State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEAL OF MARILYN PARSONS

New Hampshire Liquor Commission

Docket #96-D-18

December 12,1996

The New Hampshire Personnel Appeals Board (Miller, Johnson and Rule) met on Wednesday, October 23, 1996, to hear the appeal of Marilyn Parsons, an employee of the New Hampshire Liquor Commission. Ms. Parsons, who was represented at the hearing by SEA Field Representative Margo Steeves, was appealing a one week suspension without pay on charges that she sold alcohol to a minor. George E. Liouzis, Human Resources Administrator, appeared on behalf of the Liquor Commission.

The appeal was made by offers of proof by the representatives of the parties. The record in this matter consists of the audio tape recording of the hearing and documents which were admitted into evidence as follows:

State's Exhibits:

1. February 4, 1995 Prohibited Sales Policy
2. April 19, 1996, report of Investigator Philip Copp to David S. Austin of Alcohol Compliance Checks performed on April 11, 1996 and April 19, 1996
3. April 11, 1996, report of Investigator Philip Copp to David S. Austin reporting that Marilyn Parsons had sold alcohol to a minor during the "Alcohol Compliance Check"
4. RSA 651:2 of the Criminal Code concerning Sentences and Limitations

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5. RSA 651:2, IV of the Criminal Code concerning fines

Appellant's Exhibits

1. May 9, 1996, notice of suspension without pay issued by the New Hampshire Liquor Commission to Marilyn Parsons
2. Policy on Prohibited Sales issued March 1995

Before taking up the merits of Ms. Parsons' appeal, the Board considered Mr. Liouzis' verbal Motion to Dismiss, in which he argued that in her original request for a hearing, Ms. Parsons had admitted that she "innocently sold to the person in question." Mr. Liouzis argued that in the face of that admission, the Board was obligated to issue the same decision which it did in the Appeal of Phillipe Parent (NHPAB Docket #95-D-7) in which it upheld Mr. Parent's suspension. Ms. Steeves argued that the appellant did not admit selling to a minor. She argued that the appellant had no recollection of the sale, and would have remembered if a purchaser under the legal age had attempted to purchase alcohol from her. She argued that Ms. Parsons believed that everyone to whom she sold alcohol was of legal age. The Chairman denied the State's Motion to Dismiss and allowed the appellant to present her oral argument and offers of proof.

Ms. Steeves argued that judging a person's age is always difficult, and that if Ms. Parsons sold alcohol to a minor, it was an innocent mistake. Ms. Steeves argued that the Liquor Commission's prohibited sales policy requires clerks to use "good judgment" and "common sense" in assessing an individual's age prior to making a sale, and that as long as Ms. Parsons used good judgment and common sense, she should not be disciplined.

Ms. Steeves also argued that the suspension was deficient on its face, asserting that employees may not be suspended without at least one prior warning for the same offense, except in those instances when the conduct threatens the safety of another employee or client of the agency. Ms. Steeves argued that Ms. Parsons had no prior history of selling to minors and had never been disciplined for violation of the Commission's Prohibited Sales policy. She also argued

that immediately prior to the alleged improper sale, she had requested identification from a young man on his 21st birthday. Ms. Steeves argued that even if the Board were to find that Ms. Parsons had sold to a minor during the compliance check, there was no basis for a finding that such a sale would threaten the safety of another employee or client of the agency.

Ms. Steeves argued that if the Commission's Prohibited Sales policy did not require Clerks to "card everyone," nor did it require Clerks to demand identification fi-om persons until they appeared to be well over the age of 21, i.e., 25 or 30 years of age. She argued that under the current policy, unless the Commission could prove that Ms. Parsons somehow failed to use good judgment or common sense, the Commission acted unreasonably in suspending her. Ms. Steeves asked the Board to find that the imposition of a one week unpaid suspension, resulting in approximately $429 in lost wages, was an unreasonably harsh penalty. She asked the Board to restore Ms. Parsons' lost wages and expunge any reference to the suspension from her file.

Mr. Liouzis argued that while it is often difficult to guess a person's age, Liquor Commission employees are responsible for ensuring that no sales of alcohol are made to minors. He argued that under the Prohibited Sales Policy, Commission employees have an obligation to demand identification if they are not absolutely certain of a purchaser's age. He argued that if Ms. Parsons had employed good judgment and common sense, she would have demanded identification from someone whom she merely "believed" to be 21 years of age. Mr. Liouzis asked the Board to note that of the ten compliance checks involving the minor to whom Ms. Parsons made the sale, nine of the ten clerks demanded identification and refused the sale.

Mr. Liouzis argued that while suspension without pay might appear to be an extremely harsh penalty, the Commission could seek an even harsher penalty by pursuing criminal prosecution of those employees who were found to have sold alcohol to a minor. Mr. Liouzis argued that by selling to the minor without asking for some form of identification, Ms. Parsons failed at least two of the three tests for prima facie evidence of innocence and a defense to criminal prosecution under RSA 179:7 for sale to a minor. He argued that under the provisions of RSA

179:7, in order to establish that a sale to a minor was an "innocent mistake," a seller would have to prove all of the following:

1. That the person falsely represented in writing and supported by some official document that he was 21 years of age or over;
2. That the appearance of the person was such that an ordinary and prudent person would believe him to be 21 years of age or over; and
3. That the sale was made in good faith relying upon such written representation and appearance in the reasonable belief that the person was actually 21 years of age or over.

Mr. Liouzis argued that by failing to request any identification from the purchaser, Ms. Parsons could not rely on the claim of an "innocent mistake" as a defense to criminal prosecution, and therefore should not be allowed to rely on that claim as a defense to disciplinary action under the Personnel Rules.

After considering the parties' offers of proof, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. The appellant works as a clerk at the New Hampshire Liquor Commission Store #53 in Hudson, New Hampshire.
2. On April 11, 1996, the New Hampshire Liquor Commission conducted an "Alcohol Compliance Check" at five stores, including Store #53 in Hudson.
3. The minor used in the compliance check was a nineteen year old female.
4. In his April 11, 1996, report to the Commission via Chief David S. Austin, Investigator Philip Copp indicated that Ms. Fitzgerald, the minor, was instructed to enter the store, select a product, place it on the counter, and not engage in any conversation with the clerk during the attempted purchase. He further reported that she was instructed that if the clerk asked her for identification she was to say, "No, I forgot it."

5. When Ms. Fitzgerald presented a 750 ML bottle of wine for purchase, Ms. Parsons did not ask Ms. Fitzgerald to produce any proof of age and she completed the sale.
6. The minor left the store and immediately turned over to Investigator Copp the wine she had purchased and the sales slip bearing Marilyn Parsons' identification number.
7. Ms. Parsons matched the physical description which Ms. Fitzgerald gave of the clerk who sold her the wine, and was the only clerk in the store named "Marilyn."
8. As part of the compliance check, operating under the same set of instructions, Ms. Fitzgerald attempted to purchase alcohol in four other stores on April 11, 1996, and at five other stores on April 19, 1996. At each of the other stores, she was asked to produce identification and the sale was refused.
9. Ms. Parsons did not recall selling wine to any person who appeared to be less than 21 years of age.

RULINGS OF LAW

1. The New Hampshire Liquor Commission's Prohibited Sales Policy states, in part, that "No sale is to be made if there is the slightest doubt in the clerk's mind that the customer is under the legal age..."
2. New Hampshire Liquor Commission Case Control and Security/Prohibited Sales policy dated March 1995 states, in part, "Any employee who sells to a minor or to an intoxicated person will be subject to disciplinary action up to and including termination from the Liquor Commission."
3. The sale of alcohol to a person under 21 years of age constitutes a violation of RSA 179:5.
4. The New Hampshire Liquor Commission's Prohibited Sales Policy provides for discipline, up to and including termination from employment, whenever, "any liquor store employee... sells to a minor..."
5. Per 1001.05(3) of the Rules of the Division of Personnel provides for immediate suspension without pay, without prior warning, for a period of up to 20 days when an employee commits an offense which threatens the safety of another employee or client.

DECISION AND ORDER

Upon review of the evidence, and in consideration of the oral argument and offers of proof made by the parties, the Board voted unanimously to uphold Ms. Parsons' one week suspension without pay. The Board agrees that a one week suspension without pay represents a substantial penalty for what might be characterized as an error in judgment. However, the fact remains that as an employee of the Liquor Commission, Ms. Parsons knew or should have known that she would be subject to substantial discipline, up to and including her termination from employment, for any sale of alcohol to a minor.

The sale of alcohol to a minor, no matter how "innocent" such a sale might be, does constitute a threat to the safety and well-being of clients and employees of the agency and the State. As such, the Board found that suspension without prior warning was authorized by the Rules of the Division of Personnel, and warranted by the nature of the offense.

The Board appreciates the predicament in which Ms. Parsons and other employees of the Liquor Commission believe themselves to be when deciding whether or not to demand proof of age from a customer. Nonetheless, the fact remains that their job requires them to assess the appearance of every person who attempts to purchase alcohol to ensure that no person under the age of 21 is allowed to make such a purchase. If an employee can not be absolutely certain 100% of the time that purchasers are of legal age, they should require them to produce proof of age.

In support of her appeal, the appellant had argued that Ms. Fitzgerald appeared to be 21 years old. At the same time, she advanced the proposition that manner of dress, make-up,

mannerisms and speech can make individuals appear substantially older than they are. Bearing that in mind, when Ms. Parsons decided that Ms. Fitzgerald appeared to be 21 years old, she would have been well advised to remember that someone who appeared to be 21 years of age could easily have been much younger.

On the evidence, oral argument and offers of proof, the Board voted unanimously to deny Ms. Parsons' appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Lawrence H. Miller, Chairman

Robert J. Johnson, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
George E. Liouzis, Human Resources Administrator, NHSLC
Margo Steeves, SEA Field Representative

Decision Mailed on 12/16/96