ARBITRATION

Between UNITED FOOD AND COMMERCIAL WORKERS, Local 555, in behalf of Warren D. Carpentier (Union, UFCW) -and- ALBERTSON'S INC (Employer, Company) Re: Discharge Representatives: For the Union: Steven Goldberg[1] Jeff Anderson[2] For the Employer: Arthur W. Dulemba[3]	OPINION, DECISION AND AWARD by Kenneth M. McCaffree P.O. Box 10459 Bainbridge Island, WA 98110 Case No: N/A Grievant: Warren D. Carpentier Place of Hearing: Salem, OR Date of Hearing:May 22, 1997 Date of Award: August 6, 1997

INTRODUCTION

This arbitration arose from a grievance over the discharge of the Grievant for the sale of a bottle of beer to a minor. The Employer invoked its policy concerning the sale of alcoholic beverages to minors by its employees and terminated the Grievant. The Union and Grievant alleged that the policy did not require an immediate termination for such an offense where the Grievant had

[1] Member, Goldberg, Mechanic & Stuart, LLP, 1020 SW Taylor, Suite, 510, Portland, OR 97205. (503) 224-2372.

[2] Union Representative, UFCW Local 555, 7095 SW Sandburg, P.O. Box 23555, Tigard, OR 97281-3555. (503)684-2822.

[3] Attorney at Law, 1750 SW Skyline Blvd., Suite 229, Portland, OR 97221. (503) 292-5122.

used his judgment to conclude that the customer was not a minor, and grieved the discharge as unjust under the Agreement. The Employer disagreed. The matter went through various steps of the grievance procedure without resolution. The Union appealed the grievance to arbitration and these proceedings ensued.

The parties affirmed that no issues of arbitrability existed (T 10:1-4). Accordingly, the arbitrator provided full and equal opportunity to the parties to make opening statements, to examine witnesses under oath, to offer documentary evidence, to argue procedural and evidentiary issues before the arbitrator for a ruling, and otherwise to make known their respective positions and arguments in support thereof on the issues in dispute. Those who testified included Kari Price, Store Director; Dona Pike King, Director of Labor Relations; Diana Lynn Winters, Checker; Warren D. Carpentier, Checker and Grievant; and Ed Clay, Union Secretary-Treasurer. The arbitrator accepted the following exhibits:

Joint
1. Salem Area Agreement For Albertson's and Union
2. Grievance Processing Materials, three pages
3. Employer Policy Prohibiting the Sale of Alcoholic Beverages and Tobacco to Minors

Employer
1. Grievant's Statement, undated (September 19,1996)
2. O.L.C.C. Notice of Violation to Employer and Related Materials, three pages
3. Grievance Request of Grievant, 9-2-96
4. Grievant's Statement of Facts, three pages (E 3 and 4, identified only, not admitted (T 142:23 - 143:11)).
5. Grievant's Signed Employer Policy on Alcoholic Sales, 9-3-96
6. Excerpts from Oregon Employment Department Services Handbook

7. Grievant's Work Search Record
8. Excerpt from Telephone Directory
9. Employment Agency Listings in Telephone Directory and Summary of Newspaper Clerk/cashier Advertised Positions
10. Newspaper Listing of Vacant Positions, 20 pages
11. Ltr, Lucas to Dulemba re Hiring at Fred Meyer Stores in and near Salem, OR

Union

1. Record of Fine Payments by Employer, three pages
2. Ltr, Paolini to Clay re Hicks Reinstatement, 1-24-92, two pages (Tentative Acceptance Subject to Later Final Ruling (T 50,51:25-2:1-4)).
3. O.L.C.C. Pamphlet on Selling Alcohol and Tobacco, four pages
4. Hines' Grievance Materials, four pages (Note Tentative Acceptance re Comment U 2 (T 69-73)).
5. Albertson's Liquor Law Policy, 1998
6. Grievant's Signed Acceptance of Personnel and Orientation Manual, 11-8-83, two pages
7. Grievant's Signed Acceptance of Retail Stores Orientation & Policy Handbook, 8-10-94
8. Grievant's Citation to Appear in Court, 10-8-96
9. Court's Order of Dismissal of Charges against Grievant, 3-14-97
10. Employment Department Decisions re Unemployment Benefits, seven pages
11. Safeway Stores Policy on Sale of Alcohol and Tobacco to Minors
12. O.L.C.C. Law Orientation, two pages

By agreement of the parties, the Union gave an oral closing argument with the privilege of a rebuttal statement to a written brief of the Employer (T 192 - 205). The Employer's brief and the Union's rebuttal statement reached the arbitrator in timely

manners, the latter arriving for the arbitrator on or about July 18, 1997. In addition to the above, the arbitrator received a copy of the transcript and has used that record in the preparation of this Opinion, Decision and Award.

ISSUES

The parties suggested statements of the issue that were somewhat different but both of which recognized that the substantive issue was whether or not the discharge of the Grievant was for just cause under the Agreement (T 17:22 - 18:2). After examination of the grievance documents, briefs, statements and arguments of the parties, I have stated the issue statement as follows:

> Did the Employer violate Article 18.1 and/or 18.3 of the Agreement by the termination of the Grievant on or about September 27, 1996? If so what is an appropriate remedy?

In setting forth this statement, the arbitrator was cognizant that the Employer insisted that the only relevant section was 18.1 that provides for a just cause discharge. It insisted that 18.3 was unrelated to the instant issue because the conduct of the Grievant, under the policies of the Employer, justified immediate discharge. The Union claimed that 18.3 required a "warning" before discharge, which the Grievant had not received for selling alcohol to minors, and therefore just cause did not exist to discharge the Grievant. (See arbitrator's comments at T 16:1 - 17:18).

APPLICABLE AGREEMENT PROVISIONS

ARTICLE XVIII - DISCHARGE OR DISCIPLINE

18.1 The Employer shall be the judge of competency and qualifications of its employees, and reserves the right to discharge any person in its employ for just cause. The Union may process any alleged unjust discharge through the Settlement of Disputes Procedure of Article XIX of this Agreement.

18.3 Before a regular employee is discharged for incompetence or failure to perform work as required, the employee shall be advised and given an opportunity to improve his or her work, except that a warning shall not be required for cash handling irregularities or failure to record sales.

ARTICLE XIX - SETTLEMENT OF DISPUTES

19.3 Jurisdiction and Authority

(a) The jurisdiction and authority of the Arbitrator shall be confined exclusively to the application of interpretation of a specific provision or provisions of the Agreement at issue between the parties. The Arbitrator shall not have the right to alter, amend, delete, or add to any of the items of this Agreement. The arbitrator may consider the entire Agreement in making his award.

(b) The Arbitrator shall have the authority to resolve the grievance or dispute and in cases where it is concluded that an employee has been improperly discharged, the Arbitrator may reinstate the improperly discharged employee. The Arbitrator shall not render an award which requires the Employer to pay an improperly discharged or suspended employee for time that employee has not actually worked in excess of the wage and benefits the employee would have earned had he worked his normal schedule during the ninety (90) calendar days immediate following the date of the discharge; nor shall the Arbitrator be entitled to require the Employer pay benefits on behalf of an employee for a

time period the employee has not actually worked in excess of the ninety (90) days allowable herein.

(c) The parties further agreed that the Arbitrator is not empowered to award any back wages or benefits to an employee whom the arbitrator determines to have been improperly laid off; the parties recognize that the language of Paragraph 6.8 precludes the awarding of back wages for any type of seniority violation.

(d) The award of the Arbitrator shall be written and shall be final and binding on both parties. The expenses and fees of the arbitrator shall be borne by the losing party as determined by the Arbitrator, who shall specifically rule on the issue.

(e) If in the judgment of the arbitrator, equity is best served by apportioning the cost of the arbitration between the parties, he may order such apportionment.

19.4 The Arbitrator shall render the decision and award within thirty (30) days of the closing of the hearing of the receipt of briefs, whichever is later, any Arbitrator failing to comply with these provisions shall not be compensated except for actual cost incurred. The moving party shall notify the Arbitrator of the provision during the selection process. if the assignment is refused ...

POLICY PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES AND TOBACCO TO MINORS (State of Oregon)

Albertson's, Inc. is committed to keeping alcoholic and tabacco products out of the hands of minors and complying with state lays concerning the sale of these products. Accordingly, any violation of state alcoholic beverage and/or tabacco sales laws resulting from a failure of an Albertson's employee to check identification and establish the lawful age of a customer to purchase such products will result in disciplinary action which may include termination. In Oregon, individuals must be at least age 21 to purchase alcohol and at least age 18 to purchase tabacco produces.

If a checker has an absolutely certain knowledge that a person is of legal age to purchase alcohol or tabacco, it will not be necessary for the checker to verify identification. Remember, however, that the risk of the customer being underage is on the checker, and if any violation of the alcoholic beverage or tabacco laws occurs, the checker's job is at stake. In this

regard. it's prudent to check the identification of any customer who appears to be less that age 30.

Additionally, if any employee assists a minor in the purchase of alcoholic beverages or tabacco or in any way assists or encourages some other person to do so, the employee will be immediately terminated.

We regret the harsh tone of this policy, but we simply cannot place in jeopardy the well-being of minors, continued viability of our liquor and tobacco licenses, and the jobs and hours of work of our employees.

FACT SUMMARY

On September 18, 1996, shortly after 7:00 p.m. when the "rush hour" was over, a customer presented himself at the Grievant's checkout stand with a single quart of beer (T 107:1-2). When the beer was scanned by the register it "locked." This condition required the Grievant either to enter the date of birth of the customer or to strike the enter key to release the register and to allow the sale to continue. The Grievant assessed the customer to be 24 years old and more than 21 (T 162:2-4, E 1). The Grievant did not ask for identification, manually overrode the "lock" on the checkout system, and completed the purchase (T 107:13-14).

The customer was an undercover police cadet, age 19. The Grievant and the Employer were caught in a "sting" operation over the sale of alcohol to a minor. Within minutes of the sale, an officer approached the Grievant and informed the Grievant that he had just sold beer to a minor. A marked $20 bill was retrieved from the cash register, the Grievant escorted to the break room where the Grievant was given a citation (T 107:17-24; U 8). The Grievant subsequently went to court on charges of furnishing alcoholic beverage to a minor, only to have the case dismissed

several months later on the basis that "the evidence does not support the allegation" (U 8; 9). In turn, the Employer was cited by the Oregon Liquor Control Commission for violation of the law and Commission regulations and fined $390 (E 2; U 1).

The Employer placed the Grievant on suspension pending investigation of the matter. Price referred the issues to Labor Relations. After confirmation that the Grievant was aware of the Employer's Policy on the sale of alcoholic beverage to minors, admitted that he regarded the customer to be 24 years old but that he failed to ask for identification, King directed Price to terminate the Grievant (J 3; E 5; E 1; T 34:24 - 35:17: 61:2-15). The Employer discharged the Grievant on or about September 27, 1996 (E 4).

The Grievant notified the Union of a potential grievance over his termination. The Union acted to file the grievance which was denied by the Employer (J 3A, B). Other steps of the grievance procedure followed without resolution of the grievance. The Union appealed the issue to arbitration and these proceedings have followed.

The Grievant had been employed by the Company for 23 years prior to his termination. During that time he never previously had been written up for selling liquor to minors, although in 1986 the Grievant did receive a written warning based on his work performance (T 93:19-23; T 205:3-15). During the employment of the Grievant since 1983, the Employer did change its disciplinary policy concerning the sale of alcoholic beverages to minors. A 1988 policy provided expressly for a three day suspension for the first offense, and termination for the second (U 5). Reference to disciplinary action in the current policy, adopted about 1992,

no longer refers expressly to a first and or second offense by the employee. The Employer contended, however, that the current policy is a "strict liability" policy that requires immediate termination on the first offense of selling alcoholic beverages to a minor. The Union contended that such was not the case, that the policy provides for and the Agreement then requires a warning under certain circumstances as those in this case before termination may be taken for just cause.

Other aspects and details of testimony and documentary evidence are incorporated below as appropriate.

CONTENTIONS OF THE PARTIES

A. Employer

The Employer contended that the Grievant was terminated for just cause under Article 18.1. Several arguments were offered to support this central contention.

First, the Employer maintained that its policy of termination for unlawful failure to check ID resulting in the sale of alcohol to a minor is a reasonable and necessary effort to comply with a critical public policy. In addition, the effect upon the Employer's business of non compliance with that public policy is substantial, leading to loss of license to sell alcoholic beverages with a business volume of $600,000 in the Grievant's store alone. Further, the Employer noted that its competitors have fashioned and arbitrators have upheld the stern penalty of termination for the first violation of selling to a minor. On the latter the Employer cited ten arbitration decisions in the food industry in which termination was sustained where

company policy required "immediate discharge" for sale of liquor to a minor.

Second, the Employer argued that Article 18.3 was irrelevant, that no prior warning was required in this case. But even if one was, the Grievant did receive a letter of warning in 1986 that satisfied the prior condition for Article 18.1 discipline. But the instant case is not a simple matter of "failure to perform work as required," but is a matter of grave public policy justifying immediate termination. According to the Employer arbitrators have consistently rejected the contention that the sale of an alcoholic beverage to a minor is a work performance issue, and again it cited ten or more arbitration decisions to support this contention.

Next, the Employer contended that termination was presumptively appropriate for an incident involving the sale of alcohol to a minor, an issue that the Union has not rebutted, the Employer argued. Citing argument in Elkouri and Elkouri the Employer alleged here that the Union was required to produce evidence or argument to show that that which is presumed is not true. The public policy and business aspects of the situation raise a presumption in favor of termination for the sale of alcohol to a minor. Arbitrators have supported this argument for decades, the Employer asserted.

Here, the Employer insisted that the Grievant had actual or constructive notice of the consequences for his conduct. The Grievant signed the Employer's policy on two occasions only a few days before the incident leading to his termination (J 3; E 5). The Grievant cannot and did not deny that he was aware of the contents of the Employer's policy and that he had access to

copies for detailed study. Any contention that the Grievant had not read the policy is no defense. Here the Grievant believed that the customer was over 21, but less than 30 years of age, never checked the identification of the customer, and ignored the "lock" on the register and made the sale. The Grievant admits that he did not follow the procedures of the Employer's policy, the Employer pointed out.

In addition, the Policy is clear, according to the Employer. Its initial paragraphs state clearly that failure to check the identification and establish the lawful age of a customer will result in disciplinary action that "may include discharge." Next the policy states that failure to check without absolute knowledge that the customer is over 21 years of age puts the checker's job "at stake." Finally and "additionally" the Policy makes clear that anyone who "assists" a minor to purchase alcohol "will be immediately terminated." According to the Employer, these admonitions make clear that the Policy is one of "strict liability" leading to immediate termination upon sale of alcohol to a minor. Even though Grievant exercised judgment, it cannot be an excuse for failure to follow and comply with the Policy. The experience and prior good record of the Grievant offers no assurance to future compliance. Termination was justified, the Employer concluded.

Contrary to the Union's argument that intent was relevant, the Employer maintained that it was not, but that in any event objective or constructive intent was satisfied on the record. Here the Grievant overtly over rode the register and clearly expressed the intent to make the sale to a minor. But in effect, the Employer's policy avoids determination of subjective intent

and makes the offense a culpable one without regard to what the employee expressed. Here, again, the Employer relied upon reasoning of this arbitrator that in the case of "grazing," intent was irrelevant, and that sale of alcohol to a minor was in the same category industry wide because of the public policy and business reasons involved.

Also, the rule was reasonable and necessary for strict compliance with laws which significantly impact the Employer's business. Here the loss of business by loss of license far exceeds any burden upon the employee, the Employer asserted, especially where a prior warning is required. In the latter case, with 30 employees likely to check sales of liquor, if each were given two "mistakes" before termination, the store's license would be long lost, the Employer asserted, before effective discipline could be administered. Clearly the industry wide rule accepted by arbitrators affirms the Employer's position, here in a "high volume, low profit margin and highly competitive industry."

Lastly, the Employer contended that no mitigating circumstances were relevant. Length of service with a good record is to no avail, since no standard exists on how many years would justify setting aside termination. Further, the dismissal of the criminal complaint against the Grievant is irrelevant since it arise under a different jurisdiction and rules than the instant arbitration. Finally, the Employer's judgment on discipline should not be overturned in the absence of gross abuse of discretion by the Employer. Clearly public policy issues and the loss of license to the Employer should be given substantial weight. The Employer noted that the employee could control

whether or not to abide by the Policy, but that the Employer had no direct control over the situation. Accordingly, arbitrators should not second guess the disciplinary judgment of the Employer.

Finally, the Employer argued that the Grievant had failed to make a reasonable job search and should accordingly be denied any back pay, should the arbitrator determine that the termination was to be set aside. In closing, however, the Employer concluded that its action had been consistent with its Policy on the sale of alcoholic beverage to minors and the Agreement. The grievance should be denied and the discharge sustained.

B. Union

The Union contended that the Employer did not have just cause to discharge the Grievant. This basic contention rested on several arguments.

In oral closing, the Union acknowledged that, for the most part, general agreement existed over the facts. Alcohol should not be sold to minors, as a matter of policy. Further, Grievant admits that he made a mistake on a serious matter for which some discipline may be appropriate. But the fact of the mistake is crucial, the Union pointed out. No deliberate or intentional mistake was made, but a sale was based on the honest belief that a customer was over 21. The Grievant didn't knowingly sell to a minor. The judgment of the Grievant was based on years of experience, and here he based a decision on that experience examining the physical appearance, the type and style of clothing worn, and the maturity of the customer. According to the Union, the Grievant did make a mistake, but not a deliberate or

intentional one. Accordingly, his discharge should be set aside for several reasons.

First, the Employer's policy in this case is not clear as to the consequences of its violation. The Union pointed out that the reference to "grazing" by the arbitrator and the cases cited by the Employer reflect a clear and specific policy with clear provision that its violation leads to immediate termination. Here the policy is much in doubt on the basis of its language and as understood by the employees. The Employer has changed its policy. From 1983 and for some years thereafter, the Union asserted, the Employer provided for progressive discipline explicitly in its policy, terminating the employee only upon a second violation of the policy on sale of alcohol to minors. At no time has this policy been expressly repudiated. In the 1996 policy statement signed by the Grievant, the Union alleged it is not clearly stated that if you sell alcohol to a minor, regardless of your intent, "you are out of here, you're fired" on the first offense. Without this certainty in policy, the termination cannot be sustained here, the Union concluded.

Both Winters and the Grievant interpreted the policy in the same manner prior to the Grievant's termination. In the first place, an employee who fails to follow the procedures and the Policy "may be terminated." In the second part of the Policy statement, both asserted that if an employee knew a customer was under 21 and or assisted others to provide alcohol to a minor, immediate termination would result. Both asserted that the Policy did not ignore the intent of the employee. Thus according to the Union, Articles 18.3 and 18.1 were both relevant.

According to the Union, the use of the word "additionally" at the beginning of the third paragraph confirms that this is a separate prohibition which is more serious in that its violation results in immediate termination than that provided in the first two paragraphs where discipline can result that "may include termination." If the third paragraph means the same as the first two, then it is redundant. The Union maintained that Clay's explanation that it applied where the employee knew the customer was under 21 makes sense, and the Employer's rationale does not. By clearly articulating what conduct is subject to immediate termination (the sale of alcohol to a minor who you know is a minor), it is certainly reasonable to conclude that the other conduct prohibited by this policy would result in discipline, but not in immediate termination. Here this analysis is consistent with the principle of contract interpretation that "to express one thing is to exclude another," the Union asserted.

The Union pointed out that the Company set forth certain conduct as resulting in summary discharge in its Personnel and Orientation Manual in 1983. Among the eleven issues listed, no mention was made of the sale of alcohol to a minor (U 6). Further, the 1994 Orientation and Policy Handbook that the Grievant signed does not list sale of liquor to a minor as conduct subject to immediate discharge without warning (U 7). A common thread among those items listed was that conduct required determination of "intent" to violate the rule. Although in Union 7 reference is made to "illegal behavior," this conduct requires "intent" to violate the law. According to the Union, for prosecution under the Oregon law, the employee must have knowledge that the purchaser was under 21 years of age, which is

consistent with both the dismissal of the charge against the Grievant in the District Court and the decisions to grant unemployment compensation to the Grievant (U 9; U 10).

The Union asserted that the above arguments indicated that Article 18.3 was relevant, contrary to the Employer's argument. In addition, if Article 18.3 does apply in this case, the Employer cannot support its position by the 1986 letter of warning received by the Grievant. The letter is nine years old, in the first place, and second, there is no evidence that it had anything to do with the sale of alcohol, which is essential if it is to be used as the prior warning required by Article 18.3.

In addition to the above line of argument, the Union discussed the cases cited by the Employer in support of its justification for summary dismissal. It claimed that these were distinguishable, primarily by the fact that the applicable rule or policy in each instance was unequivocal in providing for "immediate discharge" upon violation of the policy or rule on sale of alcohol to minors." The Union went through the entire list to cite the applicable rule and to distinguish it from the instant policy of the Employer. In summary, the Union asserted that it does not "dispute that where the employer has clearly and consistently with the applicable labor agreement, put employees on notice that a particular act will result in summary discharge, such discharges are generally upheld." It noted the same result in two cases of this arbitrator, one involving Local 555 and Albertson's (Crume, 1989) and the second, Local 1105, UFCW and Allied Employers, Inc. (Safeway Stores/Riggs, 1983).

Thus in summary, the Union claimed that the Employer's policy for violations of the sale of alcohol policy does not

require immediate discharge in the instant case, and that accordingly, Article 18.3 then becomes applicable. If the arbitrator concludes that Article 18.3 is not applicable, and immediate discharge was not warranted, mitigating factors become relevant to determining appropriate discipline. Here the Union pointed to the progressive "discipline" provided for by the O.L.C.C to the store, and noted that the Employer refused to treat its employees similarly. The penalty of discharge over and against the insignificant fine for the Employer is a consequential difference. Further, the 23 years of employment with the Company cannot be ignored, nor can the near perfect disciplinary record. The Grievant articulated a reasonable basis for why he did not card the police cadet on September 18. Notice should also be taken of his prior commendation by the Company for honoring its policy and not selling alcohol to minors.

Finally, the Union ask that the Grievant be reinstated with back pay and benefits as provided under the terms of the Agreement. It contended that the Grievant made appropriate attempts to find employment under the circumstances of his situation. Although some discipline may be warranted in this case, a three day suspension as used under the Employer's prior policy seems appropriate, the Union concluded, along with back pay. The grievance should be sustained.

DISCUSSION

I concluded that the Grievant should be reinstated and the termination set aside, although some discipline of the Grievant was appropriate in this case. The following considerations and reasoning led to this conclusion.

Because no major differences appeared between the parties over the facts of the case, the substantive aspect was the interpretation and application of the Employer's Policy on Sale of Alcoholic Beverages and Tobacco to Minors (J 3, hereafter "Policy"). The Employer asserted that the Policy provides for strict liability and immediate discharge for the first violation of the Policy by an employee. On the other hand the Union claimed that, at the least, the Policy was ambiguous with regard to immediate termination for all violations of the Policy and at the other extreme made clear distinctions that only some violations of the Policy led to immediate discharge. It alleged, in any event, that the Employer never made explicit and clear to the Grievant and other employees that the Policy meant termination on its first violation.

Fundamental to the application of just cause principles for discipline is the requirement that the employee must know what is the policy or rule by its clear and unambiguous statement and specifically what are the consequences for violation of the policy. Here the Employer's Policy and its application were sufficiently deficient in these regards that I was persuaded to set aside the Grievant's termination.

A. <u>The Employer's Policy on Alcohol Sales to Minors</u>

The Employer's policy statement on sale of alcohol to a minor is ambiguous and unclear, at the least, with regard to discipline for the first offense. At the same time its language is subject to a reasonable interpretation that all violations of the Policy will not result in immediate termination. The absence of any expressed clarification made known directly to the

Grievant and other employees that the Policy means immediate termination of employment with the first violation of the Policy leaves the Employer short of a just cause termination. The consequences of a first offense violation are uncertain to the employee and thus a summary discharge may not be sustainable under the Policy's application. It was not in the instant case.

1. Conflicts in the Policy

In the first paragraph, the language of the Policy provides that "any violation ... resulting from a failure of an ... employee to check identification and establish the lawful age of a customer to purchase such products will result in disciplinary action which may include termination." If discipline "will result" but only "may include termination," the implication is clear and certain that discipline other than termination exists. Termination is not mandatory, but "may" occur, although some discipline will result.

On the other hand, in paragraph three the Policy provides that "if any employee assists a minor in the purchase of alcoholic beverages...or in any way assists or encourages some other person to do so, the employee will be immediately terminated." Here, to what ever action this refers, the discipline is "immediate termination" and mandatory. "Will" be terminated is in marked contrast to the "may include termination" in paragraph one.

The Employer argued that paragraph two brought the two paragraphs together in meaning. But this cannot be sustained by the language used. Although the language of paragraph two states that "...if any violation of the ... laws occurs, the

checker's job is at stake," this latter phrase is fully consistent with either the meaning of the permissive "may include termination" in paragraph one or the mandatory meaning of "will be immediately terminated" in paragraph three, and fails to reconcile the difference between the permissive "may" and the mandatory "will" of paragraphs one and three.

In addition, the literal meaning of the sentence in paragraph one of the Policy refers to violation of the "laws," and by that a violation of the Employer's policy. Thus, even if the Grievant's job may have been "at stake" in the sense of immediate termination by a violation of the law in this instance, the court found no violation of law occurred. Thus in this regard, the Employer's reliance upon the "at stake" language to terminate the Grievant must be set aside.

2. Paragraph Three of the Policy

Further, the meaning of the verb "assists" as used in the third paragraph was unclear.. The Employer insisted that it meant actions by the checker who failed to card a likely minor but sold the alcoholic beverage to the minor. But the use of the word "assists" to describe the sale of a grocery product is strained. It asserts an active and positive action, not commonly understood as descriptive of the passive checking of products at the check stand. Alternatively a person who buys a bottle of beer for a minor has affirmatively "assisted" in the purchase of liquor, or the clerk, knowing that the customer is a minor, completes the purchase for the minor.

Both the verbs "assists" a minor and "encourages" another to assist a minor carries the implication of knowledge that it is a

minor that will benefit from the purchase. One cannot "assist' or "encourages to assist" without knowledge of that which is assisted or encouraged to be assisted. In other words, as the Union argued here, the employee must know that the person being assisted to purchase liquor is a minor in order for paragraph three to be applicable. This argument was illustrated by the decision in Hughes Market, Inc. v. UFCW Local 770 (Michael Prihar, 1992). The arbitrator sustained a discharge when the checker looked at the identification of the customer, found it to be under 21, but sold the alcohol anyway. The employee knew the customer was a minor, and intentionally and deliberately "assisted" the minor to purchase the beer. No evidence indicated here that the Grievant knew that the police recruit was a minor when the sale of a bottle of beer was made on September 18, even though the Grievant did err in concluding the customer was over 21 years of age without checking identification.

I found the Employer's contention unpersuasive that "assists" refers to checkout duties where the checker does not know the age of the customer and concludes on reasonable bases that the customer is of lawful age without checking ID, and then makes a sale, to constitute "assisting" the minor in violation of the Policy. Even if the Employer intended that checking out was "assists," I found the language of the Policy across the three paragraphs and in paragraph three specifically sufficiently ambiguous and misleading to the employee, that summary discharge could not be sustained when employees had no explanation on the Policy other than their own reading of it.

B. Employee Understanding on "Immediate Discharge"

Confronted with the above conflicting and ambiguous language the Employer was obligated to make unequivocally clear to the employees that this Policy meant "immediate termination" for the first violation of the Policy. So far as the record shows, employees where handed the Policy, ask to read it and sign it without any explanation by an Employer representative as to its meaning. So far as the record indicated, the Employer never stated either orally or in writing that a first violation of the Policy would lead to "immediate termination."

Under the above circumstances, the interpretations of both Winters and the Grievant were reasonable, that the Policy did not mean "immediate termination" for the first violation unless the employee knew the customer was under 21 years of age and proceeded to sell the alcoholic beverage to the minor, or otherwise directly and intentionally assisted a minor or helped another adult obtain liquor for a minor. These beliefs were supported reasonably in part, at least in the Grievant's case, by the fact that the lists of offenses for which immediate termination could occur did not included any reference to the Policy, documents that he signed as he did the Policy (U 6; U 7).

This understanding of these two employees was consistent with the "practice" of the Employer as noted in the record of the arbitration. No instances of "immediate termination" under this policy were reported by the Employer even though it applied to 105 stores and some 3000 employees in the Washington/Oregon division of the Company. Not with standing the testimony of King on the meaning of the Policy, the absence of any evidence of "practice" under the Policy leaves the application of "immediate

discharge" on the first violation of the Policy in substantial doubt.

The above analysis and the several factors noted contributed convincingly to the conclusion that the Policy was deficient in its clarity of what constituted the discipline for the first violation of the Policy and was an unpersuasive basis for the discharge of the Grievant here. Rather the analysis of the Policy statement gave support to the Union's position that the straight forward reading and examination of its language led to progressive discipline for some violations of the Policy under some circumstances and directly to termination in other circumstances.

Clearly the Policy has two parts. The first relates to checking and determining the lawful age of a customer and refers to the responsibilities of checkers. Violations of the Policy here may but does not necessarily lead to termination. The second part concerns "any employee" and concerns activities that constitute "assists" and or "encourages" to assist a minor in the purchase of liquor or tobacco. Where an employee aids a customer to obtain alcohol or tobacco, knowing that the customer is under lawful age, immediate discharge is in order.

The separateness of these parts was demonstrated in part above by the discussion of the provisions over discipline that "may include termination" versus the third paragraph that asserts "will be immediately terminated." The use of the word "additionally" at the beginning of paragraph three implies something more or something different than that in the first two paragraphs. If it represents only a restatement of paragraphs one and two, it is redundant and unnecessary. Rather the word

literally and in its common meaning means "added to," something "in addition to" to that already stated. Since that already stated refers to discipline for offenses that "may include termination", reasonably, without being redundant and duplicative, paragraph three refers to other offenses for which termination will be immediate on the first offense.

C. Issues on Employer Supporting Arguments

Before examining specifically what it was that the Grievant did and the consideration of appropriate discipline for that conduct, two other contentions of the Employer merit comment. In the first place, the Employer argued that the nature of the public policy and business reasons involved in the sale of alcohol to a minor made immediate termination presumptively proper. Although the significance of both public policy and the Employer's business interest must be recognized, here the Employer has seen fit to issue a specific policy related to the sale of alcohol and tobacco to minors. It is that policy that is relevant and that applies to the interests as seen and expressed by the Employer. Further, it is not what the Employer asserts is the meaning of the Policy, but how that Policy was explained to the employees and may reasonably be interpreted by them. In effect the analysis above sets aside this contention of the Employer.

But a second related issue was the use by the Employer of industry practice to support its action of immediate discharge for the Grievant. At the hearing and with brief, the Employer discussed some fourteen arbitration decisions it alleged supported its position here. But that analysis of industry

policies as supported by arbitration decisions must be set aside here for several reasons. First, what other employers and collective bargaining jurisdictions may do with regard to rules and policies about the sale of alcohol to minors does not confirm what is done in the instant case. The Employer recognized this fact by its objection to the introduction of Union Exhibit 11, the Safeway policy on the sale of alcohol and tobacco to minors in the local jurisdiction of the Union.

Second, the arbitration cases cited by the Employer identified employer rules and polices on the sale of alcohol that were clear and unequivocal with regard to immediate discharge on the first violation. For example, in Vons Companies, 100 LA 297 (Marshall Ross, 1992) at page 298 the arbitrator affirms the "Company rules...list the sale of alcoholic beverages to minors as an offense that will lead to immediate discharge." Five decisions involving Safeway Stores report the rule in the signed statement of the employee, "I acknowledge that failure to abide by these rules will result in termination of my employment." Lucky Stores provide that "violation of this work rule is...cause for discharge without further warning" (Lucky Stores, Inc. v. UFCW 1442 (William Levin, 1990), p 3). Even the Company's rule in its bargaining unit with UFCW Local 324 in Las Vegas provides that "violation of the state alcoholic beverage laws...will result in that employee's immediate termination. No exceptions" (Albertson's Inc v. UFCW Local 324 (John H. Gibson, 1993), p 6).

The straight forwardness and clarity of the cited rules in the arbitration decisions are in marked contrast to the Policy of the Employer in this instance. Aside from the analysis above, the somewhat extended explanation of the Policy by the Employer

in brief at pages 26 ff, even though plausible and reasonable, confirm the complexity of its statement and the uncertainty of what is stated about "immediate termination" upon any (or the first) violation of the Policy. Under such circumstances, the Employer cannot hold the employees, or the Grievant in this case, accountable on the basis of the Employer's alleged meaning of the rule. The Employer must assure that employees are fully aware of the consequences of violation of work rules and policies in order to sustain just cause discipline.

D. The Grievant's Offense

The Grievant acknowledged that he failed to follow the procedures prescribed by the Employer for the sale of alcoholic beverages. Since the Grievant was not absolutely certain that the customer was over 21 years of age, he was required to ask for identification and did not. Rather the Grievant exercised his judgment as to the age of the customer, erred in that judgment and accordingly completed a sale to a minor. These circumstances justify discipline.

No evidence indicated that the Grievant even suspected that the customer was a minor. Rather the Grievant used his "best judgment" to assess the customer, and concluded that the customer was 24 years of age (E 1; T 162:2-4). The Grievant's assessment was deliberate and not causal nor inattentive, as his statement and testimony indicated, and as corroborated by Prell (T 107:5-13; E 1). Even though the Grievant "unlocked" the register when no date of birth information was inserted and consciously concluded the customer was over 21 years of age, these actions confirmed only that the Grievant intended to make a sale, not

that he intended to make a sale to a minor as contended by the Employer. At this time, the Grievant did not know, nor did he believe that the customer was under legal age to buy the bottle of beer, nor was there any evidence in the record to demonstrate that he did.

Accordingly, I concluded that the Grievant sold the beer to the police recruit without knowing that the latter was under 21 years of age and therefore did not sell liquor intentionally and deliberately to a minor in violation of the alcohol beverage laws and the Employer's policy. Thus, on the basis of the analysis of the Policy above and the failure of the Employer to make explicit to the Grievant and others that the Policy meant immediate termination whether the customer was known to be or not known to be under 21 years of age, the Grievant's termination was not consistent with the Policy and represented an unjust discharge under Article 18.1.

E. Appropriate Discipline

The parties affirmed and the arbitrator agrees that the sale of alcoholic beverages to minors is a serious matter representing a threat both to public health and safety and to a substantial part of the Employer's business. Stern disciplinary measures to avoid such sales are justified under these circumstances. As the Employer reported from several arbitrations, employer policies providing for "immediate termination" have been sustained as reasonable and necessary policies on these bases.

I concluded that Article 18.3 did not apply in the instant case. The public policy considerations set apart the work rule and disciplinary policy regarding sale of alcohol and tobacco to

minors from those rules covered in the Retail Stores Orientation and Policy Handbook that result in immediate discharge and/or as may apply under Article 18.3 (U 7, p 3). In addition, the alcohol sales' policy applies to violations of law as well as employer policy and as such lies outside either the issues of "incompetence" or the "failure to perform work as required" in Article 18.3. These considerations led to the conclusion to disregard Article 18.3 in the instant case in determining appropriate discipline for the Grievant.

Under circumstances here the extended service of the Grievant and his excellent work disciplinary record cannot be ignored. Although the Grievant's failure to seek identification of the police cadet on September 18 before making the sale of a bottle of beer cannot be condoned, the absence of any prior incidents of a similar nature over some 23 years represents an enviable record. If that record were matched by all other employees, the Employer's probability of losing a license becomes small, even though some fines would be required under the policies of the O.L.C.C.

On balancing the competing factors, I concluded to suspend the Grievant for ninety calendar days in lieu of the discharge, and reinstate the Grievant to his former position under conditions to which he would have been entitled had he not been unjustly discharged on September 27, 1996.

DECISION AND AWARD

After study of the testimony and documentary evidence produced at the hearing and of the arguments of the parties in oral statements and written briefs on that evidence in support of

their respective positions on the issues in dispute and on the basis of the above discussion, analyses, findings of fact and conclusions, I decided and award as follows:

I. The Employer violated Article 18.1 of the Agreement when it terminated the Grievant on or about September 27, 1996. The Grievant was discharged without just cause, and in this regard the grievance was sustained.

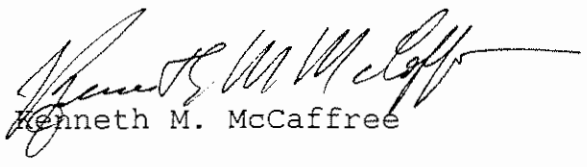
II. The Employer is directed to offer reinstatement to the Grievant to his former position with those benefits, rights and privileges under the Agreement to which he would have been entitled had he been continuously employed from the date of his unjust termination to the date of the receipt by the Grievant of a written offer of reinstatement pursuant to this Award.

III. In lieu of the notice of termination of employment to the Grievant, the Employer is directed to give the Grievant a ninety calendar day suspension without pay, effective September 27, 1996, for his failure to follow the procedures set forth in the Employer's Policy on the Sale of Alcohol and Tobacco to Minors.

IV. The parties are directed to apply Article 19.3(b) to the payment of back pay, if any.

V. Under authority granted by Article 19.3(e), it is the judgment of the arbitrator that equity is best served here by apportioning the cost of the arbitrator's fees and expenses equally between the parties.

Respectfully Submitted



Kenneth M. McCaffree

KMM;MEM