

Issue: Group III Written Notice with 5-day suspension (selling alcoholic beverages to minor); Hearing Date: March 4, 2002; Decision Date: March 5, 2002; Agency: Department of Alcoholic Beverage Control; AHO: David J. Latham, Esquire; Case Number: 5384



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5384

Hearing Date: March 4, 2002
Decision Issued: March 5, 2002

APPEARANCES

Grievant
Representative for Agency
Five witnesses for Agency

ISSUES

Was the grievant's conduct on October 12, 2001 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on November 16, 2001 because grievant sold an alcoholic beverage to an

underage buyer.¹ She was suspended for five days as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Alcoholic Beverage Control (hereinafter referred to as "agency") has employed the grievant as store manager for 27 years. During the performance cycles ending in 1996 through 2000, she was rated as either exceptional or exceeding expectations; in the 2001 performance cycle she was rated a contributor.² She has no other active disciplinary actions.

The agency's policy since at least 1996 has been to identify all buyers of alcoholic beverages who appear to be under the age of 30.³ The most recent memorandum to retail employees on this subject states, in pertinent part:

1. When proof of age is requested, two ID's are required.
2. Any employee selling to a person less than 21 years old without checking two forms of I.D. that prove the customer to be of legal age, may be subject to termination. All classified employees found selling to a minor will be subject to a Group III Disciplinary Action and five days suspension. All part-time employees found selling to a minor will be terminated immediately.⁴

To enforce the law and the agency's policy, an underage buyer (UAB) program has been established. The agency recruits persons aged 17-19 to work as part-time buyers. The young people recruited for this position must pass a criminal records check. They are paid a straight hourly wage and do not receive any bonuses or other incentives based on the number of people who improperly sell alcohol to them. These employees are carefully trained to avoid the use of any deception when attempting to purchase alcoholic beverages. The agency does not want to conduct "sting" operations; it attempts only to ascertain whether retailers are complying with the rules for sales to people under the age of 30. Buyers dress in relatively plain clothes, do not wear makeup, wigs, jewelry or anything else to disguise their appearance.

Classified special agents always accompany underage buyers when they go to retail locations. Prior to the attempted purchase, the special agents assure that the underage buyer has only one form of identification (usually a driver's license) on their person and only money provided to them by the special agent for the purchase. Underage buyers are instructed to attempt to purchase an alcoholic beverage and to answer honestly any questions put to them by the retailer. If asked their age, they respond with their actual age. For their own

¹ Exhibit 3. Written Notice, issued November 16, 2001. [Although the Written Notice shows October 16, 2001 as the date of issuance, the Notice was actually issued on November 16, 2001 – the date on which grievant signed the document.]

² Exhibit 1. Performance Evaluations, 1996-2001.

³ Exhibit 2. Memorandum to all wholesale/retail employees, April 1, 1996.

⁴ Exhibit 2. Memorandum to all wholesale/retail employees, July 1, 1998.

protection, buyers are instructed to leave the store immediately after the transaction is completed and return to the vehicle in which they arrived.

The store that grievant manages closed at 6:00 p.m. on October 12, 2001. Shortly before 6:00 p.m., two special agents and an 18-year-old female buyer arrived at the store location. One special agent remained in the vehicle, which was parked at the side of the store; he was not able to see into the store from his location. The buyer entered the store, followed shortly thereafter by the second special agent. She went to the window⁵ and requested a pint of Smirnoff vodka. Grievant requested identification and the buyer produced her driver's license.⁶ Grievant commented to the buyer that her hair was longer in the ID photograph; the buyer responded that she had recently cut her hair. Because the buyer did not have a second form of identification, grievant asked her to sign her name on a brown paper bag. The buyer signed her name on the bag and passed it to grievant.⁷ Grievant compared the signature on the bag with the driver's license and then completed the sales transaction by selling vodka to the underage buyer.

Pursuant to instructions, after purchasing the alcohol, the underage buyer left the store and returned to the vehicle. The agent who followed grievant into the store identified himself and advised grievant that she had just sold alcohol to an underage buyer. The grievant had not previously met the buyer. She had not had any previous adverse interaction with either of the two special agents.

On October 12, 2001, grievant had worked since 9:15 a.m. and had a bad headache throughout the day. She had a hectic week, having spent two nights in the library with her daughter, attended a funeral and was up late three nights earlier when her husband had to go to an emergency room. She contends that she was quite tired and feeling stressed.⁸

The grievant was charged with the unlawful sale of an alcoholic beverage to a person less than 21. In a trial before a judge, the circuit court held that grievant did sell alcohol to an underage buyer and that she was negligent in doing so.⁹ However, the court dismissed the charge against grievant because the requisite element of intent was not proved.

The agency has uniformly enforced its policy when employees sell alcohol to underage buyers. The agency submitted documentation demonstrating that at

⁵ This particular retail store does not allow customers direct access to alcoholic beverages; customers must go to a bank-teller-style security window and request the beverage they want to purchase.

⁶ Exhibit 10. Driver's License of underage buyer. The license lists her date of birth as October 22, 1982, and states that she is under the age of 21 until October 22, 2003.

⁷ Exhibit 11. Photocopy of brown paper bag with underage buyer's signature. [The vodka was placed in this bag and sold to the underage buyer.]

⁸ Exhibit 8. Memorandum to regional manager from grievant, November 15, 2001.

⁹ Exhibit 7, pp. 24-25. Transcript of Circuit Court proceeding in re: Commonwealth vs. grievant, December 17, 2001.

least five other employees who sold alcohol to underage buyers were each given Group III Written Notices and a five-day suspension.¹⁰

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹² promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60

¹⁰ Exhibit 4. Written Notices issued to five other employees from 1998 through 2001.

¹¹ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

¹² Now known as the Department of Human Resource Management (DHRM).

provides that Group III offenses includes acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

After careful consideration of the testimony and documentary evidence, it is concluded that the agency has demonstrated, by a preponderance of the evidence, that grievant did sell alcohol to an underage buyer. Grievant acknowledges that the buyer to whom she sold alcohol is underage, however, she offers several reasons for having done so.

First, she believes she may have misread the buyer's birth year as 1962 rather than 1982. This is not credible because a birth year of 1962 would mean that the buyer was 39 years old. The hearing officer will take administrative notice of the fact that the 18-year-old buyer testified during the hearing, and she could not possibly be mistaken for being 39 years old. Moreover, grievant asked for a second form of identification and when the buyer could not produce one, asked the buyer to provide a signature exemplar. At this point, grievant should have been sufficiently alert to the possibility of an underage buyer to scrutinize the buyer's appearance more closely. Grievant also recalled noting the buyer's home address and thought it was unusual that she was attempting to purchase alcohol in a different part of the city.

Second, grievant contended during a general district court proceeding that on October 12, 2001, the buyer had been wearing a wig that made her hair look "short and crimply."¹³ However, the buyer and both special agents all testified very credibly that the buyer was not wearing a wig on October 12, 2001. The buyer has naturally straight hair and it was not permed or curled on October 12, 2001.

Third, grievant does not believe that the signature on the brown paper bag is the same as the signature on the buyer's driver's license. However, grievant acknowledged that she is not a handwriting expert. The hearing officer observes that, although there are some differences in the handwriting, there are sufficient similarities to suggest that the same hand wrote both signatures. In any case, grievant has produced no evidence to overcome the credible, sworn testimony of the underage buyer that she did write both signatures. Mere allegation is insufficient to outweigh credible, sworn testimony.

Fourth, grievant contends that the buyer was wearing a tweed jacket over a dark tee shirt. The buyer maintains that she was wearing a tee shirt only. This difference in testimony is a red herring. Regardless of whether the buyer was wearing a jacket or a tee shirt, her facial and physical appearance were the same, i.e., clearly under the legal age to purchase alcohol.

Fifth, grievant alleges that the ID presented by the buyer had a different first name. Grievant's recollection of a possible different name is substantially outweighed by the credible testimony of the buyer and two special agents that

¹³ Exhibit 5. Notes from grievance meeting, December 17, 2001.

the buyer carried only one driver's license into the store, and that it had the buyer's correct name on it.

All of grievant's defenses are predicated on the inference that the buyer and two special agents conspired against her by using a different driver's license, different clothes, a wig and even a different buyer (since grievant contends the signatures are different). However, for the reasons stated above, none of the grievant's allegations have merit. Moreover, grievant has offered no theory as to why the buyer and two special agents would be motivated to put their own positions in jeopardy by submitting false evidence in court. During the hearing, grievant stated that she would be filing charges of fraud if the decision in this case is unfavorable to her. The hearing officer explained that any evidence of fraud should be disclosed during the hearing. Grievant acknowledged that she had no such evidence.

While there is no doubt that grievant sold alcohol to the underage buyer, it is unlikely that grievant did so intentionally. She had never previously met the buyer and therefore had no reason to knowingly circumvent the law. Nonetheless, her sale to the underage buyer is a violation of agency policy. The agency's policy details the discipline that will be issued in all such cases.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.¹⁴

In the instant case, grievant has long service with the agency and an above average performance record. However, the agency has made known to all employees that the discipline for this particular offense will always be a Group III Written Notice and five days suspension. The agency has provided proof that this discipline has been meted out to all employees who violate the rule. It would be unfair if the grievant were to receive less discipline than others similarly situated. Moreover, grievant should recognize that the normal consequence of a Group III Written Notice is termination of employment.¹⁵ By suspending her for only five days, the agency has already applied mitigation.

¹⁴ Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹⁵ Section VII.D.3.a. *Ibid.*

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on November 16, 2001 is **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer