons under various degrees of intoxication. It was his opinion, in being familiar with Mr. Simon coupled with his experience of gauging intoxication or lack thereof, that Mr. Simon in fact did not appear to him to be intoxicated on September 16, 1979.

Mr. Saunders indicated that his attention was focused upon the two Inspectors, however, because of the loud comments made between the parties regarding the go-go girls.

After the bar was closed that night, the assignment of cleaning up the premises was allocated to Mr. Saunders. It was his recollection that in sweeping and mopping the floor, contrary to the Inspectors' testimony that the drinks purchased by them had in fact been dumped on the floor, that he saw no liquids of any kind on the floor.

On cross-examination Mr. Saunders made distinctions between persons obviously drunk and those who would simply sit there minding their own business and drinking a beer and not bothering anybody. Under those circumstances Mr. Saunders said, he wouldn't bother a guy. If a person was passing out, staggering, loud or roudy with fellow patrons, causing trouble, yelling obscenities at the go-go girls, then he would remove such persons. Mr. Saunder also indicated that a tavern having go-go girls created a different kind of atmosphere than the ordinary bar. In such a climate or atmosphere people tended

OAL DKT. NO. ABC 0137-80

to be louder, reacting to the dancing go-go girls. However, as long as patrons or persons were not overly boisterous, or throwing up or passing out, he would serve them upon request.

Additionally, if such persons evidencing what he considered a state of inebriation would enter the bar, and he were to observe them when they came in, he would request them to leave.

On cross-examination, probed as to a description of a derelict, Mr. Saunders made a distinction between normal persons. His idea of a derelict was the stereo-typed definition of persons whose clothes were unkempt, usually unshaven and chosing for his associates other derelicts in town. Priorities were placed on purchasing alcoholic beverages rather than food necessary for sustenance. That description comparts substantially with the accepted definition of derelict.

He further indicated that "Charley" even when so-called normal, evidenced a lack of muscular control, the majority of the time being incoherent as well. Subsequent to the incident it was Mr. Saunders' testimony that he had occasion to speak with "Charley" in the train station. One of his drinking buddies had asked what happened. Mr. Saunders' attempts to converse with him proved futile. So unintelligible was "Charley" that he finally gave up attempting to understand him and left.

Mr. Saunders related in conjunction with the new law prohibiting the serving of an apparently intoxicated person, one of his procedures was to sit by the bar or the front door and screen patrons as they would come in. He conceded however, it was difficult to individually screen every patron as they came in because of his duties to service the customers. Consequently, a good deal of the time, opportunity to check them out more closely occurred when they would place their orders. He so checked Charles Simon. Charles Simon in his estimation, again, did not demonstrate intoxication, but in Mr. Saunders' words he seemed "pretty mellow" that night.

Mrs. Ehrlich testified briefly. Mrs. Ehrlich indicated that at the time of the incident, she held a 50% shareholder interest in the Showcase Lounge, and at the present time was the sole owner of the corporation. She too was on the premises the night of September 16, 1979. She related that subsequent to the incident, there were two elderly gentlemen, who happened to be neighbors of Charles Simons, and their comment was Charley "had trouble crossing the street in morning." He always appeared to have problems walking and physically handling himself. Mrs. Ehrlich indicated while she did not know Charles Simon personally, she had on several occasions seen him at the Showcase Lounge.

OAL DKT. NO. ABC 0137-80

At the conclusion of Mrs. Ehrlich's testimony, the licensee rested her case.

In determining these facts to be what actually occurred on September 16, 1979 in the Showcase Lounge, I have carefully weighed the credibility of all the witnesses. It is the unique responsibility of the trier of fact to determine if the testimony comes from credible witnesses and is credible in and of itself. See Spagnuolo v. Bonnett, 16 N.J. 546, 1954, Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960). I have viewed all the facts and circumstances which show the witnesses' relation to the case and to the parties and have evaluated any possible interest or bias of each witness who has testified. See In Re Hamilton State Bank, 106 N.J. Super. 285 (App. Div. 1969). In evaluating such testimony, I am guided by the firmly established principle that disciplinary proceedings against liquor licenses are civil in nature and require proof by a preponderance of the believable evidence. See Freud v. Davis, supra, and Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 1956.

As a result of said evaluation, I FIND that:

1. Showcase Lounge, Inc., is the possessor of plenary retail consumption license No. 1214-33-090-002 located at 12 Easton Avenue, New Brunswick, New Jersey.
2. On September 16, 1979, Inspectors L.C. and A.N. of the New Jersey State Police, Division of Alcoholic Beverage Enforcement together with two state troopers and two ATRA agents, visited the premises of Showcase Lounge.
3. Inspectors L.C. and A.N. entered the premises approximately 1:30 a.m.
4. The Inspectors ordered rye whiskey and gingerale.
5. The Bar was large square shaped with a go-go ramp where go-go girls were dancing.
6. Charles Simon approximately 60 years of age was seated near the two Inspectors.
7. Charles Simon was observed drinking beer from a glass with a partially filled bottle of Budweiser in front of him.

OAL DFT. NO. ABC 0137-80

8. Charles Simon while evidencing slow movements in getting the glass of beer to his lips did not spill the beer.
9. The Inspectors in an attempt to engage in conversation found Charles Simon unintelligible, eyes bleary and some lack of muscular control.
10. Charles Simon was not loud, boisterous, did not engage in any offensive remarks either to the go-go girls or patrons.
11. Charles Simon was known by Lynn Saunders, bartender and manager as a derelict in the neighborhood. Usually unkempt, unshaven, hanging out with other derelicts and "winos" in the neighborhood, living off of a pension.
12. Charles Simon's normal gait was unsteady and usual manner of communicating unintelligible.
13. In an inebriated state, familiar to Lynn Saunders, Charles Simon would stagger, yell and scream.
14. No such manifestations of intoxication was demonstrated September 16, 1979.
15. No sale, service or delivery of the beer was made in the Inspectors presence.

The owning of an alcoholic beverage license is a privilege and not a right and should be protected as such. In State v. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960) it was stated that

"whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skills, and is habitually and properly inquired into by witnesses who have occasion to see him and whose means of judging correctly must be submitted to the trier of facts..."

The Court held in Hornauer v. Division of ABC, 40 N.J. Super. 504, 410 (1956) that the general accepted gauge of administrative factual finality is whether the findings are

supported by substantial evidence. Additionally, in Freud v. Davis, 64 N.J. Super. 242, 247, (App. Div. 1960) *** as our highest court said almost a century ago, it is "the constant established practice" to permit lay opinion evidence on the question of intoxication. Kastner v. Slicker, 33 N.J.L. 507, 509-510 (E&A 1969). The issues in the case are essentially factual. It is evident that the resolution of the factual issues turns upon the credibility of the witnesses. The approach becomes in effect a balancing of the Inspectors' experience in determining intoxication and that of the bartender. Here, the peculiar social status of the individual comes into play as a pivotal factor for consideration. A bartender servicing customers over a long period of time tends to become familiar not only with their drinking preferences, but gain additionally, perception into customers' level of intoxication.

"The rules are directed to the possessors of retail consumption licenses and those in their employ - persons who by reason of their occupation may fairly be deemed to possess a certain expertness in this field of endeavor". Division of Alcoholic Beverage Control v. Zane, 99 N.J. Super., p. 201.

A person apparently intoxicated, the Court went on to say,

"...refers to the observable manifestations of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior..." at p. 201.

The "norm" of Charles Simon as attested to by Lynn Saunders, was to slouch, walk with an uneven gait, display slow movement and look bleary eyed.

Additionally, the respondent experienced some credibility problems. The statement by Inspector L.C., for example that Mr. Simon spilled his beer was contradicted by Inspector A.N., who stated exactly the opposite. The reference to an oval bar which as attested to by Mr. Saunders was, in fact, a hand hewn square bar. The lack of recollection as to how Charles Simon was dressed whether dishevelled or not. The idea of dilated pupils upon exposure to direct contact with the brilliance of flash light poses additional problems.

Given Mr. Saunders' knowledge of the individual as opposed to the Inspectors' first and only encounter while on first assignment as ATRA agents, the balance would tend to tip in favor of Mr. Saunders' asserted facts. Under the circumstances, the Inspectors could understandably err.

While the respondent is not required to offer proof that a patron was "actually intoxicated," to meet the preponderance of the believable evidence standard would require more than what was herein recited under the circumstances described and given the averred status of the patron.

The Court CONCLUDES therefore the the Division of Alcoholic Beverage Control has not proved by a preponderance of the competent evidence that N.J.A.C. 13:2-23.1 (b) was violated.

Not having found the licensee in violation, the Court directs the Director of the Division of Alcoholic Beverage Control to DISMISS the charges against Showcase Lounge, Inc.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, 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. COURT DECISIONS - SHOWCASE LOUNGE, INC. - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4511-79

SHOWCASE LOUNGE, INC.,

Petitioner-Appellant,

v.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND
PUBLIC SAFETY, DIVISION OF ALCOHOLIC
BEVERAGE CONTROL, and JOSEPH H. LERNER,
DIRECTOR,

Respondents.

Argued: February 23, 1981 - Decided: March 24, 1981.

Before Judges Milmed and Francis.

On appeal from Final Judgment of Suspension by Director
of Division of Alcoholic Beverage Control

Robert W. Gluck argued the cause for appellant
(Gluck & Kelso, attorneys).

Jerome A. Ballarotto, Deputy Attorney General, argued
the cause for respondents (John J. Degnan, Attorney General
of New Jersey, attorney).

PER CURIAM

(Appeal from the Director's decision in Re: Showcase Lounge,
Inc., Bulletin 2414, Item 1. Director affirmed. Opinion
not approved for publication by Court Committee on Opinions.)


Joseph H. Lerner
Director