

**A MATTER IN ARBITRATION**

In a Matter Between:	)		
	)		
RITE AID CORPORATION,	)	Grievance:	Termination of
	)		Jennifer Hall
(Employer)	)		
	)	Hearing:	March 16, 2009
and	)		
	)	Award:	June 5, 2009
	)		
UNITED FOOD AND COMMERCIAL	)	McKay Case No.	09-031
WORKERS UNION, LOCAL 1167,	)		
	)		
(Union)	)		
	)		

**DECISION AND AWARD**

**GERALD R. McKAY, ARBITRATOR**

Appearances By:

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**STATEMENT OF PROCEDURE**

This matter arises out of the application and interpretation of a Collective Bargaining Agreement, which exists between the above-identified Union and Employer.<sup>1</sup> Unable to resolve the dispute between themselves, the parties selected this Arbitrator in accordance with the terms of the contract to hear and resolve the matter. A hearing was held in Bloomington, California on March 16, 2009. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The Arbitrator received copies of those briefs on or before May 22, 2009. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

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<sup>1</sup> Joint Exhibit #1

## ISSUE

Was there good and sufficient cause for the termination of the Grievant? If not, what is the appropriate remedy?<sup>2</sup>

## RELEVANT CONTRACT LANGUAGE

### ARTICLE 4 - DISCIPLINE/VOLUNTAR QUILTS

#### 4.3 DISCIPLINE

4.3.1 Good Cause. Non-probationary employees shall not be discharged except for good and sufficient cause such as dishonesty, insubordination, incompetency, intoxication, unbecoming conduct or failure to perform work as required. Age, sex, creed, or color shall not be grounds for the termination of an otherwise qualified employee.

## BACKGROUND

At the time of her termination, the Grievant was working as an associate at Store No. 5685, 29 Palms, in Southern California. The Grievant had been with the Employer at the time of her termination for approximately 7 months.<sup>3</sup> It is the position of the Employer that the Grievant purchased beer during her working hours and placed the beer in the trunk of a minor. The Employer asserted that the Grievant's conduct violated its store policies and California law, as well as placing the store in jeopardy of significant fines and penalties for that conduct. It is the position of the Union that the Grievant did not violate any rules or policies because she had permission from her supervisor to engage in the conduct which she did. Furthermore, she placed the beer in a portion of the vehicle which did not make it illegal for a minor to transport alcohol.

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<sup>2</sup> Transcript page 6

<sup>3</sup> Transcript page 30

For these reasons, the Union asked that the Grievant be reinstated with full back pay and benefits.

In December 2006, the Grievant underwent orientation with respect to the Employer's policies regarding the sale of alcoholic beverages.<sup>4</sup> The acknowledgement, which the Grievant signed indicates, "My manager has explained the federal, state and local laws to me and I understand that failure to follow these laws will result in disciplinary action up to and including termination of employment."<sup>5</sup> The Employer's policies prohibit Cashiers from selling alcoholic beverages to anyone under the age of 21. Anyone who appears to be under the age of 27 is required to produce proper identification to establish the age of the customer.<sup>6</sup> One of the questions involved in the training that employees are required to answer asks, "What action is taken if an associate sells alcoholic beverages to anyone under the legal age of 21 years?" The appropriate answer is "Associate is terminated immediately."<sup>7</sup> The Grievant also received a "Certificate of Achievement" from the Employer indicating that she had successfully completed the "Alcoholic Beverage Control Laws" as of January 2007.<sup>8</sup>

On June 11, 2007, approximately 20 minutes before the end of her shift, the Grievant testified that she received a call from her husband who asked her to purchase beer for him. The Grievant wrote a statement in which she said, "I asked him if he could wait until I got off because I only had 20 minutes left of work."<sup>9</sup> According to the Grievant's statement, as she was

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<sup>4</sup> Employer Exhibit #2

<sup>5</sup> Employer Exhibit #2

<sup>6</sup> Employer Exhibit #3

<sup>7</sup> Employer Exhibit #3

<sup>8</sup> Employer Exhibit #4

<sup>9</sup> Employer Exhibit #5

talking to her husband, her cousin named Christina who is not 21 years of age dropped by. The Grievant's husband, who was still on the phone, asked the Grievant if she could have Christina bring the beer by so he did not have to wait for the beer. The Grievant's statement indicates that she agreed with her husband, hung the phone up and purchased an 18 pack of Bud Light. The Grievant then indicated in her statement that she put the beer in the trunk of her cousin's car. She then came back into the store and 10 minutes later her husband called to thank her for the beer.<sup>10</sup> In the written statement, the Grievant made no mention of getting permission from a supervisor to purchase the beer and place it in Christina's trunk. However, at the hearing, the Grievant claimed that she had obtained the permission of her supervisor, Simona Zuniga, to purchase the beer for her husband and place it in her cousin's trunk. At the hearing, the Grievant testified:

"To ask her if it was okay. 'Hey, I am going to buy some beer. I am going to put it in Christina's trunk, and she is going to take it to Miguel; is that all right?' And she said, 'Yeah.' It was more of a yeah and nod. Like yeah."<sup>11</sup>

The Grievant stated that she did not believe she had to ask permission from Ms. Zuniga, but was trying to be considerate. The Grievant also acknowledged during her testimony at the hearing that she realized she was not supposed to buy anything, including alcohol while she was on the clock even if she was on break. The Grievant stated that she bought the alcohol while she was on break because "I asked my supervisor first."

Simona Zuniga testified that she is a Shift Supervisor and acts as the Manager in absence of the Store Manager. She testified that she remembered the incident in June because the

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<sup>10</sup> Employer Exhibit #5

<sup>11</sup> Transcript page 41

Grievant purchased alcohol while she was on the clock. The Grievant was not on a break at the time she purchased the alcohol, according to Ms. Zuniga.<sup>12</sup> Ms. Zuniga actually saw the Grievant purchase the 18 pack of beer. Ms. Zuniga stated:

“I asked her what she was doing, and she said she was buying it for her husband, and her cousin was going to take it. . .

I just said it wasn’t allowed because if she is giving it to a minor . . .

She said that if her cousin got caught with it, she wouldn’t tell where she got it from.

And she put it in her car.”<sup>13</sup>

After observing this, Ms. Zuniga testified, she notified the Store Manager, Tammy Barnett, by telephone. Ms. Barnett told Ms. Zuniga that she was going to call Loss Prevention to deal with the matter. Ms. Zuniga testified that she knew Christina to be the cousin of the Grievant because Christina’s mother also worked in the store. She knew that Christina was not over 21. On cross-examination, Ms. Zuniga was asked why she did not suspend the Grievant on the spot for the alleged violation, and Ms. Zuniga testified that she did not have authority to do so as a Shift Supervisor, and as a member of the bargaining unit.

Ms. Tammy Barnett testified that she is the Store Manager at the store where the Grievant was working. Ms. Barnett testified that employees are trained on whether it is permissible to give alcoholic beverages to minors.<sup>14</sup> Training consists, according to Ms. Barnett, of the employees being told that they cannot do it. It is not permissible for an employee to give alcohol to a minor on the pretense that the minor is carrying it to an adult. According to Ms. Barnett,

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<sup>12</sup> Transcript page 12

<sup>13</sup> Transcript page 13 and 14

<sup>14</sup> Transcript page 56

there was a sting operation done at the store where a decoy was sent in and a cashier sold the decoy alcohol. As a result of that incident, the store had to pay a fine.

Ms. Barnett testified that she became aware of the incident in June involving the Grievant when she received a call from Ms. Zuniga telling her that the Grievant had purchased beer and put it in Christina's car. Upon getting the story from Ms. Zuniga, Ms. Barnett called Loss Prevention. Ms. Barnett testified that she did not do anything else with the matter until Loss Prevention came in and interviewed the Grievant. After Loss Prevention interviewed the Grievant, Ms. Barnett testified, she told the Grievant that she was suspended until further notice. When the Grievant was told this, Ms. Barnett testified, she began to cry.

Several weeks prior to this incident that led to the Grievant's termination, Ms. Barnett stated, she talked to the Grievant about a very similar circumstance. Apparently, the Grievant wished to purchase beer as she did in the present case and send it home with her cousin Christina.<sup>15</sup> Another supervisor, Laurie Davis, told Ms. Barnett that the Grievant had asked her, "If she could purchase some beer for her husband and let Christina take it home."<sup>16</sup> Ms. Barnett stated she was told the transaction did not occur. However, Ms. Barnett testified, she spoke to the Grievant and said "that she could not purchase the alcohol and give it to Christina."<sup>17</sup> The Grievant claimed that she did ask the Store Supervisor, Laurie Davis, if she could purchase beer and put it in her cousin's trunk.<sup>18</sup> According to the Grievant, she made the purchase and put it in the trunk, and was not disciplined at all. The Grievant denied that Ms. Barnett ever spoke to her

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<sup>15</sup> Transcript page 66

<sup>16</sup> Transcript page 67

<sup>17</sup> Transcript page 67

<sup>18</sup> Transcript page 71

about this incident. She stated, "She is lying."<sup>19</sup> The Grievant acknowledged that when she was suspended for the second incident that led to her termination, Ms. Barnett did raise that with her.<sup>20</sup>

### **POSITION OF THE PARTIES**

#### **EMPLOYER**

The Employer argued that the Grievant violated the Employer's zero tolerance policy regarding alcoholic beverage control laws. It is a violation of the Code for an employee to furnish alcohol to a minor. The Grievant was trained on these rules and understood that the failure to follow these rules will result in termination. The Grievant acknowledged that she knew it was illegal to give alcohol to a minor and that doing so would result in termination. The Union, the Employer argued, presents no legitimate argument for why the Employer should not have terminated the Grievant for breaking the law. It is illegal to furnish alcohol to a minor whether or not the minor can be trusted not to drink the alcohol. The California alcohol beverage control laws do not permit a retail store employee to purchase alcohol from their place of employment and give it to a minor under any circumstance. No exception to the law exists for "giving" alcohol to a minor merely to transport it home. California Vehicle Code Section 23224 does not exonerate the Grievant from violating alcohol beverage control laws. Whether or not the Grievant was on a break is irrelevant to the question of whether she broke the law.

The Grievant's testimony is unbelievable and provides no legitimate excuse for her act of furnishing of alcohol to a minor. The Grievant received a verbal warning for attempting to

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<sup>19</sup> Transcript page 72

<sup>20</sup> Transcript page 73

furnish alcohol to a minor prior to June 11, 2007. The Grievant's testimony at the arbitration is inconsistent with her written statement she made on June 21, 2007. In the written statement, the Grievant did not mention that she was on a break. She also failed to mention that she received permission from Ms. Zuniga to purchase the alcohol and put it in her cousin's car. Ms. Zuniga made the call to Ms. Barnett on June 11<sup>th</sup> to report the Grievant. The Grievant's claim that her husband needed the beer is specious. The Grievant testified that her husband brought her to work and took her home. When Christina allegedly dropped the beer off at the house for the husband, in order for him to pick up his wife, he would have had to leave almost immediately to drive back to the store to pick up the Grievant. The Employer suggested that the husband would not have had an opportunity to drink the beer unless he intended to crack a Bud Light for road. The Employer stated that the Grievant changed her testimony having the cousin not only deliver the beer, but come back and pick her up. The Employer stated that the Grievant's story makes no sense. Based on the evidence, the Employer argued, it has established good and sufficient cause for the Grievant's termination and asked the Arbitrator to deny the grievance.

## **UNION**

The Union argued that the rest break under the Collective Bargaining Agreement provides that employees are entitled to a 15-minute break without regard to a specific time during the work shift. The Grievant, the Union argued, was on a legitimate work break. The Employer did not produce any concrete written policy that stated employees could not purchase alcohol while they were on a break. Whether or not the employee is technically on the clock during a break, the contract requires that it be uninterrupted and that the employee not be under the Employer's control. Clearly, an employee on a break could purchase a candy bar or a soft

drink. Whether an employee could leave the premises under the Employer's policy is confused by the different testimony and is not supported by any written document.

The Union noted that the supervisor did not discipline the Checker who actually sold the beer to the Grievant. Supposedly, it would be just as much a violation to sell it to one who cannot purchase it as it would be to sell for one who sought to purchase it for another. The Shift Supervisor, Ms. Zuniga, did not stop the actual sale of the alcohol to the Grievant. While there is a conflict with respect to what the supervisor told the Grievant, it is clear that the supervisor did not warn the Grievant that she would be terminated or disciplined if she continued with the transaction. When the Grievant returned after putting the alcohol in her cousin's car she was not issued a reprimand for insubordination or having committed an illegal act. Another blight on the Shift Supervisor's credibility is her recollection that the Grievant, without any regard for her cousin's welfare or store liquor license blatantly said that the cousin would lie to law enforcement with respect to where she had obtained the beer if she was stopped. Furthermore, Vehicle Code Section 23224 would immunize the cousin from the mere act of transporting the beer in her trunk.

When the Grievant placed the beer in the cousin's trunk that does not equate to giving or furnishing her alcohol. The Store Manager's personal opinion about her belief, or questioning, if the cousin removed the alcohol from her trunk does not carry the day. These comments were pure subjectivity and cannot replace the Arbitrator's objectivity or the non-contradicted facts. The beer was not for the cousin, nor was it was given to the cousin for her consumption. She was merely a transport agent. The obvious question is whether the Grievant gave or furnished beer to the cousin in violation of company rules. The Legislature did not define the words

“furnish” or “give.” The implication that when something is given or furnished to another it is for that individual’s personal use or consumption. It is an intellectually, as well as rationally, bad stretch to equate the Grievant’s placement of the beer in the cousin’s trunk as furnishing/giving alcohol to a minor.

The controversy swirls around a prior incident of the same basic fact pattern. The Store Manager related how she and the Grievant had a discussion where in the Grievant wanted to purchase alcohol and send it home for her husband with her cousin as a means of transportation. The Manager told the Grievant in no uncertain terms that such a transaction could not be done. Contrary to the Manager’s recollection, the Grievant said she asked permission to buy the beer from a Shift Supervisor to have the cousin transport the product, and was given permission. The Grievant claimed that the beer was actually purchased and placed in the Grievant’s car. Not only did the Grievant receive no discipline, there was never any conversation between the Grievant and the Store Manager concerning that prior incident. If such a conversation had occurred, it would have been raised either in the Employer’s Letter of Termination, or it would have been raised when the Grievant was suspended pending investigation. For all these reasons, the Union stated, the Employer did not establish good and sufficient cause for the Grievant’s termination, and the Grievant should be reinstated with full back pay and benefits.

### **DISCUSSION**

In analyzing a case, such as the present one, when there is a significant amount of dispute between the stories of various witnesses, an arbitrator frequently has to step back and take what may best be described as a commonsense view of the likely possibility of the validity of each

story. There is no absolute way to determine which witness is lying and which witness is not lying. One simply tries to determine which story is more likely to be true than the other story. In the present case, the Grievant's story reflects a circumstance where she is 20 minutes from the end of her shift. Her husband requests that she purchase beer for him so that he can drink it. According to the Grievant, the husband apparently wanted the beer immediately and suggested that the cousin, who was at the store, drive the beer home to him. However, the Grievant also testified that her husband picked her up at the end of her shift, which means that he would have been at the store in 20 minutes. The Grievant stated it took about 5 minutes to drive from the store to her house. That means that if the cousin had driven to the house, she would have arrived at a time when the Grievant had less than 15 minutes left on her shift, and the husband would have had to leave within a few minutes after that in order to pick the Grievant up. The Grievant seemed to have changed her story to suggest that the cousin delivered the beer then came back and picked the Grievant up, which is a very unusual arrangement. There is no logical explanation for why the husband was in such need of beer that he could not wait the 20 minutes that would have passed before he could have gotten his hands on the beer. It is highly unlikely in the brief period of time that transpired that he could have consumed the beer, assuming he was coming to pick the Grievant up.

The Arbitrator has no idea why the Grievant purchased the beer and gave it to her cousin. It is possible that the beer went home to the husband. It is possible that it went someplace else. It just does not make a great deal of commonsense to engage in the type of transaction that the Grievant claimed to have engaged in at the time that she did it. With only 20 minutes left on her shift, one would anticipate that a normal, logical reaction would be to say to her husband, "I will

purchase the beer at the end of my shift and give it to you when you pick me up.” The rest of the Grievant’s story simply raises lots of doubt. It is possible that the Grievant did what she claimed even though it was illogical. It is also possible that the Grievant was lying. But the best conclusion is that the Grievant’s story concerning the purchase of the beer and giving it to the cousin does not make a lot of commonsense.

Another aspect of the Grievant’s case which is troubling is the fact that in the report that the Grievant wrote at a time when she knew she was being investigated for allegedly providing alcohol to a minor, she overlooked the fact that she allegedly received permission from her supervisor, Ms. Zuniga, to give the beer to the cousin to transport to her husband. The story concerning Ms. Zuniga would be exculpatory in its entirety. Why the Grievant did not think about that at the time she wrote the report is a bit troubling. It appears that it took the Grievant approximately a year after the incident to recall the fact that Ms. Zuniga gave her permission. Once again, applying the commonsense story test to the facts, it would appear to the Arbitrator that the Grievant’s failure to mention the fact that her supervisor gave her permission to purchase the beer and place it in her cousin’s car does not make a lot of commonsense. It is more likely that no permission at all was given and the Grievant simply went ahead and did what she wanted to do. The question of whether Ms. Zuniga told the Grievant that she could not do what she did has more credibility because Ms. Zuniga immediately called the Store Manager to report it. Ms. Zuniga did not believe she had authority to impose discipline since she is a fellow bargaining unit member. Her reaction was to report what she believed to be wrong, leaving the analysis of the situation to Ms. Barnett for purposes of discipline.

The issue of whether the Grievant purchased beer earlier for her husband and placed it in her cousin's car is also problematic. The Shift Supervisor allegedly reported this to Ms. Barnett. Ms. Barnett said she told the Grievant that she could not engage in this kind of transaction. The Grievant denied that she had any conversation of this nature with Ms. Barnett. The Grievant asserted that she actually did purchase the beer in contrast to Ms. Barnett's recollection that no beer was purchased. The problem the Arbitrator has with the storey is that if Ms. Barnett had realized that a purchase was actually made, and the transaction occurred with the Grievant placing the alcohol in the cousin's car, why did Ms. Barnett not react as she did in the present case and bring in Loss Prevention. It appears to the Arbitrator to be more logical that Ms. Barnett was informed by the Shift Supervisor that the Grievant had asked to engage in this transaction but had not actually done so. As a result, there was no basis for Ms. Barnett to discipline the Grievant except to give her an oral warning that transactions of this nature were not permitted. Apparently the Grievant was with Ms. Barnett for other problems that she was having at work and in the course of the discussion regarding these other problems, this matter came up as well. Since there was no basis for disciplining the Grievant since she did not actually purchase the beer and place it in her cousin's car, at least according to Ms. Barnett's understanding of the facts, the only appropriate action for Ms. Barnett to take would be to warn the Grievant not to do this because it would create a problem for her. The Arbitrator believes that Ms. Barnett's story is probably more likely than that of the Grievant.

Whether the Grievant was on a break or not, or whether the Grievant could purchase items when she was on a break or not, or whether the Grievant could leave the store while she was on a break or not, is really irrelevant to the essence of the dispute. The dispute is that the

Grievant purchased an 18 pack of beer, took the beer and put the beer into her underage cousin's trunk. The Union argued that taking beer from the store and putting it in the car controlled by a minor with no adult present in the car does not constitute furnishing alcohol to a minor. The Arbitrator does not believe that the law requires that in order to be found guilty of furnishing alcohol to a minor that the provider must open the can so that the minor can drink from it. If the law permitted what the Union suggests, any storeowner could say that a minor came to the store requesting the store place the alcohol in the minor's trunk so that the minor can transport it to his parent. In the Arbitrator's opinion, furnishing alcohol to a minor means placing in the control of the minor an alcoholic substance without an adult being present. That is exactly what happened in the present case. The Grievant has no idea whether the minor cousin is going off to have a party with her other teenage friends using the beer. She claimed that her husband got the beer and called her to thank her. This seems like an unusual response by the husband. While it is possible that it did happen, it is possible that it did not happen. All that the Arbitrator knows for sure is that the Grievant purchased alcohol and put it into the car of her minor cousin. All of the other facts are unsubstantiated or in dispute.

In summary, it is the Arbitrator's opinion that the most likely story of what happened on June 11<sup>th</sup> is that the Grievant bought an 18 pack of beer without getting permission from her supervisor to do so, and put the beer in her cousin's car knowing at the time that she did so the cousin was a minor. Whether the Grievant's husband got the beer or not, the Grievant put the alcohol into the control of a minor in violation of the Code with respect to furnishing alcohol to a minor. The Grievant knew from the training she received by the Employer that to do so was wrong. Furthermore, the Grievant had attempted to do this before and was told by her Store

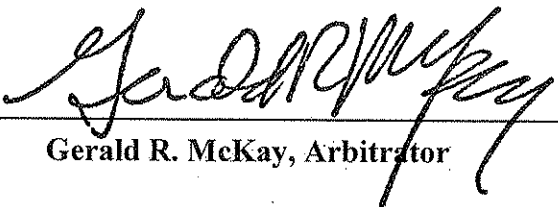
Manager not to do it. As a result of her conduct, the Employer terminated the Grievant. When it did so, it had good and sufficient cause to terminate her. The grievance, therefore, is denied.

**AWARD**

The Employer had good and sufficient cause to terminate the Grievant. The grievance is denied.

**IT IS SO ORDERED.**

Dated: June 5, 2009

  
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Gerald R. McKay, Arbitrator