

In the Matter of Arbitration)
)
 between:)
)
 THRIFTY PAYLESS INC. dba RITE AID)
)
 and)
)
 UNITED FOOD AND COMMERCIAL)
 WORKERS, LOCAL 770)
)
 (Termination of Linda Johnson))
)
 _____)

**ARBITRATOR'S
OPINION
AND
AWARD**

Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Union: Amy M. Cu, Esq.
Schwartz, Steinsapir, Dohrmann & Sommers LLP

Company: Laura J. Clark, Esq.
Kelly, Hockel & Klein PC

Hearings Held: July 11, 2011
Los Angeles, CA

Submitted to Arbitrator: August 31, 2011

This proceeding arises under the Retail Drug Agreement between Thrifty Payless Inc. dba Rite Aid ("Company") and United Food and Commercial Workers, Local 770 ("Union") dated July 13, 2008 – July 15, 2012 ("Agreement") [JX 1]. The parties concur the grievance at issue was processed pursuant to the provisions of Article 16 of the Agreement and is properly in arbitration.

MATTERS AT ISSUE

The parties stipulated to the following statement of the issues to be decided in this proceeding [JX 2]:

1. Was Grievant Linda Johnson discharged for good cause?
2. If not, what is the remedy?

BACKGROUND

Grievant Linda Johnson was hired by the Company on June 9, 1981 as a clerk at the store at 5th and Hill in Los Angeles. She served in various positions over the years. In 2003, she transferred to the store at La Brea and Rodeo. She worked in the photo department until that service was eliminated from the store in 2008 or 2009. Thereafter she remained at that site as a sales associate clerk. Prior to the incident resulting in the termination at issue, Grievant had no record of disciplinary action.

On July 7, 2010, Grievant was the only clerk working the check stand at 2:00 p.m. when she sold alcohol (three 24 oz. cans of beer) to a female minor. Grievant testified she did not ask for identification because the minor looked over 30 years old and was someone she thought she had carded previously. Shortly thereafter, Grievant was confronted by an officer from the Department of Alcoholic Beverage Control (ABC) who informed her the customer was a 19 year old decoy [CX 13]. The Company was not aware an undercover sting operation was being conducted. The ABC officer photographed Grievant with the minor holding the beer she had been sold [CX 11] and handed Grievant a citation for violating the state laws on selling alcohol to a minor [UX 1]. The Company terminated her the same day for committing for this offense. The instant grievance and appeal to arbitration ensued [UX 3].

The Company has a longstanding policy subjecting clerks "to immediate discharge" for selling or giving alcohol to a minor [CX 1-4]. District Manager Frank Granillo explained the rationale for the penalty is the severe consequences to the Company for a violation which include a fine, suspension, or even revocation of its liquor license. In an effort to avoid these harsh ramifications, the Company redesigned the cash registers to block the sale of alcohol unless the customer's ID is swiped or a birth date is entered manually by the clerk. All clerks,

including Grievant, are trained twice yearly on the policy and the procedures to be followed as a precaution to prevent a violation [CX 5-8]. Clerks are instructed to request ID for every customer appearing to be under the age of 30 and to do so whenever there is any doubt. Grievant was well versed in these policies and aware of the severe consequences of a violation.

District Manager Granillo testified the Company has zero tolerance for any violation regardless of seniority. He said he was aware of at least five other summary terminations by the Company for a first offense. Granillo cited one of the training screens as an example of how clerks are reminded twice a year compliance with this policy is critical and the dire consequences of a violation:

- As a condition of employment. You are **required** to act in accordance with these laws regarding the sale of alcoholic beverages.
- Failure to comply with these laws will result in **immediate termination**.
- Associates who are found to violate these laws and policy pertaining to the sale of alcoholic beverages may also be subject to **fines** and **further legal action**. [Bold in original.]

For her part, Grievant testified the store was very busy at 2:00 p.m. with 6-7 customers in line when the sale was made. She said she was the only checker, felt harried, and other customers were asking her questions while she processed the sale to this minor. Grievant insisted the minor looked over 30 years of age and appeared to be someone she had carded before. Grievant claimed she has never intentionally sold alcohol to this or any other minor and would certainly always ask for ID in the future.

At arbitration, the parties were afforded a full opportunity to call and cross-examine witnesses under oath, introduce documents, and present argument. A transcript of the proceedings was prepared. Upon receipt of post-hearing briefs, the case was submitted for decision. No useful purpose is served by summarizing the entire record evidence and argument, all of which has been carefully reviewed and considered. Rather, only those matters deemed necessary in resolving the termination at issue are discussed herein.

///

OPINION

To establish good cause for termination, the Company must show Grievant committed the misconduct alleged and the penalty was appropriate. The Company maintains good cause for termination under its policy of zero tolerance is established regardless of seniority because the sale of alcohol to minor is a crime with dire consequences to the clerk, store and the public. The Union, however, contends termination is not appropriate for a clerk with 29 years of seniority for a mere negligent act of performance in which no harm or actual damage occurred. A review of all the evidence and argument in this proceeding supports the position of the Company. It follows the grievance will be denied.

There is no dispute Grievant was caught by ABC authorities selling alcohol to a minor in a sting operation at this Company store on July 7, 2010. Nor is there any question such act is a crime strictly prohibited by Company policy. Rather, the controversy dividing the parties is whether summary termination was appropriate in this case given Grievant's length of service and other mitigating circumstances said to be presented.

The Company's insistence on zero tolerance regardless of seniority is reasonable based on the serious nature of this offense and the extensive precautions taken by management to prevent a violation. Under state law, the sale of alcohol to a minor is not only a crime for the clerk but subjects the Company to fine, suspension or revocation of its liquor license. The Company could also face civil liability should the minor harm him or herself or another after consuming alcohol purchased at the store. To avoid these harsh repercussions, the Company requires all clerks to undergo training twice yearly to remind them, over and over, the precautions to be taken and the dire consequences of a breach. Those procedures include checking ID for anyone appearing to be under 30 years of age. The Company also modified all cash registers to block the sale of alcohol until the clerk swipes the customer's ID or otherwise enters a birth date manually.

While certainly not infallible, these measures and training has made it crystal clear to all clerks the policy and procedures may not be blithely ignored without facing termination. On this occasion, Grievant made no effort to ascertain the age of the minor decoy or even ask for identification. The evidence confirms Grievant knew the policies, had undergone the repeated training over the years, and was well aware she could be terminated for a violation of this

policy. There is no evidence there have been other similarly situated employees who sold alcohol to a minor and were not terminated by the Company. Under these circumstances, good cause to discharge Grievant for this offense is established.

The mitigation for her actions that day claimed by Grievant rings hollow. She alleged she was busy at the time as the only checker on duty with 6-7 customers in line and distracting her with questions. The security video taken of the sale played at arbitration, however, failed to confirm any of the ambient conditions she described. But even if she was overloaded as she claimed, no justification was presented for her failure to ID a young customer purchasing alcohol. Being busy or distracted at the register is hardly a novel experience for a clerk with 29 years of experience. Grievant says the minor appeared to be over 30 years of age. But the photograph taken of the minor that day and observation of Assistant Manager Ashraf Graies belie this claim. Graies was present when Grievant was confronted by the ABC agent with this minor. He credibly testified the minor clearly appeared to be under 21 years of age.

The Union correctly observes clerks are not trained how to determine the age of a customer by appearance alone. When in doubt, however, clerks are instructed to ask for ID. Given the youthful appearance of this minor, there is no question Grievant should have asked for ID. Had Grievant followed store practice and policy with respect to the appearance of this minor, Grievant would not be in this predicament. It is recognized no damage to the minor or the Company resulted from this sting and that Grievant was never prosecuted for the offense. Rather, she was merely required by the authorities to take a class on the subject. Nevertheless, the potential for serious harm to herself, the Company, and this minor was present. For these reasons, the fact Grievant was fortunate no further damage occurred does not lessen the seriousness of her violation. Accordingly, the various factors cited by Grievant fail to mitigate those in aggravation of her actions.

Cases of serious misconduct by long term employees are always difficult and often heart wrenching for everyone involved. In this instance, the offense was committed inadvertently by a retail store clerk with 29 years of seniority and no history of prior discipline. The Union correctly maintains such longevity deserves extraordinary deference as evidenced by the many arbitration decisions cited in which discharge for otherwise serious offenses was reduced. Yet, as reflected by several other arbitration cases cited by the Company, long service does not insulate employees from summary discharge in all circumstances. A review

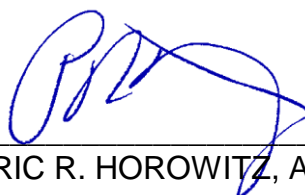
of the authorities submitted by both parties confirms each case involving the termination of a long term employee must stand or fall on its own merits in light of the job performed, the offense committed, and the industry involved. Every factor in mitigation and aggravation of the misconduct must be considered and carefully weighed.

The sale of alcohol to minors by a clerk is widely viewed as a cardinal offense in the retail food and drug industry. Such conduct is a crime and can result in substantial legal liability to the clerk and the establishment. The fact the ABC conducts sting operations such as occurred here underscores the seriousness with which the state and that agency view any offense. The economic harm to the Company which could result from a lapse in judgment by a clerk is real and significant. For these reasons, the Company has taken extraordinary precautions to reconfigure all registers and train every clerk twice yearly on the policies and procedures to prevent even a single occurrence. The grim consequences of a violation are underscored and reinforced. Unfortunately for Grievant, length of service does not excuse her offense. Her conduct on July 7, 2010, in bypassing the mandate to ID a minor during the sale of alcohol was egregious. By these actions, Grievant exposed herself and the Company to serious legal and financial liability and demonstrated she may no longer be relied upon to comply with these requirements in the future. Good cause for discharge having been established, the grievance must be denied.

AWARD

1. Grievant Linda Johnson was discharged for good cause.
2. The grievance is denied.
3. Pursuant to Article 16.5.3. of the Agreement, the fees of the Arbitrator shall be borne by the Union

DATED: October 31, 2011
Santa Monica, California



FREDRIC R. HOROWITZ, Arbitrator