

**DIVISION OF ALCOHOLIC BEVERAGE  
CONTROL,  
Petitioner,**

v.

**HARRY M. STEVENS, INC., TA  
ATLANTIC CITY RACE TRACK,  
Respondent.**

Decided April 13, 1981

**Initial Decision**

**SYNOPSIS**

Respondent was charged by the Division of Alcoholic Beverage Control with serving alcohol to an apparently intoxicated person in violation of *N.J.A.C.* 13:2-23.1(b).

The administrative law judge assigned to the case found that while the Division's investigators had observed an apparently intoxicated person being served by the respondent, any conduct observed by the respondent's employees behind the bar did not give rise to a conclusion by a reasonable person that the individual's behavior departed from the norm.

Accordingly, the administrative law judge ordered that the matter should be dismissed.

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**Jerome A. Ballarotto**, Deputy Attorney General, for petitioner  
(**James R. Zazzali**, Attorney General of New Jersey, attorney)

**Joseph S. Nester**, Esq., for respondent (Russo, Tumulty & Nester,  
attorneys)

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**MOSES, ALJ:**

This matter was brought before the court as the result of a disciplinary proceeding initiated by the Division of Alcoholic Beverage Control on September 14, 1979. The complaint charged Harry M. Stevens, Inc., t/a Atlantic City Race Track, with serving alcohol to an apparently intoxicated person, in violation of *N.J.A.C.* 13:2-23.1(b).

An initial hearing was scheduled in this matter for July 10, 1980.

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All parties received notice and appearances are noted above. Immediately prior to the commencement of testimony on that date, the Deputy Attorney General moved to amend the complaint, by changing the date of the actual sale of alcoholic beverages to intoxicated persons from July 6, 1979 to August 10, 1979. The original complaint alleged as follows:

On July 6, 1979, you sold, served and delivered and allowed, permitted and suffered, the sale, service and delivery of alcoholic beverages, by such persons in and upon your licensed premises; in violation of *N.J.A.C.* 13:2-23.1(b).

The attorney for the licensee objected to said amendment. Briefs were filed on behalf of the Division and in opposition to said amendment. On October 8, 1980, this judge issued an opinion amending the complaint so that it states that the alleged violation of *N.J.A.C.* 13:2-23.1(b) took place on August 10, 1979.

The case was heard on March 2, 1981, and the same attorneys appeared.

The Division relied on the testimony of Inspector W, who has been with the State Police Bureau of Alcoholic Beverage Control for the past 10 years. Inspector W's duties as an undercover investigator include investigating sales to minors and to intoxicated persons. Inspector W testified that on August 10, 1979, he went to the Atlantic City Race Track in the company of two other inspectors, I. and V. At 9:30 p.m. he saw Joseph Wesley Jones drinking a beer at the bar on the lower level. W was 10 feet away from Jones and noticed that he was swaying just a little bit. At that point, Jones left the bar and wandered through the crowd, and Inspector W lost sight of him.

The inspector next saw Mr. Jones at the bar at 10:45 p.m. He observed him weaving and swaying with his feet spread wide apart, and heard him talking in a loud and slurred voice. He watched Mr. Jones go to the TV screen, 10 feet from the counter, to look at the odds. In W's opinion, Jones had difficulty walking, in that he was swaying, staggering and almost stumbling. Jones had a paper cup of beer while at the bar, but he left it there when he went to look at the odds. Inspector W could not state where he got the beer and who sold it to him.

Inspector W followed Jones through the crowd, watching him sway, stumble and bump into patrons. Jones got on an escalator and went to the second level. The agents followed. On the second level, Jones went to a refreshment stand, pushing people out of his way. He was loud and boisterous and upset the other patrons. His speech was

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slurred. Jones ordered a sandwich, paid for it and ate it in a very sloppy fashion. He then walked down the stairs, falling down the last three steps and losing his sandwich. Inspector W watched Jones get back up and walk slowly down the hallway between the levels, holding the railing. The inspectors then watched him walk back to the bar, still staggering and fumbling with a one-dollar bill, which he eventually placed on the counter. All the aforementioned activities, with the exception of placing the one-dollar bill on the counter, were out of the eyesight of the bartenders.

Inspector W testified that Mr. Perone, one of the bartenders on duty, took the one-dollar bill and laid it on the register, but did not bring anything to Jones. Jones then told Perone, in a loud slurred voice, he wanted his beer or his 85 cents back. The bartender picked up a paper cup marked "\$.85," filled it with beer from a Budweiser tap, placed it in front of Jones and turned to the other customers. This took place at approximately 11:15 p.m. Jones picked up the cup and tried to align the glass to his lips to take a sip. It was at this point that Inspector W told Inspector V to get a uniformed officer. W said he continued to watch Jones at the bar for about five to seven minutes. He was swaying, staggering, leaning on the counter and had droopy eyelids and bloodshot eyes. At 11:22 p.m., Jones went to a cigarette machine and tried to purchase a pack of cigarettes. He brought his beer with him. When he could not get the correct amount of change into the machine, he banged and kicked it and then broke the glass on the front of the machine. Two detectives and a uniformed trooper went over to Jones, while W identified himself to the bartender, Nicholas Perone, and told Perone he had served the beer to Jones while he was intoxicated. Inspector W testified that Perone stated he served the beer to Jones in order to get rid of him. In the opinion of Inspector W, Jones was intoxicated.

Cross-examination revealed that the original investigation in the summer of 1979 at the Atlantic City Race Track was to pursue allegations of sales to juveniles. No charges were ever filed against the licensee in that respect. Inspector W explained that the reason July 6, 1979, was inserted in the report as the "date of the crime," rather than the date of the event, August 10, 1979, was that the July date was the day the investigation started, and that was policy at the time he wrote that report. Inspector W conceded that he stayed in the bar area on August 10, 1979, for four hours and never saw any other people who were intoxicated. He also conceded that the bartenders refused service to juveniles.

Inspector W's most relevant testimony was that it was not until

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10:45 p.m. that he saw Jones exhibit the signs of intoxication which led to the instant complaint. Inspector W did not confront the bartender at that time because he wanted to see if the bartender would serve Jones. Even though Jones was rowdy, fell down the stairs and jostled and disturbed other patrons (Inspector W's own words) Perone had only a limited opportunity to observe Jones before serving him the beer, "maybe half a minute" and nothing happened in that 30-second period to draw Perone's attention to the fact that Jones was intoxicated.

Inspector W conceded that the police never arrested Jones for breaking the glass nor does he believe they threw him off the race track property. He also conceded that the bartender did not see Mr. Jones fall down the stairs, drop his food or sway, stagger, stumble and jostle people on the lower grandstand level. Inspector W reiterated that Perone admitted selling beer to Jones because Jones was at the bar bothering him, and the only way to get rid of him was to serve the beer.

Both counsel stipulated that the testimony of Inspector I would be substantially the same as the of Inspector W, on direct and on cross, and therefore it was not necessary to call him to testify. The Division then rested at the conclusion of Inspector W's testimony.

The licensee moved to dismiss the case for failure to state a claim, on the grounds that there was no evidence that Perone saw evidence of apparent intoxication and that the words "apparently intoxicated" were vague and unconstitutional. The Division argued that it had presented more than a scintilla of evidence that the licensee's agent did see the conduct, and was entitled to all the favorable inferences of the direct testimony. The motion to dismiss was denied.

The licensee presented the bartender, Nicholas Perone. He has been a bartender at the Atlantic City Race Track, working for Harry M. Stevens, for the past 18 years. On August 10, 1979, he worked the 4 p.m. to midnight shift. The bar is 60 feet in length and he has to serve an eight-foot area. He does not know Jones and does not recall serving beer to him. Mr. Perone specifically recalled he did not serve any beer to any intoxicated person on August 10, 1979. He is instructed by his boss not to serve such people. He also testified he cannot see the cigarette machine from his position at the bar and has no recollection of the broken glass incident. Mr. Perone denied that Inspector W ever identified himself as a State Alcoholic Beverage Control policeman, and denied that Inspector W accused him of selling to an intoxicated person. Perone further testified he does not

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allow bar patrons to stand and drink at the bar because it is a "fast" bar, especially on Friday nights. It would be extremely unusual to have someone stay seven or eight minutes at the bar, because he is instructed by his employer to keep people moving. Perone was adamant in denying that he admitted to the inspector that Jones was bothering him and that he served Jones a beer to get rid of him. Mr. Perone continually stated he had no recollection of an "Alcoholic Beverage Control man" ever approaching him on the night in question. He is 74 years old, has been working for Stevens for 18 years and hopes to do so again during the 1981 racing season.

The court directed that both attorneys file memoranda addressing the following issues:

1. Credibility of the witnesses.
2. The indicia of apparent intoxication.
3. The effect of the alleged admission of Mr. Perone.
4. Is there any adverse inference to be drawn from the failure of the Division to produce Mr. Jones.

Both counsel filed briefs in a timely fashion.

The Division argues that the court should not draw an adverse inference from its failure to call the intoxicated patron, Mr. Jones, as a witness. The Deputy Attorney General cited *Hickman v. Pace*, 82 *N.J. Super.* 483, 490 (App. Div. 1964), which states that an adverse inference does not arise when the person in question is equally available to both parties, or if the person's testimony is comparatively unimportant, cumulative or inferior to what has already been utilized. He argues that Jones' testimony would have been cumulative and really unimportant, relative to the observations of the agents. The Division further argues that it is wholly irrelevant that the bartender had a limited opportunity to view the symptoms of apparent intoxication exhibited by Mr. Jones, because of the alleged admission made by Mr. Perone to Inspector W, and because Mr. Perone took a dollar bill from Mr. Jones without giving him a beer. The Division further argues that, even if Perone did not actually know Jones was apparently intoxicated, he should have known, because the licensee bears the burden of being responsible for all conduct occurring on his premises. He cannot close his eyes and ears but must use them effectively to prevent improper use of a licensed premises.

Counsel for the Division of Alcoholic Beverage Control states that the evidence supports a finding that Mr. Jones was apparently intoxicated within the meaning of *N.J.A.C.* 13:2-23.1(b), and that said standard is fair and not unduly vague. *Division of Alcoholic Beverage*

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*Control v. Zane*, 99 *N.J. Super.* 196, 201 (App. Div. 1968). He urges the court give more credence to the testimony of the inspector than that of Mr. Perone, because Mr. Perone is a long-time employee of Stevens and because he is 74 years old.

Licensee responded by pointing out that the only time Inspector W testified about an employee serving Mr. Jones was at 11:15 p.m. He further argues that the indicia of intoxication that were seen by Inspector W were never seen by the bartender. For example, he states that there is no evidence whatsoever that Mr. Perone observed the incident at the cigarette machine, or the staggering and stumbling of Mr. Jones amongst other patrons. The licensee relies on Perone's denials that he knew or saw Mr. Jones in the apparently intoxicated condition, that Inspector W confronted him and that he admitted selling to Jones. Thus, the licensee urges strongly that there is no proof of any kind that the bartender, Mr. Perone, ever observed Mr. Jones in an apparently intoxicated condition because, other than when he saw Mr. Jones purchase the beer at 11:15 p.m. for about 30 seconds, all other activities were out of his sight. He rejects the theory that he should have known of this conduct and argues that the Division has not proved the elements of the violation by a preponderance of the evidence. He argues that the case of *Division of Alcoholic Beverage Control v. Zane*, 9 *N.J. Super.* 196 (App. Div. 1968), refers only to *observable* manifestations of intoxication and, since Perone did not see the conduct, the Division has failed to prove its case.

After having observed the witnesses and after having reviewed the entire record, including the testimony and the exhibits submitted in evidence, and after reviewing the letter memoranda submitted by both counsel and the arguments contained therein, the court makes the following findings of fact in regard to the issues in controversy:

1. Both witnesses, Inspector W and Mr. Perone, gave credible and sincere testimony.
2. Inspector W made the following observations, which the court adopts as fact:
  - A. At 10:45 p.m. Mr. Jones was standing at the bar with his feet spread wide apart; swaying, talking in a loud voice and leaning on the counter for balance. He had difficulty in walking and was swaying, staggering and stumbling. Inspector W. has no knowledge of where he got the beer or who sold it to him.
  - B. When Jones left the bar, he stumbled through the crowd, pushing people out of his way as he went to the second

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- level. When purchasing food on that level, he was loud and boisterous and his speech was slurred.
- C. Jones walked down the stairs between the two levels in an unbalanced manner, and finally fell down the last three steps, dropping his sandwich and then retrieving it with difficulty.
- D. Jones then walked very slowly down the hallway between the levels and proceeded slowly back to the counter where Mr. Perone was tending bar.
3. All of the aforementioned activities took place out of the eyesight of Mr. Perone. Furthermore, there is no evidence whatsoever that any employee of the licensee observed the conduct described by Inspector W.
  4. At approximately 11:15 p.m., Mr. Jones walked slowly to the bar and placed a one-dollar bill on it. Mr. Perone took the bill, but did not give Jones anything.
  5. Jones then said in a loud, slurred voice that he wanted a beer or his 85 cents back. At that point, Mr. Perone gave Mr. Jones a beer. The court adopts Inspector W's opinion, that this transaction took half a minute, as fact.
  6. Mr. Perone then had to tend to other patrons, and turned away from Jones. Jones had some trouble aligning his glass to his lips, and was swaying and leaning on the counter. He had droopy eyelids and his eyes were bloodshot.
  7. The Stevens bar on the lower level at the Atlantic City Race Track is a "fast" bar, in that it serves many patrons in a short period of time between races, in that it does not encourage lengthy stays at the bar and in that it is very crowded on Friday nights in the summer. It was busy and crowded on August 10, 1979. Therefore, Mr. Perone did not have an opportunity to observe Jones after serving him.
  8. The conduct which Mr. Perone did observe does not give rise to a conclusion by a reasonable man that Mr. Jones' conduct and demeanor had so far departed from the normal pattern of behavior that Perone had to instigate an inquiry before he served him the beer in question.
  9. Any statement made after the fact by Mr. Perone, that he served the beer to Mr. Jones in order to get rid of him, does not automatically give rise to an inference that Mr. Perone knew that Mr. Jones was intoxicated, especially in light of Jones' tone of voice and in light of the fact that this is a "fast" bar, crowded on a summer Friday night.

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10. Inspector W followed Mr. Jones as he left the bar after drinking his beer, and as he went to the cigarette machine. At the machine he had trouble inserting coins, and eventually broke the glass. The cigarette machine is not visible from the bar.
11. Mr. Jones did not return to the bar. No charges of any sort were ever filed against him.

In determining these facts to be what actually occurred on August 10, 1979, at Harry M. Stevens, Inc., t/a Atlantic City Race Track, the court has taken into consideration that 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. Ronnett*, 16 N.J. 546 (1954); *Freud v. Davis*, 64 N.J. Super. 242 (App. Div. 1960). The court is guided by the firmly established principle that disciplinary proceedings against liquor licenses are civil in nature and require proof by only a preponderance of the believable evidence. *See, Fried v. Davis, supra*, and *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, 20 N.J. 373 (1956). As a result of evaluating the testimony of both witnesses, the court finds their testimony to be credible in that each told the truth about what he remembered of the night in question. This judge has also taken into consideration any facts or circumstances which might have shown Mr. Perone's relationship to the case and to the parties, and has evaluated any possible interest or bias that he may have. *See, In re Hamilton State Bank*, 106 N.J. Super. 285 (App. Div. 1969). The fact that he has been employed by the license for 18 years, or that he is 74 years old, does not automatically taint his testimony. His testimony was sincere, if gruff, and this judge finds that he told the truth about his lack of observation of Mr. Jones prior to 11:15 p.m. and his failure of recollection about the 30-second transaction.

On the other hand, the court has no difficulty in accepting the observations of Inspector W, which form the basis for his opinion that Mr. Jones was apparently intoxicated. The standard for such a determination is not ambiguous or vague. The Appellate Division has clearly stated:

The term "apparently" refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor has departed from the normal patten of behavior. *Division of Alcoholic Beverage Control v. Zane, supra*, at 201. The observations of Jones by Inspector W., adopted in the findings of fact, clearly show a pattern of behavior which portrays a person who fits the Appellate Court description.

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The issue in controversy in this case is whether or not the bartender, Mr. Perone, and employee of Harry M. Stevens, made the same observations and saw the same manifestations of apparently intoxicated conduct that Inspector W saw. If the court finds that he made similar observations to those of Inspector W, then the court must find he should have reached the same conclusion as Inspector W as to apparent intoxication, and that Perone served Jones alcohol in violation of *N.J.A.C.* 13:2-23.1(b). The court's problem is that the vast bulk of Jones' conduct, upon which Inspector W rested his conclusion of apparent intoxication, took place out of Mr. Perone's sight. Inspector W himself stated that Mr. Perone only made direct observations of Jones for one-half minute. Furthermore, the court has found as fact that the bar was a fast bar and there were crowds of patrons that evening, a summer Friday evening at the Atlantic City Race Track. It is thus unlikely Mr. Jones stayed there for five to seven minutes, and even if he had trouble aligning the glass to his lips and swayed or held the counter for balance, there is no testimony before this judge that Mr. Perone observed this. (The issue of whether Perone *should* have seen him will be addressed later.) Other than the 30-second period of observation, the only other testimony that could support a finding that Perone saw Jones in poor condition is Inspector W's statement that Perone admitted he sold Jones a beer in order to get rid of him. Perone denies this. But that admission, in and of itself, does not mean Perone knew Jones was drunk. It could mean that Perone gave him the beer to get rid of him because he was talking loudly. Therefore, although the Division has proved by a preponderance of the competent and credible evidence that Mr. Jones exhibited the indicia of apparent intoxication, they have not satisfied the burden of proof in regard to whether or not the licensee or his employee permitted, suffered, sold, served and delivered beer to a person that *they knew* was actually or apparently intoxicated. The bartender did not have actual knowledge of Jones' apparent intoxication.

The court comes to this conclusion without drawing an adverse inference against the Division from its failure to produce Mr. Jones as a witness. His testimony would have been cumulative at best, and would have been unimportant, because it is not his observations or recollections of what happened that night, but the observations of the licensee, or his duty to make certain observations, as well as the observations of the inspector before reaching his opinion, which are crucial to this matter.

A major issue here is whether or not the licensee should have made

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the observations or should have immediately recognized the indicia which Inspector W saw because of a licensee's obligation to adequately supervise a licensed premises. No one disputes that *N.J.A.C.* 13:2-23.1(b) is in furtherance of the stated objective of the Division, which is the fair, impartial, stringent and comprehensive administration of the alcoholic beverage law. See, *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, 20 *N.J.* 373 (1976). The controlling case in regard to serving intoxicated persons, *Division of Alcoholic Beverage Control v. Zane*, *supra*, points out that responsibility in regard to "observable manifestations of excessive indulgence in alcohol" does not place the tavern keeper or his employees in a dilemma or force them to make doubtful decisions. The *Zane* court indicated that the licensee may always make suitable inquiries when a person appears to be intoxicated, in order to verify either that he is intoxicated, or has reached a point where he ought not to be served alcoholic beverages. See, *Zane*, *supra*, at 201. It is this court's opinion that, although the detailed description of Jones' deportment, as observed by the agents of the State Police, clearly established that the manifestations of apparent intoxication were present, the inspector's testimony, taken in conjunction with that of Mr. Perone, does not establish by a preponderance of the evidence that the bartender observed the manifestations of apparent intoxication to such a point where he would be required to make the "suitable inquiry" detailed in *Zane*, *supra*. Therefore, the court concluded that the Division of Alcoholic Beverage Control has not proved that the bartender saw such activities that he should have observed more of the conduct of Mr. Jones, and made inquiry. The court further concludes that Perone did not, in fact, observe the reprehensible conduct in question.

The court has no jurisdiction in this matter, nor is the question before it, to determine whether or not employees of Harry M. Stevens, the licensee, violated other regulations of the Division of Alcoholic Beverage Control, because employees, other than Mr. Perone, did not make the appropriate observations of Mr. Jones when he exhibited the conduct observed by Inspector W. Nor will the court determine, in this matter, that a "fast" bar is or is not a violation of Alcoholic Beverage Control regulations.

The Division has only proved that Mr. Jones exhibited the indicia of apparent intoxication to an Inspector of the New Jersey State Police Alcoholic Beverage Control Enforcement Bureau. It has not proved that the bartender saw enough of Mr. Jones' activities to determine apparent intoxication, or to even question Jones further before serving

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him, nor has it proved that this bartender should have seen the conduct of Mr. Jones, which is described above.

Accordingly, it is hereby **ORDERED** that the complaint charging Harry M. Stevens, Inc., t/a Atlantic City Race Track, with a violation of *N.J.A.C.* 13:2-23.1(b) on August 10, 1979, be and is hereby **DISMISSED**.

**After reviewing this Initial Decision the  
Division of Alcoholic Beverage Control on May 22, 1981,  
issued the following Final Decision:**

Written exceptions to the initial decision below were filed by the Deputy-Attorney General on behalf of the Division and written answer to the said exceptions were filed on behalf of the licensee, pursuant to *N.J.A.C.* 13:2-19.6.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the initial decision, the exceptions filed thereto, and the answers to the said exceptions, I concur in the findings and recommendations of the administrative law judge and adopt them as my conclusions herein.

I have decided to give the licensee the benefit of the doubt in finding that the evidence very narrowly preponderates in its favor. However, I think it should be emphasized that the fact that the licensee operates a "fast" bar serving many patrons, does not immunize it from the responsibility of making the proper observations to determine whether or not the patron to be served is apparently or actually intoxicated. In fact, because it is a "fast" bar, the licensee is required to use an even greater degree of care, i.e., that degree of care consistent with the circumstances, to assure that a violation of the subject Regulation does not occur.

My determination in this matter is based solely upon the evidence adduced herein, and should not be regarded as a precedent in the consideration of cases hereinafter adjudicated.

Accordingly, it is, on this 22nd day of May, 1981,

**ORDERED** that the licensee herein be and is hereby found "not guilty" and the said charge be and the same is hereby dismissed.