BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

NED GARITANO, Appellant, v. LIQUOR CONTROL BOARD, Respondent.	Case No. RED-00-0007 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and LEANA D. LAMB, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on September 28, 2000. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Ned Garitano was present and was represented by Mark E. Brennan, Attorney at Law, of Webster, Mrak & Blumberg. Valerie B. Petrie represented Respondent Liquor Control Board.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a reduction in pay for neglect of duty and willful violation of Liquor Control Board policies or procedures. Respondent alleges that Appellant sold alcohol to a minor.

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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. MOTION

2.1 At the outset of the hearing, Appellant objected to being called by Respondent as a witness. Appellant argued that Respondent has the burden of proving the allegations against him through the testimony of its own witnesses rather than establishing justification for the sanction imposed through his testimony. Appellant also asserted that he is allowed to raise defenses based upon the collective bargaining agreement and that Respondent violated the just cause provision of the Collective Bargaining Agreement. Appellant argues that numerous arbitration decisions prohibit an employee from being called to testify and asserts that arbitration decisions are relevant and have authority in this matter.

2.2 Respondent argued that it is a customary practice with this Board for a Respondent to call an Appellant to testify and that Appellant received prior notice through Respondent's witness list that he would be called to testify. Respondent further argued that the arbitration standards cited by Appellant are not applicable to this Board because this is not an arbitration case and because Appellant is not a grievant.

2.3 The Board denied Appellant's objection, noting that Appellant had received prior notice through Respondent's witness list that he would be called as a witness to testify.

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III. FINDINGS OF FACT

3.1 Appellant Ned Garitano is a Liquor Store Clerk and permanent employee for Respondent Liquor Control Board. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 20, 2000.

3.2 By letter dated February 11, 2000, Gary J. Ferko, Acting Deputy Director of the Product and Retail Services Division, informed Appellant of his reduction in salary. Mr. Ferko reduced Appellant's salary from Step K of salary range 29L ($12.67/hour) to Step A of salary range 29L ($9.63/hour) for a duration of 164.47 hours worked. Mr. Ferko alleged that on April 1, 1999, Appellant sold alcohol to a minor.

3.3 Appellant began his employment as a Part-Time Liquor Store Clerk in February 1997. Appellant has no prior history of formal or informal disciplinary action.

3.4 On April 1, 1999, the Tacoma Police Department, in conjunction with the Liquor Control Board, conducted a "sting" operation in which minors were sent into Liquor Control Board (LCB) stores to purchase alcohol. Kathlyn Lawrence, Liquor Enforcement Agent for the LCB, was participating in the compliance check and drove the underage operative to the liquor store. At approximately 8 p.m., Tacoma Police Officers Colleen Jackson and Tim Deccio observed operative Judd Johnson, then 19 years of age, enter the store where Appellant worked. The officers remained in an unmarked vehicle parked outside of liquor store #122. Appellant was on duty and was one of two employees working in store #122.

3.5 Both Officers Jackson and Deccio credibly testified that after entering the store, Mr. Johnson selected a bottle of liquor, entered the check out line, and purchased the bottle of liquor.

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Mr. Johnson testified that Appellant did not ask for identification from him. Officers Jackson and Deccio testified they had a full, unobstructed view of the inside of the store and of the clerk who sold the bottle of liquor, who was later identified as Appellant. After Mr. Johnson exited the store, Officers Jackson and Deccio and Liquor Enforcement Agent Lawrence entered the store and approached Appellant. The police officers informed Appellant that he had sold liquor to a 19 year old and informed him of his rights. Appellant was given a citation.

3.6 During his testimony, Appellant stated that he did not know whether he made the sale to Mr. Johnson. However, based on the credible testimony of Officer Jackson, Officer Deccio and Mr. Johnson, who identified Appellant as the clerk who sold the liquor to Mr. Johnson, we find that it was more likely than not Appellant who made the sale of liquor to Mr. Johnson, a minor at the time.

3.7 On February 7, 1997, Appellant signed a Verification of Employee Understanding which outlined Appellant's responsibilities as a Liquor Store Clerk. The form emphasized the importance of checking the "identification of any person of questionable age" and further informs the employee that "you are never too busy to check ID."

3.8 On March 4, 1997, Appellant attended a LCB training course on checking identification. The training emphasized the importance of checking the identification of anyone who appeared to be under age 30 or youthful in appearance and encouraged the liquor store clerks to use their best judgment when determining whether to ask for identification. Respondent's policy requires that liquor store clerks receive a yearly refresher training course. Appellant was not provided with the refresher training course following his March 4, 1997 class through the date of this incident.

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3.9 Respondent has adopted a policy manual which prohibits the sale of liquor to anyone under 21 years of age (Chapter 10, Section 5). The policy also states that employees are to exercise extreme care to avoid sales to underage persons and that failure to do so is a violation of state law. The policy warns employees that selling liquor to a minor may result in disciplinary action. Respondent has established the follow progressive disciplinary penalty schedule:

> First Violation:
> 1. Employees will be subject to a salary reduction, suspension without pay, or dismissal depending of the seriousness of the circumstances.
> 2. Anyone selling to a minor . . . will have a minimum deduction in pay of $500, to be deducted each pay period in increments up to 25 percent, but not less than Step A of the appropriate salary range. . . .

3.10 During the course of the hearing, Appellant provided evidence that Steven W. Miner and Mary Elise Buckley, both employed by Respondent as Liquor Control Clerks, sold liquor to minors. Both Mr. Miner and Ms. Buckley credibly testified that Liquor Enforcement Officers were aware of their sales to minors but neither received any formal disciplinary sanctions.

3.11 Gary J. Ferko, Deputy Director of Retail Services, was Appellant's appointing authority. After reviewing reports from Ms. Lawrence and the police officers, Mr. Ferko concluded that Appellant had neglected his duty and violated LCB policies and procedures when he sold liquor to an underage individual. Based on LCB policy manual, which outlines the penalty scheduled, Mr. Ferko imposed a $500 fine, in the form of a reduction in pay, for Appellant's first offense.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that a preponderance of evidence proves that Appellant sold liquor to a 19 year old which constitutes a neglect of duty and a willful violation of Liquor Control Board policy. Respondent argues that Appellant received training and was aware that it was against state

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law and agency policy to sell liquor to a minor. Respondent argues that Appellant understood the agency's policy and was aware of his obligation to check the identification of any person of questionable age, especially anyone who appeared to be under the age of 30. Respondent asserts that the underage operative appeared youthful in appearance and looked his age. Respondent argues that the uncontested evidence established that Appellant understood the published policies, but failed to abide by them. Respondent argues that there is no evidence of any mitigating factors and that the reduction in pay was the appropriate sanction.

4.2 Appellant argues that he used his best judgment in deciding whether to request identification from customers and that he did not deliberately violate LCB policy. Appellant contends that Respondent failed to consider the mitigating circumstances that contributed to his unwitting sale of liquor to a minor. Appellant further argues that under the just cause standard, the LCB is required to issue discipline evenhandedly and to take individual circumstances into account. Appellant argues, however, that Respondent failed to treat all employees who sold liquor to minors in an evenhanded manner, delayed taking disciplinary action for ten months, which undermined its claim that his conduct needed corrective discipline, and it contributed to the many circumstances which led to his sale of liquor to a minor. Appellant contends his employer failed to fulfill its obligation to provide him with annual training, that his supervisor overruled him on a number of occasions when he had required identification from a customer, that on the day of the sting, the store was understaffed despite the expected high volume of customers, and that it assigned him extra end-of-month work to finish at the same time he was serving the high volume of customers. Appellant argues that the penalty imposed is too harsh to meet the just cause standard.

V. CONCLUSIONS OF LAW

5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

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5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

5.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

5.4 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

5.5 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness and circumstances of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

5.6 Respondent has met its burden of proving by a preponderance of the evidence that on April 1, 1999, Appellant sold alcohol to a minor. Appellant understood Respondent's policy and practice to check the identification of anyone of questionable age. Appellant's misconduct constitutes a neglect of his duty and a willful violation of agency policy. However, we conclude that the sanction imposed, a $500 fine, is too severe. This was Appellant's first offense and there is no

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history of prior progressive discipline and there is evidence that Respondent's policy was not consistently applied to other employees who also sold liquor to minors. We conclude that the disciplinary sanction should be modified to a salary reduction from $12.67 per hour to $9.63 per hour for a total of 33.34 productive hours which is sufficient to prevent recurrence, deter others from similar misconduct and to maintain the integrity of Respondent's program.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Ned Garitano is modified to a salary reduction from $12.67 per hour to $9.63 per hour for a total of 33.34 productive hours.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

_____
Leana D. Lamb, Member

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