

State of New Hampshire



PERSONNEL APPEALS BOARD

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David Fairfield - Docket #2004-D-009

NH State Liquor Commission

February 10, 2005

The New Hampshire Personnel Appeals Board (Wood, Johnson and Bonafide) met in public session on Wednesday, January 19, 2005, under the authority of RSA 21-l:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear the appeal of David Fairfield, an employee of the NH State Liquor Commission. SEA Field Representative Anna-Marie Welch appeared on behalf of the appellant. John Bunnell, Administrator of Marketing and Sales, appeared on behalf of the Liquor Commission.

Mr. Fairfield was appealing his February 13, 2004 disciplinary demotion for allegedly allowing subordinate personnel to violate Commission policies and procedures and refusing to enforce store-operating procedures. The appellant argued that the Commission demoted him for reasons that resulted in lesser discipline or no discipline of employees in other store locations, failed to provide a fair hearing in order for him to refute the evidence supporting his demotion, and failed to use the principles of progressive discipline in determining the appropriate level of response to the alleged infractions.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing on the merits of the appeal, the audio-tape recording of that hearing, and documents admitted into evidence as follows:

Appellant's Exhibits

1. January 30, 2004 letter of warning from John Bunnell to David Fairfield notifying Mr. Fairfield of his transfer and demotion from Retail Store Manager II to Retail Store Clerk II
2. February 13, 2004 letter from Anna-Marie Welch to John Bunnell appealing the January 13, 2004 letter of warning
3. February 13, 2004 letter (revised) from John Bunnell to David Fairfield notifying Mr. Fairfield of his transfer and demotion from Retail Store Manager II to Retail Store Clerk II
4. February 19, 2004 letter from John Bunnell to David Fairfield rescinding the January 30, 2004 letter of warning and demotion
5. March 1, 2004 letter from Anna-Marie Welch to John Bunnell appealing David Fairfield's February 13, 2004 disciplinary demotion
6. Printout – Loss Ratio History Fiscal Years 1996 – 2005, Store 70

The following persons gave sworn _____

Richard Gulla, Supervisor
John Laroche, Assistant Director of Stores
Lieutenant Kyle Metcalf
Peter Engel, Director of Store Operations
David Fairfield, Appellant
Colleen Blais, Retail Store Clerk II
Muriel Faulkner, Retail Store Clerk II

Position of the Parties

Mr. Bunnell argued that the Liquor Commission's decision to demote Mr. Fairfield was a result of the appellant's blatant refusal to follow Commission policies and procedures. Mr. Bunnell asserted that the appellant, during the course of an investigation into losses at the Swanzey store, admitted that he allowed employees to use "community cash drawers," that the store was opened early some days to accommodate certain customers, that damaged products were not always returned on schedule, that posted work schedules were not always observed, and that employees were allowed to make purchases of liquor and lottery tickets for themselves at their own registers. Mr.

Bunnell also asserted that the appellant refused to follow Commission directives with respect to the anti-fraud initiative, claiming that he preferred to use his own methods of cash security and inventory control.

Mr. Bunnell asserted that Peter Engel, Director of Store Operations, believed the offenses were significant enough to warrant termination, but recommended demoting the appellant instead in recognition of his long service with the State. Mr. Bunnell argued that the Commission considered the nature and extent of the violations and the appellant's long service, and voted to demote him to Retail Store Clerk II.

Ms. Welch argued that throughout the investigation at the Swanzey store, knowing that there were surveillance cameras in the store, the appellant never attempted to hide anything. She argued that the appellant admitted that he wasn't operating in accordance with Commission policies and procedures in all cases, but would have been happy to correct any deficiencies and should have been given the opportunity to do so. Ms. Welch argued that because the appellant had received good performance evaluations throughout his career and had never been disciplined, he should not have been subjected to such severe discipline. Ms. Welch also argued that the Liquor Commission violated the spirit of the Rules of the Division of Personnel by failing to use progressive discipline, and violated the appellant's rights to due process by demoting him without notifying him in writing prior to the meeting of January 30, 2004, that demotion was being considered. Therefore, she argued, he was entitled to reinstatement without loss of seniority, status or pay.

Appellant's Motion to Dismiss

By letter dated December 2, 2004, SEA Field Representative Anna-Marie Welch submitted the appellant's "Motion to Dismiss." Ms. Welch argued that the Liquor Commission violated the Rules of the Rules of the Division of Personnel by

"...not scheduling a meeting with Mr. Fairfield at the conclusion of the January 13, 2004 meeting to present whatever evidence they had gathered that they believed supported the decision to demote Mr. Fairfield and to allow Mr. Fairfield an opportunity to refute that evidence.

"Part Per 1001.07 (b)(1) (See EXHBIT 7) contains a requirement that management 'present whatever evidence the appointing authority believes supports the decision to demote the employee.' In order to be in compliance with this rule, the appointing authority would have to provide the employee with some prior notification that demotion was a consideration. This did not occur." (See Motion, page 3).

Ms. Welch also argued that the Liquor Commission did not have the authority under Per 1001.03 (a) of the Rules of the Division of Personnel to demote the appellant, and that the letter of warning issued to the appellant on January 30, 2004 should be considered invalid. She noted that the Commission later rescinded the letter and issued a revised letter of disciplinary demotion in its place.

The State responded to that Motion by letter dated January 13, 2005, arguing that the appellant had the opportunity to refute the evidence presented to him when he met on January 13, 2004 with Peter Engel, Director of Stores, John Larochelle, Assistant Director of Stores, Richard Gulla, Supervisor, and Anna-Marie Welch, SEA Field Representative. He argued that the appellant admitted to:

1. Allowing community cash drawers;
2. Opening the store prior to Commission approved operating hours;
3. Posting schedules that neither he nor his employees followed and failing to advise his supervisor of same; and
4. Allowing employees to register their own sales.

Mr. Bunnell argued that in addition to those admissions, the appellant indicated that he had his own procedures for monitoring store activity and refused to follow Director Engel's written procedures concerning fraud.

Mr. Bunnell argued that the appellant's own statements and responses to questions formed the basis of the evidence upon which the Commission relied in deciding to demote Mr. Fairfield. Mr. Bunnell argued that the investigation into activities at the Swanzey store was still in progress when

the appellant was demoted, so there was no documentary evidence from the investigation available for review by either party. Mr. Bunnell argued that the appellant was given the opportunity to respond to questions about store activities in the presence of his representative and was allowed a further opportunity to refute the Commission's evidence at a meeting at Liquor Commission Headquarters on January 30, 2004. Mr. Bunnell argued that the State abided by the provisions of Per 1001.07 (b)(1) of the Rules, and asked the Board to deny the Appellant's Motion to Dismiss.

The Board held the appellant's Motion in abeyance in order to review it in light of the evidence to be offered by the parties in the hearing on the merits of the appeal.

Findings of Fact

1. The New Hampshire Liquor Commission staffs and operates seventy-four retail outlets statewide.
2. Liquor store managers and clerks are expected to conduct business in accordance with policies and procedures approved by the Commission and published in the Store Operation Manual.
3. David Fairfield managed Store 70 in Swanzey between October 4, 1996 and February 13, 2004, when he was demoted from Retail Store Manager II to Retail Store Clerk II.
4. Although Store 70 historically had excellent inventory control and cash management reports, Store Operations began to see evidence of increasing losses at the Swanzey store beginning in March 2001.
5. Two years later, the Store 70 inventory dated March 1, 2003 showed losses of 577 bottles for the quarter, at least twice the number that would have been expected in some of the larger stores. Without conducting an investigation, neither the management in Store Operations nor the members of the fraud unit could determine whether store personnel were not taking the time to complete accurate inventories, or someone was actually removing products from the store.
6. The Enforcement Bureau had seven active investigations in progress in March 2003. Bureau personnel were unable to initiate an investigation of the Swanzey store until October 2003.

7. The preliminary investigation began with a review of store sales and inventory records and revealed that someone was making lottery sales as early as 8:00 a.m., even though the store was not scheduled to open until 10:30 a.m. or 11:00 a.m.
8. The Enforcement Bureau decided to install a surveillance camera in the public area of the store, hiding it inside an inactive store security camera.
9. Although the installation was intended to be covert, Mr. Fairfield and his clerk both noticed physical evidence that someone had moved ceiling tiles over one of the cash registers while the store was closed. They also had been alerted to the presence of someone in the store after hours when someone from the alarm company contacted staff at the Swanzey store to advise them that the premises had been accessed after hours.
10. Store 70 personnel confirmed with State Police Troop C that Investigator O'Connor (who was working out of Troop C) had been inside the store installing surveillance equipment.
11. Each time thereafter that investigators went into the store to change the tapes in the surveillance camera, the alarm company notified personnel at the Swanzey store.
12. On December 19, 2003, at a doughnut shop near Store 70, Investigators Metcalf and O'Connor met with Mr. Gulla and Mr. Fairfield to inform Mr. Fairfield of their investigation and question him concerning his clerk's activities. The investigators asked Mr. Fairfield for any information he might have about his clerk purchasing and redeeming lottery tickets prior to the store officially opening, or making liquor purchases at her own register, during and after store hours, using her own debit card. Investigators also questioned Mr. Fairfield about employees working from a "community cash drawer" and allowing certain customers to enter the store before it was open for business,
13. The appellant was called to a meeting in Peter Engel's office on January 13, 2004 with Peter Engel, John Larochelle and Richard Gulla. Anna-Marie Welch, the appellant's union representative, was present as well.
14. When Mr. Engel brought up the fraud initiative, the appellant indicated that he wasn't following Commission's procedures for monitoring inventory and cash because he had his own way of doing it.
15. Mr. Fairfield admitted that by allowing employees to use a "community cash drawer," and letting employees open registers with a key rather than with a "sale" or "no-sale," there

- were no reportable journal entries that could be traced to individual employees for activity at their registers, including any accounting for shortages or overages.
16. Mr. Fairfield admitted that he did not notify his supervisor, Richard Gulla, when employee schedules deviated from the schedules he developed and sent in to his supervisor.
 17. Mr. Fairfield admitted that while he was at work, he sometimes assisted in unloading stock for Wilbur's, the store next door, and that Wilbur's store staff would occasionally assist him by using their forklift to unload liquor deliveries.
 18. Mr. Fairfield admitted that he allowed employees to buy their own liquor products and lottery tickets from their own registers.
 19. Mr. Fairfield admitted that customers were sometimes allowed into the store outside normal operating hours because he considered it good customer service. When he stopped the practice and customers complained about the change, he told them it was not his decision and they should express their opinion via customer comment cards.
 20. Mr. Fairfield admitted that when completing "affidavits," the electronic forms that managers submit to report damaged products for return to the supplier, he would sometimes wait a month or a month and a half, although the policy calls for affidavits to be completed within a week of discovering the damage.
 21. Because inventory and cash controls at Store 70 were so lax, the Enforcement Bureau was unable to develop sufficient evidence to bring criminal charges against the employee suspected of engaging in fraud.
 22. Mr. Fairfield's unsatisfactory work performance was sufficient to justify his immediate demotion to a non-managerial position.
 23. The appellant met with Peter Engel on January 13, 2004 and discussed with him all the evidence supporting disciplinary action. At the conclusion of the January 13, 2004 meeting, Peter Engel informed the appellant that he would be making a recommendation for discipline to the Commission.
 24. The appellant attended a meeting on January 30, 2004 at the offices of the NH State Liquor Commission. In attendance were Peter Engel, Director of Store Operations, John Bunnell, Administrator of Sales and Marketing, and Anna-Marie Welch, the appellant's SEA Field Representative.

25. Mr. Bunnell reviewed the issues that had been discussed with the appellant in the previous meeting with Mr. Engel, and the conduct to which the appellant had admitted. Mr. Bunnell asked the appellant if he wished to provide any comments or additional information that he thought might dissuade the Commission from imposing disciplinary action.
26. Hearing nothing to persuade him otherwise, Mr. Bunnell issued to the appellant a letter of warning and disciplinary demotion that the Commission had authorized him to issue under the provisions of Per 1001.03 of the Rules of the Division of Personnel.
27. By letter dated February 13, 2004, Anna-Marie Welch requested a meeting with John Bunnell, Administrator of Marketing and Sales, arguing that the January 30, 2004 letter and decision violated the Rules of the Division of Personnel. In that letter she argued that the letter should be rescinded and the appellant restored to his prior position with full pay.
28. By letter dated February 13, 2004, Mr. Bunnell issued a revised notice of demotion under the authority of Per 1001.07 of the Rules of the Division of Personnel.
29. By letter dated February 19, 2004, Mr. Bunnell advised Mr. Fairfield that the original letter of warning and demotion had been rescinded,

Rulings of Law

- A. Per 1001.07 (a) (3) a. and Per 1001.07 (b) of the NH Code of Administrative Rules authorizes an appointing authority to demote an employee for failure to meet any work standard, provided that the appointing authority first offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to demote the employee and provides the employee an opportunity at the meeting to refute that evidence.
- B. Meetings between the appellant, his representative, and Liquor Commission management satisfied the requirements of Per 1001.07(a)(3) and Per 1001.07(b).
- C. Per 1001.07 of the NH Code of Administrative Rules imposes no requirement for an appointing authority to issue written warnings or to suspend an employee prior to demoting that employee for failure to meet any work standard.
- D. Chapter Per 1000 of the NH Code of Administrative Rules imposes no requirement upon an appointing authority to provide prior notice to an employee that the appointing authority is considering demotion as a disciplinary option.

- E. The evidence supporting the Commission's decision to demote Mr, Fairfield consisted of the appellant's own admissions that he had repeatedly ignored and/or knowingly violated Liquor Commission policies and procedures with respect to store operations for both inventory control and cash security. Those admissions were made in a series of meetings, culminating in the meeting on January 30, 2004 at which the appellant was informed of the Commission's decision to demote him and transfer him to another retail location.
- F. The NH State Liquor Commission complied with the provisions of Personnel Rule Per 1001.07 in particular and Chapter Per 1000 of the NH Code of Administrative Rules in demoting Mr. Fairfield from Retail Store Manager II to Retail Store Clerk II.

Board's Decision on Appellant's Motion to Dismiss

After carefully considering the evidence and arguments offered by the parties, the Board voted unanimously to deny the appellant's "Motion to Dismiss." First, the evidence does not bear out the appellant's assertion that he had no opportunity to review or refute the evidence supporting his demotion. The evidence reflects that the Commission's decision was based upon the appellant's own statements to investigators, to his Store Supervisor, to the Assistant Director and Director of Store Operations, and the Administrator of the Bureau of Marketing and Sales. Where evidence exists in the form of an employee's own statements, no reasonable interpretation of the Rules of the Division of Personnel or the generally recognized principles of due process would require an employer to create documents in order to have "evidence" to hand an employee in order to prove it had complied with the requirements of Per 1001.07 (b) (a) of the Rules. The agency did provide the evidence supporting its decision to demote the appellant, and summarized it in the letter issued to the appellant on February 13, 2004, notifying him of his demotion.

Decision and Order

The Board found that the appellant's poor work performance and his continuing disregard for Store Operation policies and procedures warranted his immediate demotion to a position without managerial responsibility. The Board also found that Peter Engél and John Bunnell, acting on

behalf of the Liquor Commission, provided the appellant notice of the reasons supporting the discipline, and gave him the opportunity at two separate meetings to review and refute that evidence. Inasmuch as the evidence consists almost entirely of the appellant's own admissions during those meetings, there was no further evidence the Commission was required to provide in order to be in compliance with Per 1001.07.

For all the reasons set forth above, the Board voted unanimously to DENY the appeal.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner



Philip P. Bonafide, Commissioner

cc: Karen A. Levchuk, Director of Personnel
John Bunnell, Administrator, Sales and Marketing, NH State Liquor Commission
Anna-Marie Welch, SEA Field Representative