

**American Arbitration Association  
Voluntary Labor Arbitration Tribunal**

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**In the Matter of Arbitration Between**

**UFCW, Local 1445**

**-and-**

**Stop & Shop Supermarket Company LLC**

**Case Number: 01-17-0003-3393**

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**AWARD OF THE ARBITRATOR**

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and having been duly sworn and having heard the proofs and allegations of the Parties, AWARDS as follows:

The Company lacked just cause to terminate Ms. [REDACTED] – or to impose any other discipline upon her – based upon the incident on May 3, 2017.

The Company shall reinstate the grievant to her former position and make her whole for any wages and benefits she lost as a consequence of her unjust termination.

The arbitrator retains jurisdiction for the sole purpose of resolving any disputes which may arise regarding the implementation of this remedial order.

  
Philip Dunn, Arbitrator

Date: January 12, 2018

Appearances: PYLE ROME EHRENBERG PC, by Tod Cochran, Esq., for the Union  
MORGAN, BROWN & JOY, LLP, by Joseph P. McConnell, Esq., for the Company

**STIPULATED ISSUE**

Whether the grievant was terminated for just cause? If not, what shall be the remedy?

**EVIDENCE PRESENTED**

The grievant, [REDACTED], commenced working for Stop and Shop's South Boston store (Store No. 53) at age 17 in December 2015 as a part-time clerk, while she was a senior in high school. During her 18 months of employment with the Company, she advanced to cashier, and then to the customer service desk – the position she held when the Company terminated her employment based upon an incident on May 3, 2017. Store Manager Vaicius testified that the grievant was a good worker and was well-liked by her fellow employees.

Store 53 sells cigarettes, but only from the customer service desk where the inventory of cigarettes is kept behind the service counter. The retail sale of cigarettes in Massachusetts is regulated by federal and state law. Federal law prohibits the sale of cigarettes to anyone under age 18. State law sets a higher threshold, prohibiting the sale to anyone under age 21. Retailers are required to have policies and procedures in place to assure that cigarettes are not sold to minors, and face sanctions such as fines or suspension of cigarette sales licenses that escalate up if the retailer repeats the offense of selling cigarettes to minors.

As a customer service clerk, "CSC," one of the grievant's responsibilities was to sell cigarettes. Stop & Shop has a written policy regulating procedures that CSCs are to follow when a customer comes to the service desk and asks to purchase cigarettes. That policy as of 12/8/2015 and continuing at least through May 2017 has read as follows:

TOBACCO SALES POLICY SIGN-OFF....

As a cashier, you are responsible for the following:

- You must not sell cigarettes, tobacco products, e-cigarettes or any smokeless tobacco product to **persons under 21....**
- Purchase of tobacco products must be in a direct, face to face transaction only.
- POS procedures must be followed for safeguarding against sale of tobacco products to minors. The system prompts you to check ID on all tobacco purchases.
- When the display prompts you with the message “Under 21? Born before mm/dd/yyyy,” You must check the identification of every person who appears to be under **30** attempting to purchase cigarettes ... by requesting a photo ID containing the customers d/o/b.
- you must compare the d/o/b from the ID to the date on the message screen to ensure that the purchaser is at least 21.
- You do not have to ask for ID from every customer who wishes to purchase tobacco products if it is obvious they are over **30**.
- You must ask for ID for anyone who appears to be under **30....**
- If you sell tobacco products to **anyone under 21**, you may be issued a summons and/or assessed a civil penalty by the governing authority. If you receive a summons for civil penalty, the company is not responsible for any fines or other fees you may incur in relation to the violation....

**I have read and understand the above procedures.... I realize that failure to follow this policy will result in disciplinary action, up to and including termination of my employment for my first offense.** (All emphases in original.)

Ms. [REDACTED] when hired in December 2015 electronically signed to confirm that she had read through this (and many other) Company policies. She thereafter physically signed printed copies of this same Tobacco Sales Policy on 2/2/16, 9/9/16, 11/4/16, and 1/31/17. Ms.

██████ testified that on each occasion that she signed off, she did read through the policy, though perhaps not the last sentence in bold which stated that “failure to follow this policy will result in disciplinary action, up to and including termination of my employment for my first offense.” Rather, she testified, she thought that for a first erroneous sale of cigarettes to a minor, she might get a disciplinary warning. She testified, without contradiction, that on each occasion her manager simply handed her the printed policy and had her sign it, without any further explanation of the policy; she never was advised by management that a first violation of cigarette sale to a minor would result in the summary termination of her employment. In any case, she testified, she understood the Company’s requirement that she “must check the identification of every person who appears to be under **30** attempting to purchase cigarettes....”

The Federal Food and Drug Administration (FDA) and the State Department of Health at times send investigators (“shoppers”) who are underage into retail premises where they attempt to purchase cigarettes, as a monitoring mechanism to determine whether the retailers are violating the laws prohibiting sales of tobacco products to minors. If the minor “shopper” is able to purchase cigarettes, then the FDA will cite the retailer for the apparent statutory violation, and after completing its investigation may impose fines or other penalties (especially for repeat offenders).

Over the years prior to May 2017, certain Stop and Shop stores on infrequent occasions were caught in such sting operations, wherein certain clerks erroneously sold cigarettes to underage FDA “shoppers.” A few of those sales of cigarettes to minors occurred in Stop & Shop stores where the clerks are represented by Local 1445. In no such instances at the Local 1445

locations were the clerks involved terminated for a first offense. Rather, they received final warnings and were allowed to return to work after serving brief suspensions without pay.

On October 10, 2016, Director of Labor Relations Joel Boone sent the following email to Local 1445 President Jeff Bollen:

Just a brief note to inform you that the Company is experiencing a higher level of alcohol tobacco enforcement activity at store level. This action has led to administrative action by the responsible agencies that can result in fines, penalties, and suspension or revocation of license. To ensure full compliance and accountability, we are restating and distributing our policies to our store associates. Please call if you have any questions or comments.

Consistent with that notice, and as already noted above, the grievant personally was directed to and did re-sign the Company's Tobacco Sales Policy on both 11/4/16 and 1/31/17. It is noteworthy that the wording of that policy remained unchanged, however; and, again, no manager gave any further, verbal explanation to Ms. [REDACTED] of the policy.

On May 9, 2017, Store Manager Christy Vaicius at Store 53 received the following notification from the FDA:

Your establishment ... was inspected on 05/03/2017 at approximately 5:43 PM.

An FDA commissioned inspector reported that a minor was able to enter your establishment and purchase cigarettes in a package. It is against the law for a retailer to sell regulated tobacco products to a minor....

The purpose of this notice is to inform you of the following:

1. a potential violation occurred,
2. to provide a photo of the facility that was inspected,

3. the date and approximate time of the inspection, as well as,
4. any physical description of the on-duty clerk that may have been noted....

#### WHAT HAPPENS NEXT?

- CTP will review the evidence obtained during the inspection of your retail establishment to determine if there was a violation of federal law. If a violation occurred, you will be notified of the violations and be provided further information and instructions....
- Your store may also be subject to additional inspections at the federal, state, or local level.

During the inspection, the following characteristics regarding the clerk who sold to the minor were observed:

- Name: [REDACTED] as observed on tag....
- Gender: female.
- Age: ... Adult (the "teen" box was not checked off).
- Hair: ... Blonde (the "black/dark brown was not checked).
- Characteristics: ... Not observed. (The "Glasses" box/option was not checked off.)<sup>1</sup>

Ms. Vaicius immediately contacted H/R Manager Mike Keaney, who directed Vaicius to review the security video which continuously records all goings on at the Customer Service Desk.

Vaicius reviewed the video for the cited time and date, and identified [REDACTED] as the clerk who sold the pack of cigarettes to the FDA shopper. Vaicius testified that from her review of the video back on May 9 and again at the arbitration hearing, "In my opinion, the shopper looks to be under 30.... This woman looks like less than 30. But I have only seen the video. I don't know how old the shopper actually was; the FDA did not tell us." Vaicius noted that the

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<sup>1</sup> Ms. [REDACTED] at the time was a teen (19 years of age), not an adult; with brunette (not blonde) hair, and was wearing quite visible, horn-rimmed eyeglasses at the time of the sale to the shopper in question. The "shopper" did at least get the gender (female) and name tag identifier correct.

grievant did not ask for identification from the shopper, and simply hit the “override” key which allowed her to bypass entering in the date of birth of the shopper.<sup>2</sup>

Vaicius reported her observations to Keaney. At his direction, Vaicius asked [REDACTED] on May 9 for her side of story regarding the cigarette sale to “Ms. Shopper” on May 3. The grievant responded that she did not remember that specific transaction. She stated further that she knew the Company’s policy that she must card anyone seeking to purchase cigarettes if they “look under 30,” and she does so. To her knowledge, she did not on May 3 or at any other time sell cigarettes to persons looking under 30 until first carding them and assuring they were at least 21 years old.<sup>3</sup>

The Company terminated the grievant for violating its Tobacco Sales Policy by her sale on May 3 of cigarettes to Ms. Shopper, who the FDA in their citation identified as “a minor.”<sup>4</sup> The Union filed a grievance asserting that this termination action was taken without just cause. That grievance remained unresolved through the lower steps of the grievance procedure, and the Union advanced the matter to this arbitration proceeding.

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<sup>2</sup> [REDACTED] testified, without contradiction, that she had been trained by other co-workers not to take the time to actually enter into the computer the date of birth of purchasers of cigarettes. Rather, she was trained simply to ask for identification from cigarette purchasers who appeared to be under 30, and after confirming their legal age to purchase, to hit the override key and complete the sale. The record evidence indicates that the practice at Store 53 was to follow that override process, and employees were not disciplined for doing so.

<sup>3</sup> Her practice always has been to ask for an I.D. if the customer looks under 30, the grievant testified.

<sup>4</sup> Curiously, the FDA notifications to the Company regarding this case never state the age of this “minor” who was the FDA shopper on May 3. Neither the Company, the Union nor this arbitrator knows anything about the shopper’s age, beyond the FDA’s representation she was a “minor.” Nor did any Company or Union officials, nor this arbitrator, ever view “Ms. Shopper” in person, either as she was dressed and made up on May 3 or at any other time. The only viewings by any of us were of the grainy video footage which was recorded at the customer service desk on May 3. Only the grievant saw Ms. Shopper in person (on May 3), and Ms. [REDACTED] when questioned on May 9 did not recall that particular sales transaction with Ms. Shopper.

### DISCUSSION

The Company terminated the grievant because she violated the Company requirement that she must check the identification of anyone “who appears to be under **30** attempting to purchase cigarettes....” As it turned out, according to the FDA, Ms. [REDACTED] on May 3, 2017 sold cigarettes to an FDA shopper who was a “minor.” The grievant did not request identification from the FDA shopper, that much is undisputed. The Company asserts that from viewing the video of the transaction, “the customer reasonably appears significantly younger than 30 years old.” Accordingly, the Company concludes, it had just cause to terminate the grievant’s employment.

I conclude that the Company has not met its burden of proving that the grievant failed to fulfill her obligations as set forth in the Company’s policy. Rather, the credible testimony of the grievant, supported by the video footage, confirms that she did exactly what the rule required her to do on May 3. I base this conclusion upon the following considerations.

First, a careful review of the video footage shows that the grievant, before selling cigarettes to Ms. Shopper, looked straight at her for several seconds. Ms. Shopper was standing about six feet off to the grievant’s left, on the customer’s side of the counter, waiting as Ms. [REDACTED] attended to a group of three customers who were working through a Western Union transaction. After some time, Ms. Shopper stepped over behind those three customers, implying a desire to proceed with whatever business she had in mind at the counter. At that point, perhaps before completing the time-consuming Western Union transaction, Ms. [REDACTED] quite appropriately looked straight out at Ms. Shopper, eye-to-eye, presumably asking how Ms. [REDACTED] could help Ms. Shopper. The group of three stepped to the side. Ms.



Shopper stepped right up to the counter, while Ms. [REDACTED] continued to look right at Ms. Shopper's face. After that physical observation of several seconds' duration, Ms. [REDACTED] proceeded to sell to Ms. Shopper a pack of cigarettes, without checking her identification.

Ms. [REDACTED] testified credibly that she did not have a recollection of that specific interaction and transaction, but she always has asked for identification if the prospective buyer of cigarettes appears to be under 30. That testimony is consistent with and corroborated by the video footage from the May 3 incident. The grievant looked straight at Ms. Shopper for several seconds as she listened to the purchase request, and before heading off to get the requested cigarettes for Ms. Shopper. That video footage confirms, then, that the grievant gave herself ample opportunity to make a good faith assessment of whether Ms. Shopper appeared to be under age 30. Because Ms. [REDACTED]'s sincere assessment was that the purchaser did not appear to be under age 30, she then completed the cigarette sale without asking for identification. By so doing, she fulfilled the affirmative duty which is explicitly set forth in the Company's Tobacco Sales Policy.

The Company argues that from viewing the video of the transaction, it is clear that the grievant's assessment of the age of Ms. Shopper quite obviously was wrong, since "the customer reasonably appears significantly younger than 30 years old." The Company thereby suggests that the grievant's assessment of Ms. Shopper being 30 years or older was an unreasonable one, and the Company thus acted with just cause when it terminated her employment.

This unreasonableness argument fails for many reasons. First, even from her own viewing of the video clip, Store Manager was only able to say, "In my opinion, the shopper looks

to be under 30.... This woman looks like less than 30. But I have only seen the video.” That honest testimony acknowledges a lack of certainty, even on the store manager’s part, as to whether Ms. Shopper might have been 30 as opposed to in her late 20’s.

Moreover, from my own multiple reviews of the video clip, my own assessment is that the footage is so grainy and from far enough away that I personally could not make a reliable determination that Ms. Shopper appeared to be less than 30. What I could make out was that Ms. Shopper likely was of Asian, African, Latina, or of mixed ethnicity, and was dressed nicely as if for an office work setting. I could not see facial detail such as smooth, wrinkled, or acned skin; nor could I discern what make-up the woman may have had applied to her visible face.

Moreover, the issue is not how Ms. Vaicius, or even this arbitrator, interpreted as best as possible the appearance of Ms. Shopper’s age, from a review of grainy video. Rather, the Company’s claim at best – under its own policy – is whether the grievant through her personal observation on May 3 could not reasonably have concluded that Ms. Shopper appeared to her to be 30 or older. The issue also is not, was the grievant’s assessment wrong after all? It is important to remember that the grievant had a close-up view for several seconds, in the flesh, of Ms. Shopper, before initiating the sale of the pack of cigarettes. That means that Ms.

██████████ had and utilized a quality opportunity to make an honest, good faith assessment of how old Ms. Shopper appeared to be. That in-the-flesh, close-up assessment, made in good faith over a period of several seconds, is entitled to considerably more weight than the assessment by the Company managers (or this arbitrator), based on review of only the grainy, distant video view of Ms. Shopper. I credit the testimony of Ms. ██████████ that her practice was to make an honest, good faith assessment of age whenever she sold cigarettes. I further

conclude from review of the video footage that she again followed that practice of observation and assessment before she sold the cigarettes to Ms. Shopper on May 3, 2017.

The Company notes that because of increased regulatory enforcement of the laws regarding sale of tobacco, it told the Union in October 2016, “we are restating and distributing our policies to our store associates.” The Company policy, however, stayed the same, re-stated or not. The rule was not amended to one of strict liability, such as: “The sales clerk must card every purchaser of cigarettes; if the clerk fails to do so and then sells cigarettes to someone who is a minor, the clerk will be terminated.” Given the stringent regulatory enforcement which the Company now is facing, such a rule, removing any subjective judgment about age and explicitly warning of the dire consequences of non-compliance, and after proper promulgation and further training of employees, might be sufficient to provide just cause for termination for subsequent non-compliance.

In this case, however, Ms. [REDACTED] fully complied with her affirmative responsibilities under the current Company policy regarding tobacco sales. For this reason, the Company lacked just cause to impose any discipline upon her based upon the incident on May 3, 2017.

By way of remedy, the Company must reinstate the grievant and make her whole for any wages and benefits she lost as a consequence of her unjust termination. The arbitrator retains jurisdiction for the sole purpose of resolving any disputes which may arise regarding the implementation of this remedial order.