State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF WAYNE M. WAY

DOCKET #98-T-11

New Hampshire State Liquor Commission

July 1,1998

The New Hampshire Personnel Appeals Board (Rule, Wood and Barry) met on Wednesday, May 20, 1998, under the authority of RSA 21-I:58, to hear the appeal of Wayne M. Way, a former employee of the New Hampshire Liquor Commission. Mr. Way, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his January 23, 1998, termination from employment as a Retail Store Clerk. Assistant Attorney General Martha Moore appeared on behalf of the Liquor Commission.

The record in this matter consists of pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and materials admitted into evidence at the hearing as follows:

State's Exhibits:

A. Memo of John Bunnell to Assistant Chief Randal Aveiy dated November 17, 1997 with attached Report on Nips losses
B. Voluntary Statement of Doreen Carpentier dated 11/25/97
C. Report of Criminal Investigation dated 12/5/97 by Chris Canney - 6 pages
D. Voluntary Statement of Hollis Burgess, Jr. Dated 12/5/97

TDD Access: Relay NH 1-800-735-2964

E. Voluntary Statement of Roger Hawkins dated 12/5/97

F. Handwritten sworn statement of Roger Hawkins dated 12/5/97

G. Handwritten Statement of John Tibbetts dated 12/18/97

H. Handwritten Statement of Diane Fernald dated 12/16/97

I. Handwritten Statement of Frances Rocray dated December 17, 1997

J. Memo to Chris Canney from Don Conner dated 12/22/97

K. Report of Nips losses dated 11/17/97

L. Transcript of interview of Wayne Way occurring on December 29, 1997, with signed Miranda Warning administered by Investigator Phil Copp

M. Statement of Wayne Way dated 12/17/97

N. Affidavit supporting arrest warrant dated 12/30/97

O. Arrest warrant for Wayne Way dated 12/30/97

P. Arrest report - case no 97-71-0058

Q. Bail Bond form

R. Complaint with dispositions noted

S. Complaint with dispositions noted

T. Complaint with dispositions noted

U. Memo from Investigator Philip Copp to Chief Aiden Moore dated 12/29/97

V. Voluntary Statement of Wayne Way dated 1/5/98

W. Certified copy of conviction for theft by unauthorized taking - Docket #98-56 dated 3/17/98

X. Memo from John Bunnell to Chairman Byrne dated 1/13/98

Y. January 23, 1998, letter of termination to Wayne Way

Appellant's Exhibits

1. Tape recording of interview by Investigator Copp of Wayne Way
2. Record of River and Climatological Observations
3. NHSLC receipts and note from St. Mary's Church

4. 3 pages of medical reports/information concerning Wayne Way from David Riss dated 1120198
5. 4 pages of personal testimonials signed by Steven Neally, Gene Marken, Priscilla Couture and John Viscardi

The following persons gave sworn testimony:

John Bunnell, Director of Stores	Wayne Way, Appellant
Christopher Canney, Investigator	Donald Connor, Store Manager
Philip Copp, Senior Investigator	

After considering the evidence and arguments, the Board made the following findings of fact and rulings of law:

Factual Findings:

1. Prior to his termination, Mr. Way was employed by the New Hampshire State Liquor Commission as a Retail Store Clerk II assigned to Store #54 in Glen, New Hampshire.
2. Some of the products for sale at the liquor store are offered with attached promotional materials called "point of sale" material, "free on-packs," or "neckers." Those promotional materials have included items such as shot glasses, glasses, barbecue sauce, sunglasses and 50 ml. bottles of liquor otherwise referred to as "nips."
3. On November 13, 1997, Doreen Carpentier of Epping, New Hampshire, reported to Liquor Store Manager Donald Coimor, that while working as a flag person for Audley Construction Company on the bridge project in Glen, New Hampshire, she observed Wayne Way giving "nips" to other Audley employees. She also reported that when she worked at Dunkin' Donuts, Mr. Way occasionally gave her presents including glasses, sun glasses and barbecue sauce.
4. Mr. Coimor relayed the substance of his conversation with Ms. Carpentier to Jolm D. Bunnell, Director of Store Operations, who then passed the information on to Randal Avery, Assistant Chief of Enforcement, in a memo dated November 17, 1997.

Attached to the memo was an inventory report of "Nips Losses" from Store 54 totaling 137 bottles.

5. The record of "Nips Losses" included only those "nips" which the Liquor Commission orders, keeps in stock and has available for sale. Nips and other promotional items attached to inventoried bottles of alcohol may not be sold separately and are not listed on the store inventory.
6. The investigation was turned over to Senior Investigator Philip Copp.
7. On November 25, 1997, Investigator Copp met with Ms. Carpentier to discuss her allegation that Wayne Way had been giving nips to members of the Audley crew.
8. Mr. Copp provided a copy of the statement he received from Ms. Carpentier, as well as a copy of the Bunnell memo with the attached report of "Nips Losses" to Liquor Investigator Christopher Canney.
9. During the course of his investigation, Mr. Canney spoke with Hollis A. "Tony" Burgess, Roger Hawkins, John Tibbetts from the Audley crew; DOT Engineer Bruce Knox; Liquor Store employees Diane Femald, Fran Rocray, Alden Drew and Wayne Way; and Perry Crook, Manager of a grocery store located in the same plaza as the Glen Liquor Store.
10. Investigator Copp interviewed Mr. Way on December 28, 1997, at the State Liquor Commission offices in Concord, New Hampshire. After having been advised of his Miranda rights, Mr. Way agreed to be interviewed without an attorney present. (State's Exhibit L)
11. In response to Investigator Copp's questions about Ms. Carpentier's allegations, Mr. Way indicated that some time during November, 1997, he "got some Jim Beam nips, paid for them and gave them to [Roger Hawkins]." He asserted that he had done so only once, and had not given away any alcohol to anyone else.
12. Mr. Way claimed to have purchased the nips for Mr. Hawkins from either Fran Rocray or Diane Femald, cashiers in the Glen, NH, store.
13. After Investigator Copp advised the appellant that he had spoken with Mr. Hawkins about the nips that he received, and after advising Mr. Way that he had statements from Ms. Fernald and Ms. Rocray indicating that they had not sold nips to the

appellant, Mr. Way claimed he had actually made the purchase through his own register.

14. NH Liquor Commission Policy prohibits employees from ringing up their own purchases, or from entering purchases under any code other than that assigned to the product.
15. Investigator Copp questioned the appellant about giving POS nips to Hollis Burgess. Although Mr. Way originally insisted that he had only given nips to Mr. Hawkins, upon learning that investigators had spoken with Mr. Burgess, he admitted that he had given nips to Mr. Burgess as well.
16. Mr. Way asserted that the nips he had given to Mr. Burgess were not POS nips. However, when Investigator Copp followed up by asking if the appellant had taken the nips "off the rack," Mr. Way first admitted that the "couple" of nips given to Mr. Burgess might have been POS nips. Later he admitted that he may have given as many as five nips to Mr. Burgess.
17. Mr. Way's answers to Investigator Copp's questions were frequently unresponsive, incomplete, or contradictory.
18. During the course of his interview with Investigator Copp, Mr. Way admitted to taking nips and other promotional materials without the Liquor Commission's permission, and giving them away to persons including John Tibbetts, Roger Hawkins and Tony Burgess.
19. The admissions made in Mr. Way's interview were corroborated by other witness statements.
20. On January 13, 1998, Director of Stores John Bunnell submitted his recommendation to the Liquor Commission that Mr. Way be terminated for theft of goods from the State Liquor Store and for violation of published Liquor Commission Policy prohibiting employees from ringing in their own purchases or intentionally ringing in purchases under the wrong code.
21. On January 19, 1998, with a union representative present, Mr. Way met with Liquor commissioner Anthony Maiola, Human Resources Administrator George Liouzis, and Stores Director John Bunnell to review the allegations and evidence supporting

his dismissal. When given the opportunity to refute the allegations, Mi-. Way asserted that because he was taking Valium when he met with Investigator Copp, he didn't recall having made any admissions.

22. On January 23, 1998, the Liquor Commission notified Mr. Way in writing of his termination for conduct in violation of Per 1001.08(b)(1).
23. On March 17, 1998, the Carroll County Northern District Court found Mr. Way guilty of Theft by Unauthorized Taking in violation of RSA 637:3.

Rulings of Law

1. Per 1001.08 (b) of the Rules of the Division of Personnel provides for the immediate dismissal of an employee, without prior warning, for offenses including: "Theft of goods or services from the state or fiom any other employee or client of the agency when the value of such goods or services is minimal;" [Per 1001.08(b)(1)]; and "Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal." [Per 1001.08(b)(3)]
2. Per 1001.08 **(f)** provides that, "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing the notice of dismissal; (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority; ...(3) documents in writing the nature and extent of the offense; [and] (4) lists the evidence the appointing authority used in making the decision to dismiss the employee."

Decision and Order

The Liquor Commission met with Mi-. Way on January 19, 1998, in conformance with the requirements of Per 1001.08(f). During that meeting, the Commission reviewed the allegations and evidence supporting Mr. Way's dismissal for theft, and for violation of

published agency policies. Mr. Way was unable to refute the evidence supporting his termination from employment, and on January 23, 1998, the Commission issued a written notice of dismissal in conformance with Per 1001.08 (g).

In support of his appeal, the appellant argued that he was frightened and confused during the investigation of his misconduct. He said that he was under a doctor's care and on medication at the time of his meeting with Investigator Copp and Commission personnel, and did not recall making admissions of theft to Investigators Copp or Canney, or to Stores Director Bunnell. The appellant offered a tape recording of his interview with Investigator Copp, arguing that it provided evidence that the appellant was both frightened and confused, and that any admissions contained therein should not be relied upon.

While it is clear that Mr. Way was very upset during some portions of his interview with Investigator Copp, it is equally clear that his distress resulted from his realization that the Commission had sufficient evidence to charge him with criminal conduct, and sufficient evidence to warrant his termination from employment. It is also clear that the investigation did not rely solely on Mr. Way's taped interview with Investigator Copp, but on the totality of the evidence obtained during the course of the investigation. That evidence supports the finding that Mr. Way did engage in theft from his employer, a finding further supported by Mr. Way's March 17, 1998, conviction on the charge of theft by unauthorized taking.

Mr. Way's conduct violated Per 1001.08 (b) of the Rules of the Division of Personnel, and the Commission therefore was authorized to immediately dismiss the appellant from his employment. That termination was both lawful and reasonable, and the appellant failed to provide evidence or argument to persuade the Board that it should exercise its equitable powers as authorized by RSA 21-I:58 to either reverse or modify the Commission's decision. Therefore, on all the evidence, the Board voted unanimously to deny Mr. Way's appeal and sustain his termination.

THE PERSONNEL APPEALS BOARD

Lisa A. Rule, Acting Chairperson

Patrick H. Wood, Commissioner

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel

Michael Reynolds, SEA General Counsel, PO Box 3303, Concord, NH 03302-3303

Martha Moore, Assistant Attorney General, Dept. Of Justice, 33 Capitol St., Concord, NH 03301