

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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Concord, New Hampshire 03301  
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## **Appeal of Stephanie Pollastro**

**Docket #2016-T-003**

### **New Hampshire Liquor Commission**

April 20, 2016

The New Hampshire Personnel Appeals Board met in public session on Wednesday, March 23, 2016, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Stephanie Pollastro, the Appellant. The following commissioners sat for this hearing: Chair, Charla Stevens, Esq., Vice-Chair Norman Patenaude, Esq., Commissioner Christopher Nicolopoulos, Esq., and Commissioner David Goldstein. Ms. Pollastro, who was represented at the hearing by Charles McMahon, SEA Grievance Representative, and Glenn Milner, Esq., appealed her termination as Retail Store Clerk II at the New Hampshire Liquor Commission. Daniel St. Hilaire, Esq., appeared on behalf of the Liquor Commission.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and documents admitted into evidence.

#### **THE FOLLOWING PERSONS GAVE SWORN TESTIMONY<sup>1</sup>:**

Stephanie Brown, Retail Store Clerk I  
Michelle Markiewicz, Store #62 Manager  
Richard L. Banks, On-Call Regional Area Supervisor  
James Richards, Store Operations Administrator  
Paula Poggi, Retail Store Clerk I

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1. The witnesses were sequestered at the request of the Appellant's representatives.

Linda Ditomasso, Retail Store Clerk I  
Mike Lafond, Regional Area Supervisor  
Sean Bolton, SEA Grievance Representative  
Stephanie Pollastro, Appellant

**ISSUES OF LAW:**

Per 1002.08(a) (b) (7)

P-101 Employee Conduct and Work Rules Policy (III)

(3). Dereliction of Duty

(5). Failure to obey an oral order of a supervisor

Violation of Buildings and Cash Control and Security 2-7

Violation of Buildings and Equipment 4-1 Policy

**BACKGROUND**

Ms. Pollastro was employed as a Retail Clerk II for the New Hampshire Liquor Commission's Store #62 in Raymond. On August 9, 2015, Ms. Pollastro smelled an odor she believed to be propane or some other type of gas or burning smell. A man with a foreign accent had been to the store twice this day to purchase alcohol and Ms. Pollastro later noticed him walking outside towards the back of the store and saw him in the vicinity of the propane tank. Ms. Pollastro believed this to be suspicious behavior and, as a result, took fifteen dollars (\$15.00) from her cash drawer and left the store to purchase a lock from a nearby store to secure the cover of the propane tank.

Ms. Pollastro telephoned her store manager for instructions due to the smell of gas. The store manager was off duty but instructed Ms. Pollastro to contact the on-call area supervisor. The on-call supervisor told Ms. Pollastro to take her cellular phone, leave the store with the doors wide open, and to call him once she was safely in the parking lot. Ms. Pollastro forgot her cellular phone in the store and could not telephone him as she believed it was too dangerous to re-enter the store to retrieve it. Ms. Pollastro left the area of the store and was driving home when the on-

call supervisor was eventually able to speak with her on a coworker's cellular phone. The on-call supervisor directed Ms. Pollastro to go back to the store to deal with the situation but she refused because she believed it was unsafe. As a result, the store manager traveled to the store and telephoned the police and fire department. After the authorities determined the store was safe to enter, the store manager followed the procedures to close the store for the evening.

The State terminated Ms. Pollastro under (1)Per 1002.08(a) (b) (7) ("Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal, (2) P-101Employee Conduct and Work Rules Policy (III)(3), Dereliction of Duty and (5).,Failure to obey an oral order of a supervisor, (3)Violation of Buildings and Cash Control and Security 2-7, and (4)Violation of Buildings and Equipment 4-1 Policy.

### **FINDINGS OF FACT**

1. Ms. Pollastro was employed as a Retail Clerk II for the New Hampshire Liquor Commission's Store #62 in Raymond. On August 9, 2015, at approximately 2:30p.m., Ms. Pollastro smelled an odor she believed to be propane gas or some other type of gas within the store. (Testimony of Ms. Pollastro and Ms. Pollastro's Exhibit 2 pp.1-3).
2. Ms. Pollastro felt nauseous, lightheaded and lethargic and her co-worker, Stephanie Brown, also did not feel well. Ms. Pollastro was acting "loopy" and became anxious about the odor. Ms. Brown was also anxious about the odor of gas, considering they were in a liquor store. (Testimony of Ms. Pollastro and Ms. Brown).
3. A man with a foreign accent had been to the store twice on August 9, 2016 to purchase alcohol and Ms. Pollastro later noticed him walking outside towards the back of the store. Ms. Pollastro checked the back of the store to try to determine where the odor was coming from. She opened the back door to the store and saw the man with the foreign accent standing near the store's propane tank. She asked him what he was doing and he asked her where he could get a haircut. She began to question him and he became agitated. Ms. Pollastro believed this to be suspicious behavior and, as a result, she took fifteen dollars

(\$15.00) from her cash drawer and left the store to purchase a lock from a nearby store to secure the cover of the propane tank. She did not take the money from “petty cash” as it had not been reconciled in some time. She believed it was more appropriate to take it out of her cash drawer and later put the receipt in her drawer to account for the missing fifteen dollars (\$15.00). She did not recall at the time that there was a policy prohibiting taking money from a cash drawer to make such a purchase. (Testimony of Ms. Pollastro).

4. The store manager, Michelle Markiewicz, testified that although there is a policy prohibiting employees from taking money from their cash drawer, that, under the circumstances, purchasing the lock was prudent. The lock could have been returned the next day if it was determined that it was not needed. Indeed, the lock was returned the next day and the money used to purchase the lock was put back into Ms. Pollastro’s cash drawer. (Testimony of Ms. Markiewicz).
5. Ms. Pollastro returned from purchasing the lock for the propane tank and telephoned Ms. Markiewicz to inform her of these events and for instructions. Ms. Markiewicz told her that she was off-duty and instructed her to call the on-call regional area supervisor, Richard Banks. Ms. Pollastro did not recall if Ms. Markiewicz told her to call the police or fire department due to her state of mind at the time. (Testimony of Ms. Pollastro).
6. Ms. Markiewicz stated that in the event of an emergency, the protocol is to call a supervisor for instructions. She also stated that she was unsure if a written manual exists that instructs employees of what action to take in case of an emergency. Ms. Markiewicz explained that full-time managers go to trainings regarding emergency procedures and these managers are expected to share what they learned with store employees. (Testimony of Ms. Markiewicz).
7. Ms. Pollastro telephoned Mr. Banks, the on-call regional area supervisor at the time, and he instructed her to take her cellular phone, exit the store and leave the front doors wide open to allow ventilation, and to call him from her cellular phone once she was safely outside. Mr. Banks described Ms. Pollastro as “panicked” and acknowledged that if propane was in the store, it would be a dangerous situation. Once outside, Ms. Pollastro did not telephone Mr.

Banks because she left her cellular phone inside the store and believed it was too dangerous to re-enter the store to retrieve it. (Testimony of Mr. Banks and SEA Exhibit ).

8. Mr. Banks telephoned Ms. Pollastro several times without success and then telephoned several liquor commission employees, with the same outcome, in an attempt to ascertain Ms. Pollastro's cell phone number. (Testimony of Mr. Banks and SEA Exhibit #2 pp.1-3)
9. Before leaving the store, Ms. Pollastro secured the cash registers but had no explanation as to why the store safe was left open. Ms. Pollastro also secured the building and set the alarm and Ms. Brown posted a hand written note on the entrance door stating that the store was closed. (Testimony of Ms. Pollastro and Ms. Brown).
10. After exiting the store and realizing that Ms. Pollastro forgot her cellular phone inside the store, Ms. Brown went to a nearby "butcher shop"<sup>2</sup> to make a purchase and Ms. Pollastro followed. Ms. Pollastro thought it would look unfavorable for her to be seen in the parking lot of this establishment so she decided to begin driving home. (Testimony of Ms. Brown and Ms. Pollastro).
11. While in or around the "butcher shop", Ms. Brown telephoned Ms. Markiewicz to inform her that Ms. Pollastro left her cellular phone inside the store and, as a result, was unable to contact the on-call regional supervisor, Mr. Banks. Ms. Markiewicz telephoned Mr. Banks and provided Ms. Brown's cellular phone number to him. Mr. Banks telephoned Ms. Brown and informed her that she and Ms. Pollastro should not have left the store area. Ms. Brown began driving in the same direction as Ms. Pollastro and caught up with her to tell her about her conversation with Mr. Banks. (Testimony of Stephanie Brown).
12. Ms. Pollastro and Mr. Banks spoke on the phone, and according to Ms. Pollastro, Mr. Banks told her to go back to the store, unlock it and go in and wait for the fire department. In contrast, Mr. Banks asserted that he asked Ms. Pollastro to go back to the store, open the doors and call the fire department. Ms. Pollastro told him that she believed the store could blow up and she refused to return to the store. (Testimony of Ms. Pollastro and Mr. Banks).

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2. Ms. Brown went to Tuckaway Tavern, a restaurant and butcher shop in Raymond.

13. Ms. Markiewicz informed Mr. Banks that she would drive to the store and manage the situation. The police and firefighters arrived on the scene and they could not smell gas and their carbon dioxide detector did not register any type of gas. As a result of Ms. Pollastro's refusal to return to the store, Ms. Markiewicz had to perform the proper procedures to close the store for the evening. (Testimony of Ms. Markiewicz).
14. Mr. Richards, the Store Operations Administrator, was informed of the situation at Store #62 by Mr. Banks and Mr. Richards told Mr. Banks that the fire department needed to be called and possibly the maintenance representative for the Liquor Commission. (Testimony of Mr. Richards).
15. The following day Ms. Pollastro visited Paula Poggi, a Retail Clerk I in the Raymond Store because she had forgotten her keys to the store at her home and needed to open the store. Ms. Pollastro was very upset and shaking and stated, "I think I made a bad call." Ms. Pollastro told Ms. Poggi that the previous day she had smelled gas in the store, Ms. Brown had also smelled it, as did a customer, and she feared that the store might blow up. Ms. Pollastro stated that she was instructed to go back to the store but refused because she was afraid for this reason. (Testimony of Ms. Poggi).
16. On August 11, 2015, Mr. Banks sent an e-mail to James E. Richards, the Store Operations Administrator, to document the incident that had occurred on August 9, 2015. He wrote, in relevant part, "I must admit Stephanie sound (sic) disoriented throughout [the] conversation." He also wrote, "I told her to open the doors and go outside and I will call her on cell phone." The e-mail goes on to further state, "I called Jim Richards who got back to me and said we need to get the fire department there." (SEA Exhibit 10 p.1)
17. Mr. Banks has worked for the Liquor Commission for approximately two (2) years and was sure he had an evacuation policy amongst his papers somewhere but did not bring it to the Hearing. (Testimony of Mr. Banks).
18. There is not a policy regarding every possible emergency, but the employees of the Liquor Commission must read the Store Operations Manual every year and sign a document

acknowledging that they have read it. Ms. Pollastro has done this on at least three (3) occasions. (Testimony of James Richards).

19. There are emergency phone numbers including, but not limited to, police department, fire department, ambulance service, the home telephone number of the store supervisor, at each register but no policy and procedures manual instructing an employee what the protocol is when dealing with an emergency. (Testimony of James Richards and State's Exhibit #2).
20. Ms. Pollastro has not attended any type of "emergency action training" or an "emergency action plan" meeting but has attended seminars on how to sell and taste wine. (Testimony of Ms. Pollastro).
21. Mr. Richards visited Ms. Pollastro at the Raymond store to question her about the incident on August 9, 2016. She told him she did not want to speak about it without union representation. Mr. Richards informed her he was seeking information to ensure the store was safe and not for disciplinary reasons. Ms. Pollastro answered questions regarding store safety. (Testimony of James Richards).
22. Ms. Pollastro is a "good worker" and has earned "meets expectations" on her performance evaluations since beginning her employment with the Liquor Commission. (Testimony of Ms. Markiewicz).

**RULINGS OF LAW:**

- A. Per 1002.08(a) (b) (7) violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal.
- B. P-101 Employee Conduct and Work Rules Policy (III) (3) Dereliction of Duty: Employees are derelict in their duties when they willfully or negligently fail to perform them, or when they perform them in a culpably inefficient manner. Examples include, but are not limited to, sleeping on duty, failure to complete required duties, failure to take appropriate action or failure to properly prepare to perform the duties as directed.

- C. P-101 Employee Conduct and Work Rules Policy (III) (5). Failure to obey an oral order of a supervisor: Failure to obey an oral order by refusal or omission constitutes an intentional defiance of authority.
- D. Violation of Buildings and Cash Control and Security 2-7: Store Cash Funds. (See State's Exhibit #2 pp. 1-4)
- E. Violation of Buildings and Equipment 4-1 Policy: Building Security (See State's Exhibit #2 pp. 5-6)
- F. According to Per-A 207.12 (b) of the Board's rules, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that : (1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) the disciplinary action was unjust in light of the facts in evidence."

### **DISCUSSION and ORDER**

The Board will first address the allegations that Ms. Pollastro violated the Buildings and Cash Control and Security 2-7 Policy and the Buildings and Equipment 4-1 Policy by removing money from her cash drawer to purchase the lock. On the day in question, a man with a foreign accent entered the store twice and made two (2) separate purchases and was then seen walking to the rear of the building. Ms. Pollastro investigated and found this man near the store's propane tank. When she asked him what he was doing, he asked where he could get a haircut. Ms. Pollastro deemed this behavior to be suspicious and purchased a lock to secure the cap to the tank. The Board agrees with Ms. Pollastro that this was certainly suspicious behavior, especially considering the day and age we live in. The Board also agrees with Ms. Markiewicz, who testified that she thought it was prudent to purchase the lock and secure the tank and that Ms. Pollastro made the right decision in purchasing the lock.

The Board finds the fact that Ms. Pollastro took money out of the cash drawer and not “petty cash” to be trivial. Ms. Pollastro did not have the means to purchase the lock herself and she testified that “petty cash” had not been reconciled in some time. Even if the “petty cash” had been reconciled and Ms. Pollastro took the money from this fund, she still would have violated the policy as the first bullet point under “Petty Cash” under 2-7 reads, in relevant part, “All purchases made for the liquor store require a Petty Cash Voucher limited to \$10.00 unless authorized by the central office.” However, the day in question was a Sunday and the central office was closed and the lock cost more than ten dollars (\$10.00). Again, the Board concurs with Ms. Pollastro and Ms. Markiewicz that it was prudent to purchase the lock and secure the tank.

The Board will next address the allegations that Ms. Pollastro was derelict in her duties as a Retail Clerk II and that she failed to obey an oral order of a supervisor. Ms. Pollastro’s Supplemental Job Description states, in the seventh (7<sup>th</sup>) bullet down from the heading “ACCOUNTABILITIES”, “[f]unctions in the capacity of manager when required, to include opening/closing liquor stores when scheduled.” Ms. Markiewicz testified that she was unsure if a written manual exists that instructs employees of what action to take in case of an emergency. Ms. Markiewicz explained that full-time managers go to trainings regarding emergency procedures and these managers are expected to share what they learned at the trainings with store employees. Ms. Pollastro is not a full-time manager but can be put in the position referred to as a “Manager in Charge” when there is no full-time manager, such as Ms. Markiewicz, on duty. The Board found Ms. Pollastro to be credible when she testified that she has never received any type of “emergency action training” nor has she attended an “emergency action plan” meeting.

Mr. Banks testified that he was sure he had an evacuation policy amongst his papers somewhere but did not bring it to the Hearing. Mr. Richards testified that there is not a policy regarding every possible emergency but stated that the employees of the Liquor Commission must read the Store Operations Manual annually and sign a document acknowledging that they have read it. He went on to state that emergency phone numbers are available at each cash register but also

testified that there is no policy and procedures manual at the cash registers, instructing an employee what the protocol is when dealing with an emergency.

The Board finds that Ms. Pollastro did not receive adequate training from the Liquor Commission in order to deal with the situation that occurred on August 9, 2015. Having an employee, who is sometimes called upon to take on the responsibilities of a store manager, simply read the Store Operations Manual (the Manual) is not training in any sense of the word. The Board also finds the Manual to be deficient in outlining how to deal with emergencies that are actually listed in the Manual. For example, the Manual states “In case of fire: When a fire is discovered, the safety of customers and employees is most important. The store must be evacuated immediately”.... The Manual, however, does not explain an evacuation procedure or any other procedure other than, “Efforts should be made to remove cash and store records unless the risk is great.”

The Board finds Ms. Brown to be credible when she testified that Ms. Pollastro was “loopy” and anxious even before calling Ms. Markiewicz.

Mr. Banks was the on-call regional area supervisor on August 9, 2015. Mr. Banks testified that Ms. Pollastro was “panicked” when he spoke with her on the phone that day and acknowledged that if propane was in the store that it would be a dangerous situation. Furthermore, Mr. Banks wrote in an e-mail to the Store Operations Administrator, James Richards, two (2) days after the incident and stated “I must admit Stephanie sound (sic) disoriented throughout [the] conversation.”

Ms. Pollastro’s verbal responses to those she spoke with during and after the incident and her actions in fleeing the store and area were clearly those of someone who was legitimately frightened and rattled by the situation. Mr. Banks recognized that Ms. Pollastro was “panicked” and sounded disoriented yet he still insisted that she manage the situation. Mr. Banks should have taken the information from Ms. Pollastro, told her to exit the store and then he should have taken the necessary steps to handle the situation, especially considering the potential danger and the frame of mind of Ms. Pollastro. Instead, Mr. Banks chose to direct her to exit the store and

instructed her to call him back once she was outside the store. According Ms. Pollastro's letter of dismissal, Mr. Banks attempted to contact Ms. Pollastro at 4:01pm, 4:03pm, 4:04pm, 4:09pm, 4:14pm and 4:19pm in order to provide her with further instructions. Mr. Banks made a total of six (6) telephone calls in a span of eighteen (18) minutes attempting to make contact with Ms. Pollastro instead of just dealing with the situation himself. After his six (6) unsuccessful attempts at making contact with Ms. Pollastro, he began calling other Liquor Commission employees in an attempt to ascertain her telephone number.

Sometime after realizing that Ms. Pollastro left her phone in the store, Ms. Brown telephoned Ms. Markiewicz to inform her that they were not able to communicate with Mr. Banks. At this point, Ms. Markiewicz telephoned Mr. Banks and provided Ms. Brown's telephone number to him and he in turn telephoned Ms. Brown. Ms. Brown then had to follow Ms. Pollastro and get her to pull off the road so that Mr. Banks could provide her with instructions on how to handle the situation. Again, the Board finds that once Mr. Banks determined that Ms. Pollastro sounded "disoriented" and "panicked," he should have taken control and managed the situation himself.

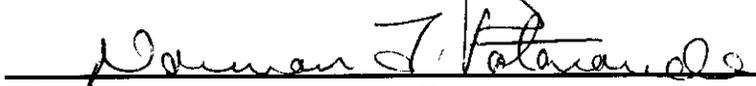
Having carefully considered the evidence and arguments presented, the Board found that the decision to dismiss the Appellant was unjust in light of the facts in evidence and voted to order the Liquor Commission to reinstate the Appellant, subject to disciplinary suspension without pay for thirty (30) days effective on the date of termination, to her former position as a Retail Clerk II. As set forth in the provisions of RSA 21-I:58, I, "The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the income loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period".

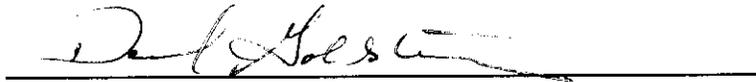
The Board strongly encourages that the Liquor Commission provide sufficient emergency training, above and beyond simply reading the Manual, to its employees so that they are better equipped to deal with situations such as described in this order.

The Liquor Commission is directed to remove letters from the Appellant's file referring to the intent to dismiss and the notice of dismissal.

As set forth above, the appeal of Stephanie Pollastro is GRANTED.

THE PERSONNEL APPEALS BOARD

  
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Vice Chair, Norman Patenaude, Esq.

  
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Commissioner David Goldstein

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